

31 October, 1952] Dr. J. S. MUIRHEAD, D.S.O., M.C., T.D., D.L., M.A. (Oxon.), LL.B., LL.D.,
Mr. HAMILTON LYONS, B.L. and Mr. G. B. L. MOTHERWELL, W.S.

[Continued]

5703. So that the summons would have to be registered in the Register of Exhibitions and Adjudications, and would that be irrespective of whether the rights were claimed in the action of divorce or not?—It would be in the option of the pursuer in the action of divorce to say whether or not he or she was going to vindicate any legal rights which he or she might have.

5704. But you could raise an action of divorce with nothing in it but the usual conclusions for divorce and then subsequently you might raise your summons for ascertainment of legal rights?—Yes, my Lord.

5705. As I understand it, what you are referring to as the summons that should be registered in the register would be the summons of divorce?—Yes, my Lord, the summons of divorce.

5706. Would you turn now to paragraph 16? You wish a decree of court, whereby the death of a person is presumed, to be effective for all purposes. Do I understand you to mean this: that if a wife brings an action of dissolution of marriage under the presumption of death provision that should operate also as decree under the Presumption of Life Limitation Act, 1891?—Not operate, my Lord, using that word in its strict sense. The object of this proposal is to eliminate one unnecessary enquiry into the same set of facts. What one visualises here is that if there has been a decree granted under the Divorce Act, anyone who is entitled to succeed to property and who might otherwise have to take proceedings under the Presumption of Life Limitation Act, on production of the decree, proceeding, as it would, on a finding that the disappeared person was presumed to have died, should be entitled to have that decree accepted as proof of the presumption of death for the purposes of the Act of 1891.

5707. And vice versa?—And vice versa. In other words, all that is eliminated by this suggestion is the double enquiry into the same facts at the instance of the same person or of different persons.

5708. But you would technically have two separate processes?—That is so, and you would have two separate decrees.

5709. You would have two separate decrees because of course the machinery is radically different in the two cases?—That is so, my Lord.

5710. And different results follow?—Yes.

5711. Different dates of death are established. In the case of a dissolution of marriage no enquiry is made into the date of death; if the person has been absent for seven years or longer then the marriage is dissolved.—That is so.

5712. But nobody says it is dissolved at such and such date. In fact it is dissolved at the date of decree, or it may be possibly at the end of seven years.—Yes.

5713. But, under the Presumption of Life Limitation Act, you have got to fix a certain date for the presumed death.—That is so.

5714. Therefore all these distinctions have got to be kept in mind, and so you are only really using one process as evidence of essential facts leading to the presumption of death in the other process?—That is correct.

5715. Do you wish to say anything about the list of suggestions which appear in the Appendix to the memorandum?—I do not think so, except possibly in relation to proposition 11. I should say that the enforcement of decrees of aliment is an obligation, at present imposed on the legal profession, which the profession, from a purely selfish point of view, would be very happy to be rid of. The difficulties in enforcing decrees of this kind are not legal but practical, and would not be solved by the placing of the obligation upon the court issuing the decrees.

5716. (Mr. Justice Pearce): Mr. Lyons, I want to ask you about cruelty and desertion, by putting them both together and suggesting to you a possible scheme as being logical, convenient and workable, and I want your criticism of it. First, you have a remedy for cruelty. That is, of course, a subjective test in the sense that it is, "Is this conduct by this man to this woman cruelty?"

But it is also, in one sense, an objective test, namely, "Can the court reasonably regard this as cruelty, whatever the personalities concerned?" In that respect your law and the English law are approximately the same?—That is so.

5717. Then there is what I might call intolerable conduct—as a shortening of your formula, which is obviously a good formula, although I do not say that it is necessarily the best that one could find. The disadvantages of including that type of conduct within the ground of cruelty is that it may not in fact be cruelty. Cruel conduct is always intolerable in some sense, but intolerable conduct is not necessarily always cruel. Supposing one were to deal with intolerable conduct in this way. One might say that no woman could reasonably be expected to continue the matrimonial life under such conditions, and that therefore she must leave. In that case, the home has been broken up by the husband just as surely as if he had physically ejected her. One might call that desertion because the husband, by his conduct, has broken up the home against the will of the wife, and therefore that conduct, for which you are asking a suitable remedy, could be treated as desertion. The only difference between that scheme and your scheme is that the wife will have to wait three years for her decree, if the intolerable conduct is not such as to amount to actual cruelty. That has this advantage possibly, that being a case of intolerable but not cruel conduct, it is possible that there may be room for amelioration and that consequently the three years may not end in divorce for desertion but may end in reconciliation. The question of whether this type of conduct should be regarded as ground for refusal to adhere can then really disappear. It could not be said that such conduct would not justify a refusal to adhere if in fact it had caused that spouse to leave the home? Do you follow?—I follow.

5718. If it did, then one might, as Lord Keith has said, have a situation in which a spouse had an excuse for leaving but not a sufficient excuse to entitle her to say "He has deserted me", with the result that neither party can get a divorce. Take it that the question was—was the conduct so unreasonable that it drove the spouse to leave?—in that case the spouse in question is either deserting when she leaves the home, or else she has been deserted. So, wherever there is a break-up, unless it is by agreement, someone has a cause of action in desertion. Do you feel that that is a convenient scheme for dealing with that aspect of matrimonial life? Do you not think that it is rather better than either treating "intolerable conduct" as cruelty when it really is not, so as to bring it under the heading of cruelty, or having "intolerable conduct" in itself as a new ground for divorce?—If we look to the law of Scotland as it stands at the moment, my Lord, that would not be a workable proposition, given the need to aver willingness to adhere throughout the triennium.

5719. I am putting forward a possible scheme, not considering whether it would fit in with the existing law, because I know it would entail alterations. But taken as a scheme, do you think that is a convenient and workable scheme for dealing with troubles of this sort?—As I see it, yes, my Lord, that is, without willingness to adhere being required, as it is in the law of Scotland at present.

5720. I am assuming that there would be no requirement as to willingness to adhere. When the woman has been turned out of the home by the husband's intolerable conduct, it lies on the husband to make reasonable approaches to get her back, and to give reasonable assurance that the intolerable conduct will cease. When she is so approached, then if it is a reasonable approach which she ought to accept, and she refuses, then at that moment she becomes the deserting party. That is the system operating in England and it is, I suggest, a convenient and workable scheme. The effect is that where a marriage has broken up, unless it is by the consent of both parties, one party is always responsible for the break-up, and that party is held to be in desertion.—That is so. The only other observation I would make is that I cannot quite at the moment tie down in my own mind the effect of that formula on the present requirement of the law of Scotland that the cruel conduct, which is complained against in an action based on cruelty, must be existent

MINUTES OF EVIDENCE

11

TAKEN BEFORE THE

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

ELEVENTH DAY

Thursday, 12th June, 1952

WITNESSES

MR. G. G. RAPHAEL, J.P.	} representing the Magistrates' Association.
SIR LEONARD COSTELLO, C.B.E., M.A., LL.B., J.P.	...	...	...	...
MRS. I. M. H. MACADAM, M.B., J.P.	...	...	...	...
MR. H. W. BIRD	} representing the National Association of Probation Officers.
MISS J. E. R. KENNEDY	...	...	...	...
MR. FRANK DAWTRY	...	...	...	...



LONDON: HER MAJESTY'S STATIONERY OFFICE

1953

THREE SHILLINGS NET

MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

ELEVENTH DAY

Thursday, 12th June, 1952

PRESENT

THE RT. HON. LORD MORTON OF HENRYTON, M.C. (Chairman)

Mrs. MARGARET ALLEN
DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELOE, M.A.
MISS E. M. BRACE
LADY BRAGO
SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.
MR. G. C. P. BROWN, M.A.
SIR FREDERICK BURROWS, G.C.S.I., G.C.I.E.
MR. H. L. O. FLOCKER, C.B.E., M.A.
MRS. K. W. JONES-ROBERTS, O.B.E.
THE HONOURABLE LORD KIRKE

MR. F. G. LAWRENCE, Q.C.
MR. D. MACE
MR. H. H. MADDOCK, M.C.
THE HONOURABLE MR. JUSTICE PEARCE
THE VISCOUNTS PORTAL, M.B.E.
DR. VIGOR ROBERTSON, C.B.E., LL.D.
MR. THOMAS YOUNG, O.B.E.

MISS M. W. DENNERY, C.B.E. (Secretary)
MR. A. T. F. OOLYVE (Assistant Secretary)
MR. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 30

MEMORANDUM SUBMITTED BY THE MAGISTRATES' ASSOCIATION

1. *The Magistrates' Association.* The Magistrates' Association represents some 8,500 individual magistrates and 120 benches who have joined as corporate members. It was founded in 1920, when Lord Haldane, the then Lord Chancellor, was good enough to accept the presidency, and since his death in 1926 successive Lord Chancellors have always followed the same practice.

2. The Association exists to assist magistrates in the responsible and difficult work which they have undertaken, and in particular:—

(a) To collect and publish periodically, by means of a bulletin known as *The Magistrate*, and in other ways, information upon any aspects of the work of magistrates; and to give information and advice to individual magistrates;

(b) To promote uniformity of practice and the best methods of preventing crime, and of treating offenders with a view to their reform;

(c) To consider new legislation and proposed amendments of the law and any developments likely to affect the work of magistrates and to take action thereon;

(d) To promote such legislation as appears to be necessary in the light of magisterial experience;

(e) To promote conferences of magistrates upon questions of principle and practice in dealing with offences and offenders;

(f) To confer with similar associations of magistrates in the Commonwealth and Colonies;

(g) To co-operate with other associations and societies in work of common interest.

3. The Association is governed by a Council consisting of representatives of individual members and of benches. The Council is assisted by a number of committees dealing with various aspects of magisterial work such as juvenile courts, treatment of offenders, mental health, legislation, licensing and other matters.

4. *Summary of recommendations.* We submit the following propositions and recommendations:—

I. *Mediationist conciliation*

(a) That the present system in magistrates' courts of attempting to reconcile the differences between the parties through the probation officer works satisfactorily and should be continued.

(b) We think the attempt to reconcile the parties should be made at the earliest possible moment.

(c) Although we consider every effort should be made to reconcile the parties and that they should be urged to accept the help of the probation officer, we do not approve of any attempt to force conciliation upon unwilling parties.

(d) We think it desirable that the offer to attempt to reconcile the differences between the parties should be made in such a way that neither party can feel they are being denied the right to have their case heard by the magistrates. (Paragraphs 21-28.)

II. *Arrangement of sittings.* The court lists should be so arranged that the parties to proceedings before the magistrates can know with greater certainty when a case may be called on. (Paragraphs 33-35.)

III. *Constitution of the court.* That in no circumstances should a single magistrate sit to hear and determine domestic cases. (Paragraph 38.)

IV. *Enforcement of orders*

(a) That rules of procedure for the enforcement of orders should be enacted. That clear authority should be given for the making of a suspended order of commitment and that the procedure to be followed with regard to putting such commitment orders into execution should also be clearly laid down. (Paragraphs 45-47.)

(b) We do not consider the proposals for recovering arrears of maintenance orders from wages to be effective. (Paragraph 48.)

V. *Custody of children*

(a) The procedure on an application for custody of children should more effectively secure that the court will direct its attention to the interests of the child, particularly with a view to securing that the issue as to custody should not be confused with the other issues before the court, and that the interests of the child are adequately considered as an issue separate from other issues before the court and even on a separate occasion. (Paragraphs 49-51.)

(b) That where an application for the custody of children is made to the court, the court should have power to appoint a guardian of *homo* with authority to enquire into the home surroundings and all other circumstances relating to the child which would assist the justices in coming to a proper decision. (Paragraph 52.)

VI. *Adopted children.* That provision should be made whereby the adopted child of one of the spouses should be regarded as a "child of the marriage" for the purposes of any order for custody and maintenance. (Paragraph 59.)

VII. *Non-enforceability during residence.* That Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, should be repealed. (Paragraph 57.)

VIII. *Appeals.* That if any right of appeal on the facts is allowed in addition to the existing right of appeal to the Divisional Court, such additional right of appeal should be to a court constituted of not less than three persons. (Paragraphs 58-60.)

IX. *Collecting officer.* That where, under the provisions of the Emergency Laws (Miscellaneous Provisions) Act, 1947, Section 2 and Second Schedule, an order is being enforced in some court other than the court which made the order, the payment of all moneys payable under the order should be made payable through the collecting officer of the court which is for the time being enforcing the order. (Paragraphs 61-63.)

X. *Bigamy.* That all marriages and divorces should be entered on the entry of the birth at Somerset House, and that these should be entered on certificates and should be produced to the clergy or registrar at the marriage ceremony. (Paragraph 64.)

XI. *Classification and consolidation.* That the law relating to matrimonial matters should be clarified and consolidated. (Paragraph 65.)

5. *Introduction.* In this memorandum we have directed our attention only to those matters within the terms of reference of the Royal Commission which may be said to come within the jurisdiction of magistrates' courts and matters on which we feel justified in expressing an opinion from the experience we have gained as magistrates.

6. We think we can best help the Commission by so restricting our evidence. We would, however, say that this limitation is not due to any failure to appreciate the gravity of the problems arising from divorce and other matrimonial causes before the Divorce Division of the High Court, or a failure to appreciate the seriousness of a dissolution of a marriage. Nor is it by reason of the fact that magistrates, in their private capacity, have no views to express on such problems. The conclusions and opinions we have formed and express in this memorandum are based on the considerable experience of matrimonial cases heard by magistrates sitting in domestic courts.

7. The jurisdiction of justices in relation to domestic proceedings, to use the expression adopted in the Summary Procedure (Domestic Proceedings) Act, 1937, is two-fold and is set out presently in the Schedule to that Act. This jurisdiction comprises:—

(a) Applications for separation and maintenance orders and for custody of children, which are dependent mainly for their statutory authority on the Summary Jurisdiction (Married Women) Act, 1895, which is the principal Act, Section 5 of the Licensing Act, 1902, the Married Women (Maintenance) Act, 1920, the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the Matrimonial Causes Act, 1937, and the Married Women (Maintenance) Act, 1949. The Act of 1895, Section 5 of the Act of 1902, the Acts of 1920, 1925 and 1949 are together cited as the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

(b) Applications for the custody of infants and for the right of access thereto and for their maintenance. These applications are dependent for statutory authority on the Guardianship of Infants Acts, 1886 and 1925, and the Guardianship and Maintenance of Infants Act, 1931.

8. At the present time there are over 1,000 magistrates' courts sitting in England and Wales and distributed throughout the country. Each county, with the exception of Rutland, is divided into a number of petty sessions divisions, with one or more court houses to each division. In addition a certain number of boroughs have their own separate courts. In some of the more remote rural areas courts are held at intervals of a week or possibly less frequently, although in such places more frequent sittings can be arranged at short notice where necessary on grounds of urgency. In the larger cities, towns and more populated

petty sessions divisions, courts are held daily. In such places a separate court dealing solely with domestic cases is held at least once every week.

9. The Criminal Statistics for 1950, published by the Home Office (Table XII, page 71), show that in that year 36,454 applications were made to magistrates for orders under the Acts mentioned in paragraph 7. These comprise 28,557 applications for maintenance orders, 945 applications for separation orders and 6,952 applications under the Guardianship of Infants Acts.

10. One of the advantages of proceedings in magistrates' courts is their simplicity. An application is made to a magistrate for a summons. The application is technically described as a "complaint" and is frequently made in writing. If in writing, the complaint is completed by the use of a printed form provided by the clerk to the justices. There are no pleadings. Where adultery is alleged particulars must be given. If the magistrate hearing the complaint decides to issue his summons the case will normally be heard within about fourteen days.

11. Apart from the speed with which action can be taken, the fees payable upon the application are small, amounting to only 3s. 6d. If the wife succeeds in her application and obtains an order she will recover that fee and the total amount payable by the husband upon the order, apart from solicitor's costs, is 8s. 6d.

12. As will be seen from the figures quoted in paragraph 9 above the majority of the applications made are for maintenance orders. The difference between a maintenance order and a separation order is that the former is an order solely for maintenance (possibly with the inclusion of an order for the custody of children), whereas a separation order provides in addition that the parties need no longer cohabit. The difference is in fact not great, but the maintenance order may more easily be discharged. Both orders can be set aside by the magistrates and neither order prevents the parties, of their own volition, resuming cohabitation; thus the separation of the parties is neither final nor irrevocable.

13. Of the orders made by justices a considerable proportion become of no effect by reason of the parties resuming cohabitation of their own volition. This is especially so in relation to orders made on the ground of desertion or wilful neglect to maintain. One of the advantages of the three years' rule under the Matrimonial Causes Act is that where the parties have obtained a magistrates' order, during the period of three years they have the opportunity of reconsidering the matter, and in our experience this frequently happens.

14. The maximum orders that magistrates are permitted to make in matrimonial cases in favour of a wife are £5 a week for a wife and an additional 50s. in respect of each child. By reason of the fact that in the homes of the lower income group the husbands are normally the wage-earners, wives are ordinarily the applicants for orders. (In fact very few orders are made on the application of husbands.) The wives are seeking a share of their husbands' wages, though if a wife should be earning wages also, that fact will be taken into account in assessing the amount of order made. Our experience as magistrates is, therefore, confined mainly to the lower income groups.

15. One of the difficulties we frequently find when fixing the amount of the order is that the husband's income is insufficient to support two homes, whereas by virtue of the separation of the parties they are in fact occupying two homes. The husband's income is rarely adequate to meet this demand. An order which would be adequate for the wife would not leave the husband sufficient money on which to live. Our experience is that the effect of a heavy order which leaves the husband with inadequate means is that he will wilfully refuse to pay anything or will give up his job and take less remunerative employment.

16. A magistrate sitting in a domestic court necessarily learns much of the difficulties and problems besetting marital relations, and he sees in the juvenile court and in his criminal jurisdiction the serious results, not only of the disruption of marriages but of hasty marriages, of the lack of sound family relations and the absence of parental affection on young children.

17. The law administered by magistrates in their domestic courts is similar to that enforced in the Divorce Division, the main difference being that the Divorce

Division has the additional power of dissolving the marriage. Apart from separation orders, which have a somewhat similar legal implication to a decree of judicial separation, the orders made by magistrates are for maintenance, custody of children and, since the passing of the Married Women (Maintenance) Act, 1949, provision for access to those children by the husband or wife, as the case may be. But the issues are the same and the standard of proof the same in adultery cases, cruelty and desertion. The comparison is now even closer as by virtue of the Matrimonial Causes Act, 1950, a petition can now be presented for maintenance on the ground of wilful neglect to maintain, which has been a ground for an order before magistrates since 1895. Thus the grounds upon which petitions for divorce are presented, namely, adultery, cruelty, desertion, etc., are, with some differences, the same as the grounds upon which applications are made to the magistrates for maintenance and separation orders.

18. Furthermore, the defences available on any application for an order made in a magistrate's court are, in all respects, similar to the defences available on a petition in the Divorce Court. Magistrates have to deal with similar problems of conciliation, cohabitation and conduct and the same problems of reasonable cause for desertion, as in the High Court.

19. The responsibility resting on magistrates is, therefore, very great and we think they may justifiably claim they have borne that responsibility with discretion and wisdom and have discharged their duties to the reasonable satisfaction of all.

20. One further feature of the domestic proceedings before magistrates emphasising the importance of such proceedings is, we think, worthy of note. That is the consideration of the welfare of the children of the marriage, which includes adopted and legitimated children. We propose to say more in relation to children later. Our experience suggests that the broken home and the state of affairs which eventually leads to the broken home are major causes of delinquency. Unsettledness and instability in a child's environment caused by the death of a parent, separation of the parents, divorce, heavy drinking and gambling, have a considerable effect on the behaviour of that child. Children suffering from these disabilities and disadvantages are frequently guilty of serious anti-social conduct. We believe that it would be generally agreed that the broken home is a pre-disposing factor towards delinquency.

21. *Matrimonial conciliation.* In the Final Report of the Committee presided over by Lord Justice Denning (Cmd. 7024) and presented to Parliament in February, 1947, the Committee states (para. 4): "We have throughout our enquiry had in mind the principle that the preservation of the marriage is one of the highest importance in the interests of society. The unity of the family is so important that, when parties are estranged, reconciliation should be attempted in every case where there is a prospect of success". In the General Conclusions of that Committee on this question of reconciliation will be found (para. 28 (i)): "The reconciliation of estranged parties to marriage is of the utmost importance to the State as well as to the parties and their children. It is indeed so important that the State itself should do all it can to assist reconciliation". Again, in *McTaggart v. McTaggart* (1948) 2 All E.R. at page 756, Lord Justice Denning says: "The law favours reconciliation", and later, "There is no chance of reconciliation unless the parties are able to talk with frankness to the probation officer and with complete confidence that what they say will not be disclosed".

22. We consider reconciliation of the parties to a marriage is, where possible, a matter of public policy, as the life of the nation depends on the soundness of its family life. It is fundamentally important that it should be preserved.

23. Magistrates' courts have available for purposes of reconciliation the services of probation officers most of whom are well equipped by training and experience to deal with the problems that arise. We consider that the present system whereby the parties are referred to a probation officer with a view to reconciliation works satisfactorily. We would not wish to alter that system at the present time and are of opinion that the probation officers should continue to perform these duties.

24. In some courts it is now the practice to have a probation officer present when the magistrate sits to receive applications for summonses, so that before any summons is issued the applicant is given the opportunity of discussing the matter with the probation officer and encouraged to do so. This practice appears to be supported by the observations of the Denning Committee already mentioned when it says (para. 22 (ii)): "The prospects of reconciliation are much more favourable in the early stages of marital disharmony than in the later stages".

25. Probation officers are frequently consulted by one of the parties at the outset of trouble. We think that husbands and wives should always feel they can go to the probation officer in this way. In any event we wish to emphasise the vital importance of the earliest possible effort being made to reconcile the parties by whatever agency may be available.

26. We are assuming that the National Association of Probation Officers will submit a memorandum of evidence and will explain in detail the work probation officers do in this connection. For this reason we do not propose at this stage to deal in detail with the work carried out by them.

27. In a considerable number of cases it is apparent that the cause of the trouble between the parties is trivial. There is too often a readiness to seek the intervention of the court without any serious reflection on the step which is being taken. These cases seem to emphasise the need for developing a livelier appreciation of the implications and burdens of married life and for the earliest effort to bring the parties together before their estrangement develops and acquires serious differences.

28. Although emphasising the need for conciliation we desire to say that in no circumstances would we approve of forcing conciliation upon unwilling parties and we think it desirable that the offer to conciliate should be made in such a way that neither party can feel they are being denied the right to have their case heard by the magistrates.

29. *Jurisdiction and procedure.* The Report of the previous Royal Commission made in 1912 contained some criticisms of the exercise by magistrates of their jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts and recommended that their powers should be restricted. Since that time, on the contrary, the jurisdiction of magistrates has in fact been steadily and repeatedly extended. The magistrates' court is now to a lesser degree regarded as a police court dealing primarily with criminal offences. The civil jurisdiction of justice has greatly increased owing to the growing number of domestic applications.

30. *Allegations of adultery.* The Matrimonial Causes Act, 1937, empowered magistrates to make orders on the grounds of adultery. Under Section 6 of the Summary Jurisdiction (Married Women) Act, 1935, no order can be made on the application of a married woman if it is proved that such woman has committed adultery. There is a proviso which is not relevant. Thus, by virtue of these Acts allegations of adultery have to be considered when alleged as a ground for an order, as a ground of defence to an application which may be made on any available ground and also on applications for the discharge of existing orders. The difficulty we frequently experience in dealing with these allegations is that the person with whom the party is alleged to have committed adultery may not be before the court.

31. In the Divorce Division where such allegations are made the person with whom the adultery is alleged, if a male, is made a co-respondent and, if a female, is named in the petition or answer as the case may be. The petition is served on the co-respondent who in any event is a party and is served on the woman named and she has the right to intervene and become a party to the proceedings. Both the co-respondent and the woman named can then contest the allegations.

32. It has been suggested that a procedure on similar lines should be provided for in the magistrates' courts, and that such a person should be given a right to appear to contest the allegation. We think there would be certain difficulties in applying this procedure to magistrates' courts and do not feel able to make any recommendation along these lines. If, however, any such procedure

were adopted it would be necessary for particulars to be served on the person with whom the party to the proceedings is alleged to have committed adultery and for that person to be informed of his right to appear to contest the allegation and of the place and date when the issue will be tried.

33. *The arrangement of sittings.* Complaints are sometimes made of the arrangements for hearing matrimonial cases. The number of domestic proceedings may not be sufficient to justify setting up a separate domestic court for the sole purpose of hearing such proceedings. When this is so domestic proceedings may be taken at the end of the list, which may have lasted throughout the day. This avoids the inconvenience of clearing the court at an early stage of the sitting. We think this is most undesirable. It may mean that a woman with several small children is kept waiting many hours for her case to be heard; her husband, too, may lose many hours of work, although in this respect he may be no worse off than other persons brought to the court.

34. In the large cities it is quite inexcusable not to make special arrangements for domestic courts and we believe that it is always done. In courts which sit less frequently and where magistrates have to travel long distances to attend the court house it is by no means easy to overcome the problem. A domestic case taken early in the list may last for several hours and hardship is then suffered by others.

35. We think courts should so arrange their lists that the parties should know with greater certainty when a case may be called on. Solicitors should be encouraged to co-operate with the court in bringing this about. We appreciate that the difficulties to be overcome are not simple of solution, but they are not insuperable.

36. *Matrimonial court panels.* We have examined a suggestion made to the Magistrates' Association that special panels should be appointed to deal with domestic proceedings in the same way as a panel of justices is appointed to the juvenile court panel. It has been urged upon us that as the needs of the young justify a special panel of justices so also matrimonial problems require the attention of justices specially experienced in these problems. We believe that such a choice of magistrates would possess many advantages. Under such a scheme justices would take greater care to see that their colleagues chosen to sit in the domestic court were specially qualified by experience and training to deal with the many difficult problems of that court. There should, however, be no statutory obligation on justices to appoint such a panel.

37. Justices should in their work gain as wide an experience as possible of all the duties of a justice, whose specialisation on certain types of cases would greatly hinder. We are strongly of opinion that each bench should be allowed, so far as possible, to arrange the distribution of its work in the manner which appears to be best to that bench. We would like more benches, however, to take steps to secure the adequate carrying out of their matrimonial work.

38. *Constitution of the court.* We consider the existing legal provisions by which a single stipendiary or metropolitan magistrate is empowered to hear and decide domestic cases alone is most unsatisfactory. We are of opinion that all domestic proceedings in magistrates' courts should be brought before a bench of not less than two justices and preferably three, and constituted to include so far as practicable both a man and a woman. Such a proposal should present no difficulties in practice in as much as there is an adequate number of lay magistrates available to assist in this work.

39. *Adjournment of cases.* As in the juvenile court, the adjournment of cases is more often necessary in domestic cases than in the ordinary adult court. From time to time it may appear to the court during the hearing that the parties should have further time to consider the possibility of reconciling their differences, and the case may be adjourned for that purpose. This need for adjournment is recognised in Section 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, by which the court upon an adjournment of a case is authorised to make an interim order until the case is decided.

40. When it becomes necessary to resume the hearing of the case difficulties in relation to the constitution of

the court may arise. At the adjourned hearing if the same justices are not present the case must be re-heard. We think it most undesirable for the parties to have to repeat evidence which may well have placed a great emotional strain on them. Furthermore, the value of the testimony of the witness may be lost by repetition. Every effort should be made so to arrange the business of the court that after an adjournment if the case has to go on it will not necessitate any repetition of the evidence.

41. *Concurrent jurisdiction of the High Court and the magistrates' courts.* The present position in relation to the concurrent jurisdiction of the High Court and the magistrates' courts is unsatisfactory.

(a) Both courts have power to hear applications for guardianship.

(b) A magistrates' court can make an order on the grounds of adultery, desertion or cruelty, and subsequently a petition can be presented for divorce on similar grounds.

(c) An application may be made to the magistrates' court to discharge an order on the ground of adultery which will be or has been the cause of proceedings in the Divorce Division.

(d) Under Section 5 of the Matrimonial Causes Act, 1937, now re-enacted as Section 7 (2) of the Matrimonial Causes Act, 1950, on a petition for divorce the High Court may treat a magistrates' order as sufficient proof of adultery, desertion or other ground on which it is granted.

42. Magistrates are frequently left in doubt where a petition has been presented whether they should proceed to hear the application or not. This is particularly so when an application is made under the Guardianship of Infants Act for the custody and maintenance of a child and a petition for divorce is before the court.

43. We submit that the petition should be clarified. Some of our members are of the opinion that it is better once the petition has been presented and the High Court has taken cognisance of the matter that their jurisdiction should be exclusive on all matters, including the custody of the children and the question of the maintenance of the wife and children. They also consider that the granting of a decree should automatically discharge any magistrates' order for the maintenance of the wife and any order as to the custody of the children.

44. On the other hand, others contend that the justices' power to make an interim order for maintenance should continue right up to the hearing of the petition, and if the wife is the successful party any existing magistrates' order should continue and be capable of variation and enforcement by the justices. Furthermore, they consider that if the question of maintenance, and custody of and access to children and their maintenance, is not decided by the Divorce Court, the wife should have the right at her option to apply for orders on these matters either to the Divorce Court or the justices. Magistrates are well accustomed to dealing with these problems. They have facilities for enquiring into problems affecting the welfare of the children and the machinery of their courts is simple, inexpensive and speedy. In addition, those holding this opinion would draw attention to the difficulty of enforcement of orders of the Divorce Court, which can involve much delay and hardship to poor people, and an extension of this jurisdiction to the magistrates' courts would largely obviate these difficulties.

45. *Enforcement of orders.* Maintenance orders made by magistrates under the Summary Jurisdiction (Separation and Maintenance) Act are enforceable in the same way as bastardy orders. The Bastardy Laws (Amendment) Act, 1872, as amended by the Criminal Justice Administration Act, 1914, enables a magistrate, on proof that the amount ordered has not been paid, to issue a warrant for the arrest of the defendant. Although technically no provision is made for the issue of a summons, in fact it is now almost a general practice to issue one in the first instance, to be followed by a warrant if the defendant does not appear on the summons.

46. In many parts of the country, when the defendant appears before the justices and they are satisfied that his failure to pay is culpable or wilful so that they are

empowered to commit him to prison, they make a committal order but suspend its operation so long as the defendant pays a stated sum of money each week in reduction of the arrears. The authority for this procedure is not wholly free from doubt. We think it is a most convenient practice and that it should be continued, but in our opinion there is a need to lay down clear rules of procedure for the enforcement of these orders.

47. There are many aspects of the present procedure which are unsatisfactory. For example, when a court makes a committal order it must be drawn up and signed by the magistrates and then it is handed to the clerk. There is no provision as to who must decide when the defendant has made default in the terms on which the order has been suspended, nor can a defendant apply to the court for relief from committal owing to a change in his circumstances. In 1921 the Home Office issued instructions to Chief Constables with regard to the execution of warrants for arrears and suggested that where the person to be arrested was suffering from severe illness so that he was unfit to be taken to prison the matter should be reported to the justices who issued the warrant.

48. The Association has on a number of occasions considered the suggestion that arrears of maintenance orders should be recoverable from wages. We understand that a system along these lines is in force in Scotland. We consider, however, that such a system would interfere with the independence of the defendant and that a third party should not be made the collecting officer for the court nor be involved in matters arising between the court and the defendant. We understand that the trade unions are strongly opposed to bringing the employer in in this way. We are also of opinion that the handling of this money might present a considerable temptation to the small employer.

49. Custody of children. Where there are children of the marriage the whole question of the separation of the parties assumes much greater importance and we consider that special efforts should be made to reconcile them. If reconciliation is not effected then further questions as to the welfare of the children arise. The probation service is available to provide reports on the home surroundings of the parents of the child should the magistrates so require, to give them the necessary information to make the best provision for the child. The ideal would be that no order for custody should be made until the magistrates have received and considered such report.

50. Where an application for custody is joined with an application for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, the order as to custody will frequently necessarily follow the decision on the application for maintenance. For example, where a wife applies for an order on the grounds of desertion and at the same time asks for the custody of the children, if she establishes that her husband has deserted her, in the majority of cases it is clear that she should have her order for maintenance and also for the custody of the children. The husband may well have left her with the children. But this is not necessarily so, and we think it is desirable in all cases before the order for custody is made, the welfare of the children should be considered quite separately from the issue as to desertion or as the case may be.

51. We consider that the existing procedure whereby on an application for a separation or maintenance order, the court may deal with the question of the custody of the children of the marriage does not sufficiently secure that the magistrates shall direct their attention closely to the interests of the child. Furthermore we find too frequently on the application for the separation or maintenance order the children are used to secure some advantage or spite over the other party. We should like to see special provisions made for more effectively securing that the interests of the child are considered as a separate issue and even on a separate occasion.

52. We consider that considerable benefits would be gained if the court were empowered upon every application for an order where children are involved to appoint a guardian of them. This is already done on an application for adoption and we believe somewhat similar steps could be taken in matrimonial cases. This appointment would secure that the court when it came to the

question of the custody of the children (whether that were done at the time the case is heard or as we think at a subsequent sitting), would have before it the report suggested in paragraph 49 made by an independent person and one who would be greatly experienced in problems relating to the welfare of children.

53. Adopted children. Where a child is adopted jointly by husband and wife he is apparently regarded as a "child of the marriage" for the purposes of any order, but the position is different where the child is adopted by one spouse only. It is not possible to make a specific provision for the maintenance of such a child, although he can be taken into consideration in fixing the amount of maintenance payable to the wife for her own use. But we consider this position is unsatisfactory and that provision should be made for allocating a separate amount to such a child.

54. Tenancy of the matrimonial home and ownership of furniture. The Association has considered the suggestion that the law relating to the ownership of furniture and chattels should be amended to provide that the magistrate, when making a separation or maintenance order, could also make an order as to the ownership of the furniture and chattels in the matrimonial home. These suggestions have been urged in Parliament on more than one occasion. In 1925 during the passage through Parliament of what is now the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a clause was introduced at the Report Stage and was withdrawn after a debate. At that time the Minister having the conduct of the Bill was not prepared to accept the clause because it laid down a new principle in asking the court to do something with regard to the division of property. Mr. Locker-Lampson, the Under-Secretary of State, then said: "You are asking the magistrates to go entirely outside their jurisdiction and to say what they think ought to belong to the husband and what ought to belong to the wife". At that time it was also pointed out that the furniture might have been bought under the hire-purchase system. A somewhat similar proposal was made in Parliament in 1951. In our opinion the suggestions would involve far-reaching changes of great difficulty and would necessitate special jurisdiction which magistrates do not at present enjoy.

55. A number of suggestions have been made that upon the making of an order the court should review the tenancy of any house occupied by the parties to overcome a hardship now suffered by the wife. Where there is a large family the housing shortage creates insuperable problems. The task of the wife with a number of children to find a new home within her means is impossible. Even where there are no children it is sometimes true that the financial position of the wife is insufficient to enable her to provide a home for herself. It is thought that the husband is frequently freer and this is certainly true where there are children.

56. It has been suggested that it might be possible to create some form of statutory tenancy in favour of the innocent wife. We do not feel able to make any recommendations on this proposal. At the Report Stage of the Summary Jurisdiction (Separation and Maintenance) Bill in 1925 a clause was introduced to carry out this suggestion but it appears to have been withdrawn without debate.

57. Non-enforceability during residence. We would, however, submit that the provisions of Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, should be considered with a view to its repeal. This subsection states: "No order made under the principal Act shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband". This sub-section has been considered by the courts on several occasions in recent years (see *Evans v. Evans* (1947) All E.R. Vol. 2, 656; *Hopps v. Hopps* (1948) 2 All E.R. 920). We consider that Section 1 (4) should be repealed and that an order should continue in force despite the fact that the wife continues to reside with her husband provided there is no cohabitation, unless and until an application is made by either party to discharge the order and a formal order of discharge is made.

58. Appeals. During the passage of the Married Women (Maintenance) Act, 1930, through Parliament, consideration was given to the question of appeals from magistrates.

PAPER NO. 30. MEMORANDUM SUBMITTED BY THE MAGISTRATES' ASSOCIATION

12 JUNE, 1952]

MR. G. G. RAPHAEL, J.P., SIR LEONARD COSTELLO, C.B.E., M.A., LL.B., J.P.
AND MRS. I. M. H. MACADAM, M.B., J.P.

A clause was then introduced and passed through the House of Commons by which such appeals were removed from the Divisional Court to which they now lie and given to courts of quarter sessions. In the House of Lords, this clause was removed. Lord Merriman and Lord Simon spoke against the clause. Lord Merriman pointed out that clerks of the peace might have no experience in matrimonial matters and Lord Simon suggested that the judges in the Divorce Division were the persons who by experience, devotion and skill were the best able to deal with these appeals. Nevertheless, although the Divisional Court has before it a copy of the clerk's notes of the evidence we recognise that the existing right of appeal leaves the decision on the facts very largely in the hands of the three magistrates who hear the case as a court of first instance. The Divisional Court does not interfere with the decision of the magistrates on the facts unless it is clearly wrong or perverse. So long as there is some evidence upon which the magistrates can arrive at their decision, the decision on the facts will not normally be over-ruled. There may be some danger in this position.

59. We consider that the existing right of appeal to the Divisional Court should remain, but we would be prepared to support some additional right of appeal so long as it is not to any court constituted of one person. If an appeal on the facts is to be allowed and is to give any measure of satisfaction to the parties, we think it should be an appeal to a court consisting of at least three persons. This may be achieved at the county court of quarter sessions but not at the borough court of quarter sessions, which is presided over by a recorder sitting alone. The appeal committee of the county would be a satisfactory court of appeal as it is presided over by a legally qualified chairman.

60. In 1948 and again in 1950 this Association recommended that where courts of quarter sessions are provided over by a recorder it is in principle desirable that other justices should sit with him and adjudicate. In this way the justices would benefit from the legal knowledge and experience of the recorder and he, in his turn, would, we believe, benefit from the assistance of justices with local knowledge and experience.

61. *The collecting officer.* Section 30 of the Criminal Justice Administration Act, 1914, authorises justices when making an order for the periodical payment of money (which includes a maintenance order) to provide in that

order for the payments to be paid through an officer known as the collecting officer. It is a fact that nowadays the great majority of orders are payable through the collecting officer.

62. Where a defendant is in arrears and resides elsewhere than in the district for which the collecting officer acts, the order may, by virtue of Section 2 and the Second Schedule of the Emergency Laws (Miscellaneous Provisions) Act, 1947, be enforced through the court for the district where the defendant resides. The advantages of this procedure are considerable. Provision is also made by Section 2 (3) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, for the variation of any order upon fresh evidence. Under this provision an order which provides for payments through the collecting officer of the court can be amended so that payments can henceforth be made through the collecting officer of the court where the defendant resides and where the order is to be enforced.

63. In our opinion, where the order is being enforced in some court other than the court which made the order, then the payment of all moneys payable under the order should be made payable through the collecting officer of the court which is for the time being enforcing the order.

64. *Bigamy.* We agree with and wish to support the suggestion on the question of bigamy which we understand the National Marriage Guidance Council is submitting, namely, that all marriages and divorces should be endorsed on the entry of the birth at Somerset House and entered on birth certificates, and that at all marriage ceremonies such birth certificates should have to be produced. We would add to this suggestion that such endorsed birth certificates should only be for the use of clergy and registrars for marriage and should be strictly confidential. In our capacity of examining magistrates the serious and far-reaching effects of bigamy are all too evident.

65. *Clarification and consolidation.* At present, as shown in part in paragraph 7 of this memorandum, the law concerning domestic courts and the making, enforcement, variation and discharge of orders is contained in a number of statutes. The Association submits that the law relating to matrimonial matters should be clarified and consolidated, and supports the recommendations of the Justices' Clerks' Society in this connection.

(Dated January, 1952.)

EXAMINATION OF WITNESSES

(Mr. G. G. Raphael, J.P., Sir Leonard Costello, C.B.E., M.A., LL.B., J.P. and Mrs. I. M. H. MacAdam, M.B., J.P., representing the Magistrates' Association; called and examined.)

2425. (Chairman): We have before us Sir Leonard Costello, Mrs. MacAdam and Mr. Raphael. Sir Leonard, you are Chairman of the Devon Quarter Sessions?—(Sir Leonard Costello): Yes, my Lord.

2426 And Mrs. MacAdam is a Bachelor of Medicine and a Justice of the Peace of Leeds?—(Mrs. MacAdam): Yes.

2427 And Mr. Raphael is a Metropolitan Magistrate and Justice of the Peace for the Borough of Deal. To whom shall I address my questions in the first instance?—(Mr. Raphael): I was the Chairman of the Committee which dealt with these proposals. I am supported by my colleagues who will deal with individual matters that I do not feel qualified to speak about myself.

2428 Before I ask any questions, do you wish to make any addition to, or explanation of, anything in your memorandum?—My Lord Chairman, there are three short observations which I would desire to make. The first one is quite obvious; this is an agreed memorandum which has been discussed by a large number of people holding conflicting views, and it suffers from the defect of having to represent a sort of synthesis of a number of conflicting views. None the less, as a whole it represents the considered view of the Magistrates' Association. The second thing I wanted to say was that the Council of the Magistrates' Association desires to bring to the notice of the Royal Commission that the Council supports

the policy that all orders for alimony or maintenance made by the High Court in respect of weekly wage-earners shall be enforceable by magistrates' courts. Further, that on proof of a change of circumstances magistrates' courts should be empowered to alter such amounts. That was not in our original memorandum, as it had not been agreed upon at the time the memorandum was submitted. The final observation that I would desire to make, and it is purely a personal matter, is in respect of paragraph 38. You will observe that in paragraph 34 we put forward the view that the existing legal provisions by which a single stipendiary or metropolitan magistrate is empowered to hear and decide domestic cases alone is most unsatisfactory. All I would desire to say is that the Commission will not be surprised to hear that I personally would not subscribe to that idea, certainly not in my capacity as a metropolitan magistrate, but I want loyally to support the considered view of the Magistrates' Association which represents largely lay justices all over the country. I would accept in principle that the hearing of domestic cases by a bench of two or three persons has certain advantages, although from my experience in the metropolitan courts the pressure of work is such that it would be impossible to dispose of the work if it were done by more than one person, but subject to that, as I say, this represents the considered view of the Magistrates' Association, and I desire to support it.

12 June, 1952]

MR. G. G. RAPHAEL, J.P., SIR LEONARD COSTELLO, C.B.E., M.A., LL.B., J.P.
AND MRS. J. M. H. MACADAM, M.B., J.P.

[Continued]

2429. You say at the opening of this memorandum:—

"The Magistrates' Association represents some 8,500 individual magistrates and 120 benches who have joined as corporate members."

Does it include all the metropolitan magistrates?—No, my Lord. A number of metropolitan magistrates who take an interest in the Magistrates' Association are members, but it is by no means true that all metropolitan magistrates are members of the Magistrates' Association.

2430. I am going to ask you one or two questions about a memorandum we have had from Mr. E. R. Guest. Is he a member of your Association?—Yes.

2431. As your memorandum deals largely with matters on which I have little knowledge or experience, I propose to leave most of the questioning to others. I have of course read it with great care and appreciation, but I would like you to turn at once to paragraph 54, which deals with the tenancy of the matrimonial home and ownership of furniture. You begin by saying this:—

"The Association has considered the suggestion that the law relating to the ownership of furniture and chattels should be amended to provide that the magistrates, when making a separation or maintenance order, could also make an order as to the ownership of the furniture and chattels in the matrimonial home."

That, as you will appreciate, is a suggestion which has been made by many individuals and organisations. Then you go on to point out that these suggestions have been urged in Parliament on more than one occasion and, putting it shortly, no legislation has been passed giving that power, and you end up by saying that when this was last suggested it was pointed out that the furniture might have been bought under the hire-purchase system. Then you go on:—

"A somewhat similar proposal was made in Parliament in 1951. In our opinion the suggestions would involve far-reaching changes of great difficulty and would necessitate special jurisdiction which magistrates do not at present enjoy."

I think the Commission appreciate the difficulties, but I want to ask you two questions. First of all, assuming that some way could be found of bringing such a provision into force, some way which would not lead to too much complication and difficulty, do you think in principle it would be a good thing?—For myself I should have thought that it was purely a civil jurisdiction and a matter which could best be disposed of in the county court.

2432. It is not that you see any strong objections to the proposals as such; your objection is that you think that to put this work on the magistrates' courts would be a mistake. Is that right?—(Sir Leonard Costello): Speaking for myself, I think it would be quite possible for magistrates to deal with this at the time when they are dealing with the question of the separation order. It would of course depend to some extent on the constitution of the bench and whether the chairman happened to be a person of some experience in civil matters as well as purely criminal jurisdiction.

2433. Of course we do realise the numerous difficulties which may arise both in connection with furniture which is being bought on the hire-purchase system and with the tenancy of a house, however much one may desire to provide for a wife.—(Mr. Raphael): All sorts of difficulties arise in respect of the ownership of property and the rights of third parties, and I very much doubt whether the best constituted court of summary jurisdiction is the appropriate tribunal to decide such matters.

2434. It is that you doubt whether the tribunal is the appropriate one rather than that you see any insuperable objection to the general principle of the proposal?—Yes.

2435. Then I come to paragraph 55, where you say:—

"A number of suggestions have been made that upon the making of an order the court should review the tenancy of any house occupied by the parties to overcome a hardship now suffered by the wife."

Then you point out the difficulties of a wife. Then you go on in paragraph 56 to say this:—

"It has been suggested that it might be possible to create some form of statutory tenancy in favour of the innocent wife. We do not feel able to make any recommendations on this proposal. At the Report Stage of the Summary Jurisdiction (Separation and Maintenance) Bill in 1952 a clause was introduced to carry out this suggestion but it appears to have been withdrawn without debate."

Is the reason why you do not feel able to make any recommendation on the proposal because there is a difference of opinion amongst your Association?—Partly that, and partly because we recognise that it would be a matter of considerable complication to enforce a transfer of a tenancy from one person to another. With a tenancy, for example, in the husband's name, that a court of summary jurisdiction should have the power to say that in future the statutory tenant should be the wife appears to be a difficult sort of proposition to arrive at and enforce.

2436. Again I suppose it comes to this, that whether it would be possible for some other court or not, you do not feel it is appropriate for a magistrates' court, is that right?—(Mrs. Macadam): May I say here, as the lay representative of the magistrates, that those of us without any legal training whatsoever would feel quite incompetent to deal with all the legal intricacies which would arise if this power was put in the hands of magistrates. It might be quite different for stipendiary magistrates with legal training, but those of us with no legal background would find we were quite incompetent to deal with these problems.

2437. I appreciate that.—That is why we say we cannot recommend that the magistrates should deal with it.

2438. I appreciate the difficulty that you mention. Will you turn to paragraph 59 where you are dealing with the rights of appeal. You say there:—

"We consider that the existing right of appeal to the Divisional Court should remain, but we would be prepared to support some additional right of appeal so long as it is not to any court constituted of one person. If an appeal on the facts is to be allowed and it is to give any measure of satisfaction to the parties, we think it should be an appeal to a court consisting of at least three persons. This may be achieved at the county court of quarter sessions but not at the borough court of quarter sessions, which is presided over by a recorder sitting alone. The appeal committee of the county would be a satisfactory court of appeal as it is presided over by a legally qualified chairman."

Now Mr. Guest makes the suggestion—have you read his memorandum?—(Mr. Raphael): No, my Lord, I have not seen it.

2439. He points out that there are certain drawbacks, in his view, in the present system of appeals. I think largely because there is not a re-hearing and it is so difficult for a magistrates' clerk to get down sufficient on paper to enable an appeal court to decide under the present system. He says:—

"None of these disadvantages . . ."

He sets out several disadvantages, I have not troubled you with all of them.

" . . . would arise if these cases followed the well-tried route that almost all other appeals from summary courts take, namely, appeal by way of re-hearing to the quarter sessions if desired, and thence—or originally—on points of law by case stated to the Divorce Divisional Court."

He is there of course drawing a distinction between appeals on fact and appeals on law. Appeals on the former he suggests should go by way of re-hearing to the quarter sessions if desired and appeals on the latter should go either on appeal from quarter sessions or direct to the Divisional Court. Then he goes on to state shortly the advantages of that proposal. He says:—

"A case stated, which has been considered by both parties before being stated by the justices concerned, should not fail to make clear the facts on which the justices acted. If it does, it can be remitted to them

12 June, 1952]

MR. G. G. RAPHAEL, J.P., MR. LEONARD COSTELLO, C.B.E., M.A., LL.B., J.P.
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[Continued]

to make these clear beyond a peradventure, so that the decision of the superior court as to whether the justices were right in law can at any rate be made on the same facts as the justices considered."

First of all, is that suggestion in substance different from your suggestion, and secondly, in so far as it differs, what are your views upon it?—I think it does represent our view that the Divorce Court at present gets appeals based on the short notes which are kept and which provide an inadequate basis for a review of the facts. We do think that an appellant should have the right of a re-hearing, which presumably would be to the quarter sessions, and that the legal points, if any remain, should be dealt with by the High Court.

2440. So that in substance you would agree with Mr. Guest's suggestion?—I think we do.—(Mr. Leonard Costello): In effect, it would be analogous to an appeal from a petty sessions court to quarter sessions in an affiliation case, in the sense that there would be a re-hearing of the facts.—(Chairman): I shall have to take your word for it because I have not sufficient knowledge of the latter procedure.

(Chairman): Now would you turn to paragraph 64 where you deal with bigamy. You make a suggestion that all marriages and divorces should be endorsed on the entry of the birth at Somerset House and entered on birth certificates, and that at all marriage ceremonies such birth certificates should have to be produced; I am afraid that it is outside our terms of reference to make such a suggestion although it might be that we could do so by way of order in law.

2441. (Mr. Maddocks): Would you be good enough to turn to paragraph 14, where you say:—

"The maximum orders that magistrates are permitted to make in matrimonial cases in favour of a wife are £5 a week for a wife and an additional 30s. in respect of each child. By reason of the fact that in the homes of the lower income group the husbands are normally the wage-earners, wives are ordinarily the applicants for orders. (In fact very few orders are made on the application of husbands.) The wives are seeking a share of their husbands' wages, though if a wife should be earning wages also, that fact will be taken into account in assessing the amount of order made. Our experience as magistrates is, therefore, confined mainly to the lower income groups."

Has the Magistrates' Association had any experience, since the Married Women (Maintenance) Act of 1949 gave magistrates power to make an order against a man of £5 a week for the wife and 30s. a week in respect of each child, of occasional applications by people who are really very well off? Magistrates can now make an order in respect of a man with three children of up to £9 10s. a week, an amount which it would take quite a rich man to pay. Have you come across that?—(Mr. Raphael): It is my own experience in the metropolitan courts that in practice we are dealing only with the lower income groups. People of means still go to the High Court, but whether the experience of my colleagues is that they are getting such applications in the provinces, I do not know.—(Mrs. MacAdam): I would say that in the provincial cities we still deal with the lower income groups and there has been no appreciable difference since the new legislation.

2442. I ask because I have come across two cases where men with an income of £1,500 a year were involved, and the question of mortgages and so on had to be gone into. I wondered if that had been your experience in Marylebone?—(Mr. Raphael): I think it is unusual. I have had one, or possibly two, such cases, but it is quite unusual.

2443. Do you not think that it is quite likely that there will be such cases in the future? It is a cheaper remedy for a woman.—(Mrs. MacAdam): There is no reason why we should not get such cases, but as yet I have not experienced any.

2444. I gather from paragraph 68 that the Association does not recommend deduction from wages for the purposes of enforcement. You say:—

"The Association has on a number of occasions considered the suggestion that arrears of maintenance

orders should be recoverable from wages. We understand that a system along these lines is in force in Scotland. We consider, however, that such a system would interfere with the independence of the defendant and that a third party should not be made the collecting officer for the court nor be involved in matters arising between the court and the defendant."

Have you considered that it might be very useful for the court to have such a power? It would be possible to enforce an order in that way in the case of a large employer, for instance the Port of London Authority, even if it could not be so enforced in the case of a small employer?—(Mr. Raphael): I think our feeling about that matter is this: that a wilful defaulter, who is the only person we want to chase in the magistrates' courts, will default by leaving his employment, and so this method would not be appropriate and would not have any advantages.

2445. Of course if one came to the conclusion that the husband was that kind of man, one would not make the order on the employer, but if a man, who has been in regular employment for many years with a big corporation, just will not pay and always waits for a summons or a warrant, it might be a useful power to have in such a case?—There are perfectly satisfactory methods of enforcing the order against the wilful defaulter without having recourse to the employer.

2446. I was thinking of the type of man who only pays when he gets a summons or a warrant.—That does not require the intervention of the employer.

2447. If the husband were employed by a big concern the employer could be made to pay the money straight into court. That type of man would not give up his job.—I should have thought that there were obvious disadvantages in requiring an employer to become a collecting officer in respect of a number of these orders. Employers have sufficient responsibility today in respect of P.A.Y.E. and things of that sort without having put upon them the obligation of enforcing court orders of this kind.

2448. Will you turn to paragraph 30 where you deal with the suggestion that the person with whom adultery is alleged to have been committed should be served with notice of proceedings and given an opportunity of appearing. Has it occurred to you that in making a person with whom adultery is alleged to have been committed a party, the difficulty of service on such a person might indefinitely delay the proceedings?—Yes, I think that we felt there was that difficulty. In theory, of course, it is obviously desirable that a person in respect of whom an allegation of adultery is made should have the opportunity of being a party to the proceedings. I would suggest that as a matter of practice in our courts it is of little importance. The way in which these allegations of adultery are made and decided in a magistrates' court really does not in any way impinge on the interests of third parties. First of all, the cases are heard in private, then the persons concerned are not really interested, even if they were to be served with a notice, and of course they are always available as witnesses.

2449. During your long experience on the metropolitan bench, have you ever come across the position where a third person against whom an allegation of adultery has been made has come along after you have decided the case and said to you, "You have done an injustice, I should have been at the trial"?—No, never.

2450. Would you be good enough to turn to paragraph 38. You have explained to us your own feeling about stipendiary magistrates. Has it occurred to you that if special matrimonial courts were set up consisting of three people there might be considerable difficulty where, as so frequently happens, cases have to be adjourned?—Yes, I agree. As you know, an experiment is being made at the moment in respect of domestic proceedings in the metropolitan area to see whether some such court could be administered by lay justices with the metropolitan magistrates presiding. There is that difficulty of reconstituting the court with the same members to deal with the cases which are so often, as you know, adjourned on the original hearing.

2451. Is it your experience that a big percentage of these matrimonial disputes are adjourned on the first hearing for something or other to be found out?—Yes, I think the majority of matrimonial proceedings in magistrates' courts

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are adjourned and not decided in the very first instance. (Mrs. Macadam): May I be allowed to say there that, although cases are adjourned in the provincial office, adjournment would in no way hold up proceedings because lay magistrates in the provincial towns are sitting every day on matrimonial cases, just in the same way as the metropolitan magistrates and the stipendiary magistrates are always sitting; there would be no difficulty about adjourning cases in so far as they are concerned. In the rural areas there might be a practical difficulty because the lay magistrates are not sitting every day. We do appreciate that point. But we feel that that is a difficulty which could be got over. We feel so strongly that there should be the three magistrates that those difficulties exist if possible be overcome.

2452. The difficulty which Mr. Raphael feels about it is this. It is true you have got lay magistrates sitting every day, but you have got to have exactly the same court.—Exactly.

2453. And the essence of police court effectiveness is speed. A woman wants to get her order quickly because she is on national assistance. If the case has got to be adjourned from one Tuesday, say, to the next Tuesday, and on the following Tuesday one of the three magistrates cannot be there, then the case has got to stand over for another week, until that magistrate can be there. Have you considered that difficulty?—We have considered it, you feel it can be got over. We think that the proposal is very important, and we feel that the majority of lay magistrates would be willing to sit on an extra occasion, as we often have to do. In the big cities we are at the end of the telephone and we are called quite frequently to sit on extra days for particular cases so that there should not be delay. It is a matter of adjustment between the justices' clerk, the solicitors, if there are solicitors in the case, the parties concerned and the magistrates. We feel that the sittings can be arranged, they always are in our court.

2454. You do not think that there would be any difficulty about it?—I do think there would be difficulties, but I do not think they are difficulties which cannot be overcome. (Sir Leonard Costello): We have never found any difficulty in the petty sessional division of which I happen to be Chairman. If there is an adjournment and if one or two of the three cannot come on the regular day, it is quite easy to have a special day appointed which suits all three without any undue delay at all. We have never found any difficulty about it.

2455. In paragraphs 41 to 44 dealing with this question of concurrent jurisdiction, you have set out the greatest position and you state the difficulties which arise. What is the opinion of the Association as to what ought to happen?—(Mr. Raphael): We think there is a real difficulty there and that it is a matter which will have to be decided. One of the difficulties which arises is, as I understand it, that when divorce proceedings are taken the parties now very seldom ask the Divorce Court to deal with the custody of children and it then often happens that there are concurrent proceedings in the magistrates' court and the Divorce Court. A petition for divorce is entered and is being heard and, at the same time, the petitioner goes to a magistrates' court and asks for the custody of the children in proceedings under the Guardianship of Infants Act. Very often, as a matter of practice, we refer to the Divorce Court and ask if there is any objection to our disposing of the application having regard to the fact that the parties are before the High Court, and the Divorce Court invariably writes back and says that there is no objection to our dealing with the application. But we think that the situation requires to be clarified so that proceedings which now go on in both sets of the courts, such as those in respect of the custody of the children, should be dealt with exclusively in the one court.

2456. What do you think about the position where a woman obtains a summons against her husband for an order on the ground of persistent cruelty and when the return day arrives the husband turns up either by himself or with a solicitor and says, "You cannot deal with this because I have started a petition for divorce against my wife also on the ground of cruelty"? Magistrates may feel at the moment that they must not decide the question because it will be dealt with in the High Court very soon, which means of course that the man has secured a delay of possibly three to six months. Does

your Association think that in those circumstances magistrates ought to be permitted to go on with the application?—We do think that the rights of the magistrates' courts in dealing with proceedings which are in some form pending in the High Court ought to be clarified.

2457. Turning to paragraph 45, where you deal with the matter of the enforcement of orders, is it a fact that all magistrates feel very diffident at the moment about making suspended committal orders, although they do make them?—I think the Association agrees with me. I hold strongly the view that suspended committal orders are objectionable, particularly because, when they come to be enforced, they may in practice be enforced, not by the court itself, but by some quite junior official in the clerk's office. To that extent the situation is unsatisfactory because a change of circumstances in the man's position might justify the further suspension of the committal. I think that that is a problem which ought to be dealt with.

2458. On the other hand, would you want to take away the power to make suspended committal orders?—I think there is an exceptional case now and again which justifies a suspended committal order, but I think the power ought to be very sparingly used.

2459. (Chairman): Might I say something arising out of that. In my first year as a judge in the Chancery Division I had figures put out as to the result of suspended committal orders. I found I had made thirty-eight suspended committal orders and that in only one case did the man go to prison for non-payment. In all the other thirty-seven cases he paid up with this order hanging over him, and I thought that was rather a satisfactory result. But you find it not very satisfactory in the magistrates' courts?—I think there is the danger that this position may arise: a suspended committal order is hanging over a man's head, entirely different circumstances arise whereby he cannot pay, some junior clerk in the office then sends out the committal order and the man is arrested and taken to prison without any right of access to the court again.

2460. (Mr. Madocks): Suppose provision was made, and I think this is a practice in most places, that the order is not to be executed unless the clerk first brings it to the magistrates who made it and says, "This man has not paid, you made a suspended committal order three months ago, shall we execute it?"—A suggestion has been put to the Commission in a memorandum, I think, by the Justices' Clerks' Society, to the effect that before a suspended committal order shall be put into operation a notice shall be served on the defendant giving him the opportunity of attending the court to give an explanation of his non-payment and saying that if he does not make any such application within, say, five days, the committal order will be put into operation.

2461. That would be satisfactory, would it not?—I should have thought some such system would be satisfactory. (Sir Leonard Costello): The fundamental point with regard to this matter is that at present it would seem extremely dubious whether the court has any power at all to make such an order.

2462. That wants clarifying, doesn't it?—Yes.

2463. I notice that nowhere in your memorandum do you refer to the difficulty—perhaps it is because justices have not found any difficulty—in enforcing orders in Scotland. Have you come across that at all?—(Mr. Raphael): That has been dealt with by a recent Statute.

2464. Since the Statute, I mean.—You mean the enforcement of orders that originate in Scotland?

2465. No, enforcing English orders in Scotland. There is no difficulty in enforcing Scottish orders in England, but I understand that there is considerable difficulty in enforcing English orders in Scotland. Has your Association taken that matter up at all?—I have not come across that difficulty on any occasion.

2466. In paragraph 52, it is suggested that a guardian ad litem should be appointed for an infant when custody is to be considered. Would there not be a great difficulty about that in the magistrates' court? Who is going to be the guardian ad litem and who is going to pay?—(Mrs. Macadam): A guardian ad litem is appointed in all cases where adoption is being considered, and the same procedure, we feel, might be applicable in custody cases. We do not find that we have any difficulty there in finding

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a suitable person to act as the guardian of *litem*. We now have sufficient probation officers to do this proposed work; they could be appointed, or the children's officers—the children's department might be willing for one of their people to do the work. We considered that the question of finding a person would not be difficult at all.

2467. There is a great difference between adoption proceedings and proceedings between husband and wife—I quite agree, I was not comparing the two. I merely wanted to show that people are there to do the work; we feel that that would not be a difficulty because we have had no difficulty in getting people to make the enquiries regarding the children in adoption cases.

2468. In adoption proceedings you have both parties together, there is usually some money available, and you are usually dealing with a society which will make all arrangements about the guardian of *litem*.—Not at all, Sir, if I may say so. We do not deal with adoption societies at all in our court; I feel there would be the same sort of enquiries to be made as in adoption proceedings, because very often in such proceedings the person making the enquiries has to go into the circumstances of a broken home. The same person would therefore be competent to do that kind of work in matrimonial proceedings.

2469. Have you a "poor box" in Leeds?—Yes, but I do not think it is used in connection with such proceedings.

2470. If the guardian of *litem* has to incur expense, there would be no difficulty in metropolitan courts because they have all got an ample "poor box" but in country districts which have no such ample "poor box", who is going to find the money?—The probation officers are there; that would mean no expense at all.

2471. You would use your probation officers as guardians of *litem*?—We could do, or the children's officers. I do not think the question of expense comes into it at all.

2472. In paragraph 57, you draw attention to the importance of the necessity for the alteration of the law which has been laid down in *Evans v. Evans* to the effect that a woman's order is quite useless if she remains under the same roof as her husband. If she is not cohabiting with him your opinion is that the order should remain enforceable?—(Mr. Raipsale): The greatest hardship in respect of orders at the moment comes from the application of this rule.

2473. (Lady Porter): I would like to ask for clarification of paragraph 37, where you say:—

"We are strongly of opinion that each bench should be allowed, so far as possible, to arrange the distribution of its work in the manner which appears to be best to that bench."

What exactly had you in mind?—Juvenile courts are specially appointed for the purpose of trying juvenile cases, and there was a proposal that some such special panel should be appointed for deciding domestic cases. We thought, on the whole, that benches should be given latitude to arrange their work to suit the particular conditions applicable to each bench without being tied down to a definite stipulation that only a domestic panel should be allowed to hear domestic cases.

2474. You do not consider that there is already quite sufficient latitude?—(Sir Leonard Costello): Yes, at present there definitely is.

2475. You go on to say:—

"We would like more benches, however, to take steps to secure the adequate carrying out of their matrimonial work."

Have you knowledge that the matrimonial work is not adequately carried out by many benches?—I do not think so.

2476. It is stated here. It is rather in the nature of a reflection on benches?—Personally I think that observation is quite unnecessary. (Mrs. MacAdam): In discussing this question of matrimonial court panels, as I have been privileged to do, with a considerable number of justices' conferences in various parts of the country, we have found, when we have been considering the question of matrimonial work, that some of the smaller benches have not regarded matrimonial work as particularly important; a great many of us feel, however, that the matrimonial work

is very important indeed. We put this in the memorandum for that reason. I would like to say, too, that conditions vary so tremendously in different parts of the country that we feel we must allow the individual benches to arrange their own panels. Matrimonial work is very exacting and tiring and it might not be a good thing for people to sit all day doing nothing else but matrimonial work. Then, too, we feel that the average lay magistrate has a pretty wide experience and we do not want to limit that experience in any way by saying that he or she should sit only on a restricted panel such as a matrimonial court panel would be. Our suggestions have arisen out of discussions about this particular point at conferences.

2477. Would you turn to paragraph 49 on the custody of children. You say:—

"The ideal would be that no order for custody should be made until the magistrates have received and considered such report."

Could you amplify that? Did you mean that, so to speak, the order would be made in two lots, that the question of custody would be completely divided from the other questions and that there should therefore be an adjournment on the question of custody?—(Mr. Raipsale): I think what we had in mind was that, quite apart from the merits of any dispute that was going on between the husband and wife, the interests of the child demanded separate consideration in respect of its custody; in particular, before any decision is arrived at, some independent evidence should be given as to the conditions of the home in which it is proposed the child should live; for example, if the husband is to obtain the custody of the child, there should be evidence as to the circumstances of his home, who is going to look after and provide for the child generally. I think that is a matter of very great importance.

2478. (Dr. Robertson): Following on two questions put by Mr. Middletons, may I ask first, has the Association no experience of difficulty in enforcing justices' orders in Scotland?—(Mrs. MacAdam): Might I say that we considered this point to be a matter for the Justices' Clerks' Society, as the matter is so much one of administration and the clerks of the courts are the people who deal with such details.

2479. Secondly, did Mrs. MacAdam say that her court never deals with adoption societies?—I will not say never, but we do not work through adoption societies.

2480. Just one further point regarding the differences which exist between England and Wales and Scotland. In paragraph 2, classes (a), (b), and (c) the Association speaks of co-operation with other similar bodies. You are doubtless aware that there did exist for some years a Scottish Magistrates' Association founded by Miss Haldane, and to the regret of a number of us that Association died a natural death. Did you feel that the procedure north of the Border is so very different that the co-operation was of no value? For example, your very valuable bulletin dealt with cases which were quite different from the Scottish police court cases, and, on the other hand, the Scottish bulletin was perhaps rather incomprehensible in the South; is that the case?—May I say that we have felt it was a great loss that there was not a closer co-operation, although we appreciated that the work of the justices in Scotland was quite different from that in England. For your information, last year a most successful residential weekend conference was held in Scotland, and this year a conference has again been arranged with the Scottish magistrates.

2481. Do you agree, generally speaking, that there is a much closer similarity between the work of lay magistrates' courts in England and Wales and those in the Dominions and Colonies, than there is between those in England and Wales and those in Scotland?—I would not know.

2482. (Chairman): Might I ask one question arising out of that. I understand that the Scottish Magistrates' Association has ceased to exist. Can the Scottish magistrates be members of the Magistrates' Association?—I think they are members. (Dr. Robertson): I think, my Lord, some of them became members of the English Association, after the breaking up of the Scottish Association.

2483. (Mr. Young): Are these cases on matrimonial matters in England conducted in police courts?—(Sir Leonard Costello): There is no such word as "police"

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court, the proper designation is a magistrate's court. (Mr. Raphaeli): The name was changed some years ago and they are all referred to now as magistrate's courts.

2484. Are the matrimonial proceedings conducted in the same building in which criminal proceedings take place?—Yes.

2485. Do you think that is a desirable thing?—I should think it is unavoidable. If magistrates have jurisdiction to deal with criminal and domestic proceedings, it necessarily follows that until they are provided with two lots of buildings they conduct all their work in one building.

2486. Would you not think that it would be desirable, if it could be arranged, that the proceedings should take place in separate buildings?—We want more magistrate's courts in any case, but to have two lots of magistrate's courts, one for domestic and one for criminal proceedings, is too optimistic a hope under present conditions.

2487. You would agree that it would be desirable if it could be achieved?—In any case, the public are excluded from domestic proceedings, and so far as our courts are concerned, such proceedings are taken at a different time of the day. All the criminal work has generally been disposed of in the morning and, apart from the smaller matters dealt with by way of summons, the domestic proceedings are generally heard at the end of the afternoon, in private.

2488. In your answer no, you do not think it is desirable?—(Sir Leonard Costello): Personally I do not think it matters at all, seeing that the proceedings are in private, what the building is in which the proceedings take place.

2489. In paragraph 38, you recommend that domestic proceedings should be brought before a bench of not less than two justices. If there are two justices and such takes a different opinion, who decides?—(Mr. Raphaeli): It is desirable of course in all cases where more than one justice is sitting to have an odd number so that the decision is the decision of the majority, and that is the invariable practice.

2490. But if you had two? I was wondering if you meant that you would have a chairman who would be the judge, so to speak, and that the lay person would be sitting in an advisory capacity. Is that what you meant?—If you have two justices and there is a difference of opinion obviously the case will have to be retired before another bench.

2491. Your proposal is that you should have a bench of two or more, all having full powers?—Yes. (Sir Leonard Costello): Apart from the courts of stipendiary magistrates there always are three magistrates in a domestic proceedings case. There must be three and not more than three. The recommendation here is that there should be two other magistrates to sit with the stipendiary magistrates.

2492. In paragraph 48, you appear to be rather against the attachment of a person's wages for the recovery of maintenance. Do you not think it would be a good thing to have the power there as a threat to the man, even if it were not used? In other words, a man who knows that his wages may be attached for maintenance may be more likely to pay his maintenance regularly.—(Mr. Raphaeli): Personally, I think not. I think that the sanctions that we have in respect of a wilful defaulter are sufficient without attaching his wages and bringing his employer into it. He always knows that if he is a wilful defaulter he is likely to go to prison.

2493. (Mrs. Allen): I would like to pursue a little further the last point suggested by Mr. Young. You say that the present arrangements are sufficient, but, supposing wages could be attached, would you not agree that the very fact that they could be attached would also act as an additional deterrent? You make the point that a defaulter would leave his employment rather than pay, but the man has got to have something to live on and would have to go on unemployment benefit. If the maintenance of the wife could be stopped from such benefit, would your attitude still be the same?—I think I personally am opposed in principle to the suggestion that the employer should be brought into the matter at all. I believe we have powers sufficient for our purpose without bringing employers into it.

2494. But from the woman's angle it might be more effective? She would be more sure of receiving the

amount granted to her. You do not think that would outweigh your feeling in regard to the employers?—I do not think the woman would be assured in particular. All that she really needs is the money, and if the process is sufficient to ensure payment of the money, she is satisfied.

2495. But at the moment there are so many wives not receiving the money. The husbands have to go to prison and the wives still do not receive maintenance.—Oddly enough, I have always been amazed myself to find that so many wives are more concerned with seeing their husbands go to prison than with getting the money.

2496. In paragraph 23, you deal with reconciliation. What are your views in regard to voluntary bodies doing reconciliation work? The emphasis is placed on probation officers in paragraph 23.—I think the probation officers do extraordinarily valuable work in reconciling parties before they come before the court. I agree with what I think is expressed by inference, if not expressly, in this document, that parties that cannot be reconciled have the right to have their cases heard and, quite apart from having their cases heard, they all have a right of direct access to the magistrates themselves, and I think that is a right which should be carefully preserved.

2497. Have you considered that voluntary associations can play any part in reconciliations?—(Mrs. MacAdam): I feel that the voluntary associations, and I presume you have in mind the marriage guidance councils, do play so extremely important part, I would say that their important part can be played before a probation officer comes into the picture. We stress that reconciliation should be started at the very earliest opportunity, even before the bench comes to the notice of the probation officers. That is where the voluntary associations come in.

2498. Would you agree that in many cases the probation officer has the first information that there is something wrong, even before the voluntary organisations?—I think that is rather debatable. Some people would prefer to keep away from the probation officer and anything that smears the court at all. Those people would go to the marriage guidance council, a voluntary organisation, first.

2499. (Mr. Selod): Are you satisfied that the waiting accommodation for children is satisfactory in most courts?—(Mr. Raphaeli): Yes, mean the ante-room to the court?

2500. Yes, the arrangements for the children.—I think in many respects they are unsatisfactory, but then it must be remembered that so many of our courts are being carried on in buildings which have been condemned years ago, and that the chances of rebuilding them would be indefinitely delayed, if further accommodation were required.

2501. I wondered whether, if that problem were settled, it would make it less difficult for people to accept the idea of the domestic court being held in the building where general cases are heard?—The ideal court building would be a building which provided all the necessary facilities including perhaps a nursery for the children to play in.

2502. But it would be a good plan, would it not, to concentrate at any rate on waiting accommodation for the children?—I think it is one of the matters that may well be considered. (Sir Leonard Costello): The answer to the question really depends on the particular court. In some places there are plenty of waiting rooms. My court actually sits in the assize court which is of course a large court with plenty of waiting rooms for witnesses and so forth. It would seem quite impossible to suggest nowadays that there should be special courts. Actually we have tried and tried again in recent months to get a court house built in a particular town, the original court house having been destroyed, but the Home Office have said that we cannot build a court house at the present time.

2503. I fully understand all those difficulties. I thought that possibly if there were a certain amount of co-operation on getting adequate waiting accommodation you might get over the other difficulty?—(Mrs. MacAdam): We should welcome it very much indeed. I think very few courts have ideal conditions and, speaking for a city such as Leeds, conditions are deplorable at the moment. We have so little room for our courts, in fact we have no room except the corridors of the main town hall for waiting, and I am sure anybody would welcome anything

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a finding of adultery is a finding involving two people, is it not?—Yes, I think I have said before, and I would emphasise, that in theory there is much to be said for the necessity for a person, in respect of whom an allegation of adultery is made, to have the right to be a party to the proceedings. All I would say is that in a magistrate's court, as distinct from the High Court, in practice it is not a matter of very great importance.

2536. I was interested to hear that, because I gather that your answer to the suggestion that an analogous procedure to that which is adopted in the High Court should be introduced in the magistrate's court is, first of all, that no substantial injustice is done under the present procedure, and secondly, that any alteration involving the necessity of serving the alleged adulterer or adulteress would tend to hinder the expedition and advantages of summary proceedings in the magistrate's court?—As a matter of practice, I think that is so.

2537. I suppose service, as has been pointed out, would be a difficulty and substituted service would not be at all appropriate to your court?—Yes, I think that is so. (Sir Leonard Costello): On this point I would again find myself personally in disagreement with the implication here. It has always struck me as rather shocking that someone should be charged with adultery and should not have an opportunity of answering the charge.

2538. That is what I was putting to Mr. Raphael. I have heard that point of view stressed. What is your view, Sir Leonard?—My own view of the matter is that if someone is charged with having committed adultery with one of the parties, that person should be given notice of the proceedings and should have an opportunity of intervening. There may be some practical difficulty in the way of service, but that is a difficulty which ought to be surmounted.

2539. Do you think that it would tend to impede the expedition with which these cases are dealt?—(Mr. Raphael): There is no doubt about it at all, because in nine out of ten cases the people in respect of whom such allegations are made are part of the floating population and the notice on them could not be served; if the proceedings then were ineffective it would be denying the remedy to the husband or wife, as the case may be.

2540. One other matter of procedure. I gather that when this allegation of adultery is made some written particulars of it, not in the form of pleadings, have to be given. Is that in the body of the summons itself?—No, but in fact all allegations of adultery today have to be supported by some particulars so that the party knows what has to be met.

2541. That is what I was getting at, because I see that in paragraph 10 you say:—

"One of the advantages of proceedings in magistrate's courts is their simplicity. An application is made to a magistrate for a summons. The application is technically described as a 'complaint' and is frequently made in writing. If in writing, the complaint is completed by the use of a printed form provided by the clerk to the justices. There are no pleadings. Where adultery is alleged particulars must be given."

What is at the back of my mind is that. I expect you would agree that in every court where a party is being charged with having committed some offence, whether it be matrimonial or criminal, it is only elementary that he or she should know exactly what it is that is going to be said against him or her before he or she comes into court?—Yes.

2542. That position is secured in matrimonial cases in the High Court by reason of the fact that all allegations here, under the rules, to be particularised in the petition, and, if they are insufficiently particularised in the petition, then an order will be made of an interlocutory nature for further particulars to be given, so that the person concerned in the High Court knows the exact details he or she has to meet before the trial. Are there any similar safeguards in your courts or not?—Particulars of adultery now have got to be given so that the party concerned knows exactly what the allegation is.

2543. Before he or she attends court on the return date of the summons?—Yes. (Mr. Maddocks): The authority which requires that to a summons alleging adultery there should be attached particulars of the alleged adultery,

as to when, where and with whom, is about four years old and was laid down by Lord Merriman in the Divisional Court as a practice to be followed and has afterwards been repeated by him on several occasions.

2544. (Chairman): I gather it is not necessary to give particulars of cruelty alleged?—No.

2545. (Mr. Lawrence): Is this a fact, that under the present law the party charged with persistent cruelty comes to the court on the return day of the summons without being furnished, unless voluntarily, with any particulars of the cruelty which is going to be alleged against him?—That is quite true, but of course in magistrate's courts it would be quite impracticable to furnish the parties with particulars of the cruelty. You have only got to hear a few of these cases, particularly when parties are not represented, to realise the impossibility of furnishing particulars of persistent cruelty. It involves a consideration of the whole of their married life, which may be a considerable period of time, assessing the remarkable number of quite small incidents which, by themselves, are little or nothing, but the cumulative effect of which is sufficient to support an allegation of persistent cruelty. I would respectfully suggest that it would be quite impracticable to require particulars of persistent cruelty to be furnished for our summary proceedings.

2546. The reason I ask you this is because yesterday afternoon we had the contrary strongly urged upon us, namely, that it was unfair that a respondent to a summons came into court knowing nothing of the details of the charges which were going to be made against him or her. You would say that it is impracticable in the magistrate's court?—Quite impracticable and, so far as unfairness is concerned, the fact that a respondent has not had previous notice of the allegations of cruelty is one of the matters which any bench ought to consider in assessing where the truth of a matter lies and does not in practice present considerable difficulty.

2547. (Chairman): If it is impracticable to give particulars beforehand, would it be a good idea for the case to be adjourned after the complainant had given particulars orally so that the other party should have an opportunity of thinking them over? Would that be practicable or impracticable?—I have no doubt that in an appropriate case that would be done but I think it is right to say that in ninety-nine per cent. of the cases the husband knows perfectly well the nature of the allegations that are being made and is quite able and ready to deal with them then and there.

2548. (Mrs. Jones-Roberts): In paragraph 29, you refer to the fact that the Royal Commission in 1912 recommended that the powers of the justices should be restricted. Since that time, however, you say that the jurisdiction of magistrates has in fact been steadily and repeatedly extended. Now a witness that gave evidence the other day put forward the proposition that, when petitions to dissolve marriages were presented to the High Court, in all cases where there were children the parties should first of all go to the magistrate's court for an interim order. I wonder if you would like to comment on that? Do you think that the magistrate's courts could cope with this extra burden?—(Mrs. Macadam): Would your point be that the interim order would be a means of safeguarding the interests of the children, or would the interim order be relieving financial distress because the husband had gone off and left the wife without any maintenance?

2549. Those points were not fully brought out in evidence. I think the emphasis was mainly on the custody of the children, but I am not quite clear as to whether the other point would not be involved as well. I am only thinking of the additional work that might be entailed for magistrate's courts.—(Mr. Raphael): I think I am right in saying that until recent times the matter of the custody of the children was raised in the divorce petition itself, and I believe the custody of the children was dealt with by the Divorce Court. It seems to me, I may be wrong, that the present practice is for the Divorce Court to exclude, certainly in the undefended cases, the consideration of the custody of the children, leaving the parties to their remedy in the magistrate's court. (Mr. Justice Pearce): As you know, judges are taking defended cases rather than undefended cases, and in those of course they always deal with custody. Where one

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AND MRS. I. M. H. MACADAM, M.B., J.P.

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deals with an undefended case, so far as I know one always deals with the question of custody. If, in fact, there is an order in the magistrates' court that appears to be working satisfactorily, one then considers whether it would be more convenient to leave it operative in the magistrates' court or whether certain advantages in the Divorce Court might outweigh that convenience. Generally one leaves the custody order operative in the magistrates' court, I should have thought, in more cases than one substitutes an order of the Divorce Court. I do not know whether those who may have more to do with the conduct of undefended cases would agree with me in that, but I should have thought certainly that the Divorce Court always deals with custody and considers whether the magistrates' order should be left operative and, if that seems best, leaves it. Where there is no prayer for custody in the petition, I think that the court will always ask what the situation is about the children and if it finds that the *de facto* position is satisfactory then it will make no order. (Mr. Raphael: What I wanted to point out was that we have a large number of cases where the Divorce Court has made no order in respect of custody of the children and where we are subsequently asked to make an order. (Mr. Mac: May I say that my experience is that, if an order for custody is not asked for in the petition, the judge dealing with the matter usually asks why? Counsel informs him that the matter is in the hands of the magistrates' court and that he is well satisfied to leave it there; if there is any doubt the judge raises the question and it has to be dealt with.)

2550. (Mr. Mac: Going back to the question of particulars of charges, if a probation officer is present when an application is made for a summons on the ground of persistent cruelty, could not sufficient details of the allegations be extracted and put on the back of the summons so that a defending solicitor would know what the charges were, and the man, if he appears in person, could be told in court, "You have been told the details, it is no good saying you do not know anything about it"?—I do not think that is practicable. It is difficult perhaps to explain precisely why not, but I have hundreds of these cases and I am quite certain that it is not in fact practicable.

2551. May I repeat any question to your colleagues?—(Mrs. MacAdam: I also would say that I do not think it is practicable, and I would also say that in the vast majority of cases one of the difficulties would be that there are no solicitors in the case at all. (Sir Leonard Costello: I think that that really is the answer to it. A woman who comes into court unrepresented generally pours out rather a long, involved story in considerable detail extending over a long period, and it would be very difficult to require her to put her allegations in the precise form of the pleading. Personally I see no difficulty about it with parties properly represented.)

2552. My suggestion is that if the probation officer is used for reconciliation purposes, he could help the party and it would save the court a lot of time because it could limit the questions to the complainant to material points.—I think that would be practicable.

2553. Would you turn to paragraph 27, where you say:—

"In a considerable number of cases it is apparent that the cause of the trouble between the parties is trivial. There is too often a readiness to seek the intervention of the court without any serious reflection on the step which is being taken."

Is it the experience of the magistrates that if one sister gets a separation order against her husband, very shortly afterwards there is an application for an order by another sister?—I have not noticed that in particular.

2554. (Chairman: None of you, I understand, has noticed that?—(Mrs. MacAdam: No. (Mr. Raphael: No.

2555. (Mr. Mac: On your point as to probation officers dealing with reconciliation, you agreed, I think, that reconciliation should take place at the first available opportunity and that once the parties have come under the shadow of the court reconciliation is more difficult. Have you given consideration to the possibility, not of having the probation officer present in court, but of

sending the parties either to a voluntary organisation or to the probation officer, which gets them out of the court atmosphere?—We very often do send people to a voluntary association. We sometimes send them to a doctor if we think that will help. We are largely influenced by the report the probation officer makes as to what is necessary in a particular case.

2556. Your last words make me feel you did not appreciate my point. I do not want the intervention of a probation officer who, we all know, is connected so closely with the court and also with the police and with criminal work. My suggestion was that reference should be made to someone who is not within the shadow of the court—I have no doubt that that is very desirable, but of course the only cases we have any cognisance of at all are cases which do come one way or another to our court.

2557. The parties come in the first place to apply for a summons?—What generally happens is that they come for advice.

2558. That is in country districts, they go to the clerk to the magistrates for advice, or to the probation officer?—Yes.

2559. If they go to the clerk to the magistrates do you not think that reconciliations might be furthered if they were told "Now, before you come near any court officially why not try reconciliation through an independent body away from the court"?—I agree with that. (Mrs. MacAdam: We would agree, and I think that is done in a great many cases.

2560. Going back to the question of adultery, may I make a practical suggestion for your consideration? The written notice which at present has to be sent to the spouse who is alleged to have committed adultery could also be served upon the third party?—(Mr. Raphael: Yes, there is no objection to it being served on the third party. There is the difficulty of service and as to whether proceedings can be effective in the absence of proof of service.

2561. Would you not agree that in the majority of magistrates' court cases the person is well known and living in the locality?—No, I should have thought the opposite. (Mrs. MacAdam: I disagree, quite the opposite. (Sir Leonard Costello: Again, I am sorry to disagree with my two colleagues but I should say that what you have just said is exactly the case. It is very often someone in the same street or nearby. I should like to emphasise again, if I may, that it really does offend my judicial sense that anyone should be charged with an offence and not have an opportunity of rebutting it.

2562. (Chairman: But is not the possible explanation that two of you are speaking as to large towns where it is very difficult to get in touch with the person, and the third is speaking of a country district where conditions are different? Is not that the answer?—That may be so but, with great respect, that does not really to my mind detract from the fundamental principle underlying this question. (Chairman: I quite follow that, I was trying to explain why you differed as to the difficulty of service, not as to the question of principle.

2563. (Mr. Mac: Let me continue my suggestion that the letter sent to the third party should contain a paragraph giving him or her notice of the date and place of the hearing, and informing him or her that he or she can appear and will be heard.—(Mr. Raphael: Most of them would not be in the least interested in any such document. (Mrs. MacAdam: In most cases the third party would never be found.

(At this stage the Commission adjourned for a short period.)

2564. With regard to paragraph 33, there is one very small point that I think ought to have consideration. Matrimonial cases are taken at the end of a long criminal list, and when the husband, say, is giving, or attempting to give, his explanation, the time comes when one of the bench says he has an appointment and wants to rise. There is an atmosphere of rush. Has that been considered by the Magistrates' Association?—(Mrs. MacAdam: Yes, it has been considered at a great many of our conferences, and that is why we do think that every consideration

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should be given to the place in the list to be given to matrimonial cases. We do much prefer them to be taken at a time when those difficulties would not arise.

2565. Do you not think it emphasises the point for taking matrimonial cases apart from the criminal jurisdiction of the court?—(Mr. Raphael): On the local bench where I sit as a lay justice, we have a special day for hearing domestic cases; that works satisfactorily. (Mrs. MacAdam): May I say, that in the busy industrial areas in the North, it has been found that the best practice is to hold evening courts.

2566. In juvenile courts you avoid the use of uniformed policemen, do you not?—(Mr. Raphael): No. It was the practice, it is not observed now. It has been held to be quite unnecessary, and now has been largely abandoned.

2567. The juvenile court is kept apart from the other court. Do you think it desirable, chiefly from the point of view of reconciliation, that the serving of a matrimonial summons should be by a uniformed policeman?—I think the answer to that is no, but I do not think the summons is served by a uniformed policeman. I think it is served very largely by post. If there is personal service I think it is effected by a warrant officer in plain clothes.

2568. I think I should be right in saying that in country districts it is effected not only by uniformed policemen but by means of a big motor-car bearing "Police" all over it—I should have thought that would be undesirable.

2569. I appreciate that it may be a convenient way to serve summonses, with the number that have to be served, but, once the neighbours have seen the police go to the house, the party served is on his or her dignity, and that may spoil the chance of reconciliation?—(Mrs. MacAdam): I think you are right.

2570. I realise the difficulties of transferring the court, and particularly the court officers who have to collect all the cash, but do you think that matrimonial cases should be separated as far as possible from the criminal proceedings and that the police should not take part in the serving of the summons or in the ushering of the court unless it were absolutely necessary?—I think we all agree to that. (Sir Leonard Costello): Actually when we are dealing with domestic proceedings there are no police there at all, and there is no ushering of the court.

2571. I appreciate that, Sir Leonard, but you see, even in your court, in a country district, the parties in matrimonial cases are summoned to the magistrate's court, and on arrival have to sit through the motor cases which take so long these days?—Yes, that is so. (Mrs. MacAdam): May I say something here regarding your point about buildings? Juvenile courts have to be held in separate buildings from the adult courts, and in some instances those premises would be admirably suited for the hearing of matrimonial cases, but, as you are probably aware, there is in existence a rule that the room cannot be used for juveniles on the same day as for adults. We are therefore debarred from using what would be an ideal court for matrimonial work because at some other time during the day that room is used for juveniles. We appreciate that the courts must be separated, but the rule that in no case must the room be used on the same day for adults and children makes the working of the court extremely difficult. If we could get over that difficulty somehow it would be a great benefit because the smaller rooms and the less formal atmosphere of the modern juvenile courts are, we think, very suitable for the hearing of matrimonial cases.

2572. Turning to paragraph 35, you say that solicitors should be encouraged to co-operate with the clerk in the arrangement of lists. Do you find any difficulty on the solicitors' side in arranging your lists?—(Mr. Raphael): There is not intended to be any imputation on solicitors in that paragraph. (Sir Leonard Costello): I do not think there is any difficulty about that. (Mrs. MacAdam): It is a matter for arrangement between the court clerk and the solicitors. The magistrates are not brought into it.

2573. Paragraph 40 is on the question of adjournment. As what part of the proceedings do you in the majority

of cases come to the conclusion that it is necessary to adjourn a case?—(Mr. Raphael): I should have thought, in the majority of cases, when one had heard the evidence of the complainant.

2574. You suggest then that there should be a talk with the probation officer?—In very many cases something emerges in the course of hearing evidence which indicates a possible line of reconciliation which has not been explored.

2575. What is the objection to the case coming on again before a new bench?—You would have to start *de novo* and hear the evidence all over again.

2576. The bench has only heard the complainant's evidence, and upon that the bench thought there was a possibility of reconciliation. The complainant goes to the probation officer, and talks the matter over with him; it may well be that when she next gives evidence she gives it in a clearer form having had the advantage of advice from the probation officer. In paragraph 40, you are, as I read it, saying that it is essential to have the case before the same magistrates. I put it to you that in many cases it would be an advantage to have new magistrates, so that they might bring fresh brains to bear on this matrimonial tangle after the parties have been given the opportunity of reconciliation?—Yes, if you are prepared to start the case all over again. It might not be altogether satisfactory in the face of perhaps a successful cross-examination which has elicited certain facts in a particular way. It might not be fair to one or other of the sides to start the case afresh each time.

2577. In the metropolitan courts the re-hearing would be within a week or so?—Our lists are so congested, sometimes it might have to wait a month.

2578. Do you think that at the end of a month you would really have any recollection of the first evidence?—I would have my mind refreshed by reference to the notes. (Mrs. MacAdam): May I say here that I do feel we must not overlook the effect that those hearings sometimes have upon the parties themselves; there is often a great nervous or emotional strain put on the parties who are giving evidence. Is it fair to ask them to go through the ordeal unnecessarily for the sake of having a new lot of magistrates to hear the case?

2579. On paragraph 50 it is agreed, of course, that the whole question is what is best for the children. Would you say from your experience that there are some wives who claim custody of children who are old enough for their custody to be given to the father, because the wives feel that it would not be proper for them not to claim custody on the ground of personal prestige?—I think that may be one of the influences. (Mrs. MacAdam): I think it might be the case. (Sir Leonard Costello): That does arise on occasions, I agree.

2580. Therefore in custody cases would you say that the same bench should deal with the custody immediately after the hearing of the case in dispute, or a different bench on a different day?—(Mr. Raphael): Personally, I should have thought the same bench should deal with the matter either then or at some other time, preferably then and there.

2581. Is that the reply of your colleagues?—(Sir Leonard Costello): I agree with that. (Mrs. MacAdam): I do not disagree because I think there are cases where it would be expedient for custody to be dealt with on the same day, but I think there are also cases where there might be a distinct advantage if the question of custody were dealt with at a separate time.

2582. (Chairman): But by the same bench?—Not by the same bench.

2583. (Mr. Moore): That leads me to this. Assume that a probation officer has made a very gallant effort, there have been two or three adjournments of a case and he has very nearly effected reconciliation, but finally the case has had to come before the bench and an order has had to be made. That is not an exceptional case, is it?—(Mr. Raphael): No.

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2584. You meet that very frequently?—(Mrs. MacAdam): Yes.

2585. Do you think it would be an advantage to have a different officer, it may be the children's officer, to deal with the custody of the children and to see those two parties about that?—(Mr. Raphael): I think it would be. (Mrs. MacAdam): I think it might be an advantage but it would surely be rather unnecessary multiplication of work, because the same reports as to home conditions would have to be made a second time.

2586. But, of course, we are dealing in the first instance with the breaking of the marriage by separation; that is very serious, is it not? In the second place we are moulting the life of a child.—Yes.

2587. Ought we to worry about the amount of work that is to be done in order to make sure that the children have the right considerations?—No, not the amount of work, but I think you would alienate the parents concerned if another person made the same enquiries a second time. You would not get such willing co-operation if they felt they had to be subjected to the enquiries a second time, and I think co-operation from the parents is essential.

2588. I am not thinking just at the moment of every case. I am thinking of a case where there has been a serious dispute between the parents, where the probation officers have been used over a long period, and then the magistrates eventually have to settle the dispute. Then comes another dispute because the parents both want the children. I would like to have your view on the advisability of having a different officer to deal solely with the children's interests.—(Mr. Raphael): In the vast majority of disputes between husband and wife resulting in an application for an order of the court, there is no real contest about the custody of the children. In the large majority of cases the father is conceding that the custody should be with the mother, because he is quite unable to do his job and look after the children at the same time. The number of disputes in those cases is remarkably small.

2589. Do I take it that you agree with me in my "difficult" case? In the difficult case where a probation officer has been concerned at two or three hearings, and then the magistrates have given a decision which is most probably very unpopular with one of the parties, do you agree that it would be better to have a separate officer?—I would agree.—(Mrs. MacAdam): It might be better, I would not say it would always be better, it might be better.—(Sir Leonard Costello): Yes.

2590. Now let us take the "easy" case. In the majority of the matrimonial cases have you a report of the probation officer on the parties?—(Mr. Raphael): No.

2591. Then if the parties have agreed that one or the other should have the children, what steps does the court take to see that that is right?—(Sir Leonard Costello): I think no further steps are taken in the majority of cases.—(Mr. Raphael): In the larger number of cases where there has been no contest about the custody of the children, it is obvious that the children should remain, unless there is a strong reason for saying the contrary, with the mother.

2592. Do you feel that there should be provision that in every case some official should look into the matter for the children's sake?—(Mrs. MacAdam): Yes.—(Sir Leonard Costello): Yes.—(Mr. Raphael): I agree.

2593. I now come to paragraph 61. An order is made by the court at A against a man to pay so much a week. He leaves the district of A and goes to B. The magistrates at A retain jurisdiction to enforce the order, is that right?—No, generally such an order would be transferred to the area where the man lives.

2594. To B, where he goes to live?—Yes.

2595. Who can send him to prison, the magistrates at A or B?—The magistrates at B, where he answers the proceedings.

2596. If that is right I have no further questions.—Yes, it is so.

2597. (Mr. Maddocks): The problem which has been raised is this. A man moves to B and the order is transferred to B. The magistrates at B will send that man to prison if he does not pay. The difficulty which arises is that the man cannot at the moment pay into the court at B. He has to send the money to the court at A. The result is that when the court at B is trying to enforce the order, it very often does not know whether the man has paid or not unless it has an up-to-date certificate from the court at A. It very frequently happens that when people are fetched before the court under a warrant they very indignantly say, "But I have sent the money", and sometimes, Mr. Raphael will bear me out, they turn out to be right.—I quite agree. A very helpful change in procedure would be for the enforcing court always to be the collecting court.

2598. (Mr. Mace): What is necessary then is that there should be a change so that the court to which the man pays the money shall be the court which considers whether or not he is making a genuine effort to pay?—(Sir Leonard Costello): Yes.—(Mr. Raphael): Yes.—(Mrs. MacAdam): Yes.

2599. Assume that it was the law that when a decree was made in the Divorce Court the judge should have power to say, "The magistrates' court will now deal with maintenance variations and enforcement". Would the magistrates accept that responsibility?—(Sir Leonard Costello): There would be no difficulty.—(Mr. Raphael): Quite reasonable and quite easy to deal with.

2600. Let us see if such a change of procedure would solve the difficulty with regard to concurrent jurisdiction with the Divorce Court. Assume that there has been an order in a magistrates' court and then the parties go to the Divorce Court, it would be for the divorce judge to say, "On matters of maintenance this remains at the magistrates' court". That would be easy?—Yes.

2601. In a divorce case where there have not been any previous proceedings in the magistrates' court, it would be quite easy for the judge to say, "The matter of maintenance I will transfer to be dealt with by the magistrates' court"?—Yes.—(Sir Leonard Costello): Yes, that is so.

2602. What is your difficulty with regard to interim orders? They would be made before decree nisi, and the judge would say, "The question of maintenance remains with the magistrates' court".—(Mrs. MacAdam): Those interim orders are not made at the present time because so often we are told that the case is going to the High Court, and because of that we in the lower courts do not make an interim order.

2603. That is your present difficulty?—That is the difficulty.

2604. But would there be that difficulty if the law is changed so that magistrates' courts will enforce all divorce maintenance orders unless the judge directs otherwise?—(Sir Leonard Costello): In that case there would be no difficulty with regard to interim orders.—(Mrs. MacAdam): We should be allowed to make the interim orders in that case, I presume.

2605. I presume so, too. Would it not be the cure for the present difficulties?—It would cure that difficulty. It might make others, but it would cure that one.

2606. May I put a possible difficulty? Assume that a summons for persistent cruelty was issued by A against B and before it was heard B launched a petition for divorce on the ground of the same cruelty. That would be a matter for decision by the High Court in any event?—(Sir Leonard Costello): That would be so.

2607. Is there any real difficulty on that point?—I think not.

2608. I have one other question. Is there in your opinion any advantage in making a separation order for a limited period?—(Mr. Raphael): Speaking for myself I would say no, because any separation order comes to an end if the parties are subsequently reconciled. I think, if an order has to be made, the complaint is

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entitled to an order for all time subject to what happens if the parties do become reconciled. Either party can ask for the order to be revoked.

2609. It would allow the court after a period of, say, three years, to give further consideration to whether the wife was, in fact, working, or capable of working, and whether the maintenance should be the same?—The person subject to an order is at liberty at any time on fresh evidence to have the matter reconsidered, certainly as to amount.

(The witnesses withdrew.)

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MEMORANDUM SUBMITTED BY THE NATIONAL ASSOCIATION OF PROBATION OFFICERS

The National Association of Probation Officers seeks in the following statement to draw attention to the need for extended provision for reconciliation work and to propose legislation for this purpose, if that is necessary.

It proposes changes in the constitution of the lower courts for dealing with matrimonial proceedings, suggests that there is a need for improved machinery for the making, variation and enforcement of orders of maintenance; and proposes certain changes in the law mainly designed to provide equality in matrimonial proceedings for men and women. Comment is made on the welfare of children of divorced or separated parents; the protection of the interests of children and aggrieved spouses; the legal age at which marriage is permitted, and sundry other matters.

Introduction

1. The National Association of Probation Officers is the representative organisation of the probation service in Great Britain and approximately ninety per cent. of the probation officers in England, Wales and Scotland are members. Many of these officers are called upon officially in their daily work to assist in reconciliation in matrimonial disputes and many are approached for advice and help by those who have met difficulties in their marriages, but have not reached the stage of wishing to take legal action. In all their duties probation officers are in daily contact with the lives and homes of the general public and are therefore familiar with the problems which arise in those lives. Their contact with homes in connection with offenders dealt with by means of probation may often reveal domestic disharmony as the background of delinquent or criminal behaviour. They therefore feel able, through this Association, to express views, based on their experience, about matters which are to be reviewed by the Royal Commission on Marriage and Divorce.

2. The probation service can also offer the Royal Commission the benefit of a long history of matrimonial conciliation work. It is seventy-five years since the Police Court Mission was formed and from the early days of that organisation, conciliation was the feature of its work, which has been gradually taken over and absorbed in the work of the probation service. Official recognition of the place of the probation service in matrimonial conciliation was given, and a duty in that field placed on probation officers, by the Summary Procedure (Domestic Proceedings) Act of 1937.

The law relating to divorce

3. Except where matters affecting the custody of children are concerned the probation service has so far had little place in the Divorce Court, and probation officers do not in the course of their duties have occasion to concern themselves with matters relating to divorce. The Association has therefore no specific recommendation to submit regarding the law relating to divorce.

2610. (Mrs. Allen): There is one small point on reconciliation. You emphasise that the probation officer should not in reconciliation. Would you agree that many people would not discuss their domestic problems with anyone other than a stranger whom they are not likely to meet again?—(Mrs. MacAdam): Yes, I would agree.

2611. And that would give emphasis to your point here?—Yes.

(Chairman): Thank you very much for your memorandum and for your evidence.

4. The opinion of members of the Association is generally against any major change in the conditions under which divorce may be obtained, but some of its members would support the proposal that the right to petition for divorce should be given to a wife or husband who has been separated for seven years or more from the marriage partner, provided that no innocent party may be compelled to accept divorce.

5. We would also suggest that the provision whereby a wife may obtain a divorce from her husband on the grounds of his depravity or indulgence is unnatural practices, might be extended to a husband whose wife indulges in lechery or other unnatural practices.

Conciliation

6. This Association would emphasise its agreement with and support for the *dictum* laid down in the Final Report of the Committee on Procedure in Matrimonial Causes that "the preservation of the marriage tie is of the highest importance in the interests of society", that "reconciliation should be attempted in every case where there is a prospect of success" (para. 4) and that "the reconciliation of estranged parties to marriage is of the utmost importance to the State as well as to the parties and their children. It is indeed so important that the State itself should do all it can to assist reconciliation" (para. 23 (i)).

7. It is not necessary to set out here the details of the scheme for the use of probation officers or court welfare officers in divorce proceedings which was suggested by the Report of the Denning Committee (para. 29, sub-paragraphs (iv) to (ix)). This Association urges the Royal Commission to recommend such legislation as may be necessary to implement those suggestions. The Denning Committee did not think that legislation would be involved, but the Lord Chancellor, in the House of Lords on 17th March, 1947 (House of Lords Official Report Vol. 146, No. 53, Col. 916/7) could not accept that view and could not promise any parliamentary time for the introduction of the legislation he considered to be necessary.

8. The National Association of Probation Officers welcome the recommendations of the Denning Committee and at the time these were published offered its fullest support to any scheme for the use of the probation service for the court welfare work proposed, whether that work was to be placed in the hands of a separate group of officers recruited from the probation service, or in the hands of the probation officers already available. It was pointed out then, and is repeated now, that if court welfare officers, as suggested, are appointed, their work cannot be confined to their personal contact in the courts with applicants for divorce, but must involve enquiries and contact with the home districts of one or both of the parties concerned, and for this purpose they could use the services of colleagues in those home districts. The probation service is now so organised that there is at least one man and one woman officer available in each petty sessional division in the country, so that the machinery already exists for conducting enquiries in connection with

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conciliation proceedings, wherever they might be needed. Furthermore, probation officers have wide experience of matrimonial conciliation work and are trained and available to accept additional responsibilities in that field. The use of the experience of colleagues in making certain local enquiries does not reduce the necessity for specialist officers to be available at the Divorce Court to assist in conciliation efforts where the petitioners so desire, or where the judge considers that this might usefully be attempted.

5. *Conciliation and condonation.* In view of the possible extension of the conciliation work of the probation service to the Divorce Court, it is necessary to ask the Royal Commission to consider the law with regard to condonation. The Denning Committee referred to this (para. 55 (ii)). Reconciliation is to be encouraged and this Association would suggest that any action taken by either party to a marriage in a genuine effort to bring about reconciliation should not jeopardise that party's right to institute or resume divorce proceedings if the attempt fails; nor should any such action constitute condonation of a matrimonial offence. Any act now regarded by law as condonation, if taken under circumstances obviously designed to assist conciliation, should similarly not be a bar to subsequent proceedings for divorce.

10. It is appreciated, however, that the law cannot be changed in such a way as to permit occasional casual resumption of married life while retaining freedom to sue for divorce, and we would suggest that the right to institute or resume proceedings after an act which would at present be regarded as condonation, should be limited to a period of twelve months after that act. This, however, is a matter which, if accepted in principle by the Royal Commission, must of course be amplified in detail by legal authorities.

11. *Conciliation in the lower courts.* This Association believes that the conciliation work already being attempted in the lower courts should be encouraged in every way possible. At present, a summons for a separation or maintenance order may be issued by the clerk to the justices, or a member of his staff, although in many parts of the country all such applications are dealt with by a magistrate sitting as an "applications court" with the clerk.

12. *Applications courts.* We would most strongly recommend that the establishment of "applications courts" be made uniform throughout the country. In country districts, where sittings of the normal courts may be infrequent or irregular, arrangements should be made for a magistrate to be available at a fixed time each week (probably on the local market day) for the purpose of dealing with applications.

13. We would strongly recommend also that when a magistrate is sitting to deal with applications for summonses, the probation officer should be either in the court or available to it, so that in matrimonial proceedings the party making the applications may, if the magistrate so suggests, be referred to the probation officer for initial enquiries and discussion about the possibility of reconciliation before a summons is issued. Much of the most helpful work in the field of reconciliation is already done in this way and the extension of the facilities for it to all parts of the country cannot fail to be helpful.

14. This arrangement was advocated by the Departmental Committee on the Social Services in Courts of Summary Jurisdiction, 1936 (Cmd. 5122, para. 16) and commended in the Home Office Memorandum on the Principles and Practice in the Work of Matrimonial Conciliation in Magistrates' Courts, 1948 (para. 32). We hope the Royal Commission can now recommend its general adoption throughout the country.

15. It must of course be the paramount right of the applicant to be granted a summons if he or she so insists and if the magistrates are satisfied that a *prima facie* case has been established, but even this need not obviate the possibility of intervention with a view to conciliation if the magistrates, at the hearing of the summons, so recommend.

16. *Legal Aid and Advice Scheme.* The scheme for the provision of legal aid and advice through the Legal Aid and Advice Act, 1949, has not yet been extended to the lower courts, but when this extension is made it will

involve the establishment of local committees and certifying committees to consider applications for legal assistance, and the opening of legal aid centres. It would be regrettable if this led to a method of granting assistance in separation proceedings so that such proceedings were actually started, summonses issued and solicitors instructed, without opportunity being given for efforts to be made to effect conciliation.

17. Attention has been drawn to this danger, and it was referred to by the Lord Bishop of Norwich in the House of Lords Debate on the Second Reading of the Legal Aid and Advice Bill on 27th June, 1949 (House of Lords Official Report, Vol. 163, No. 87, Col. 327-9). In replying to that Debate the Lord Chancellor said that he and the Home Secretary were proposing to amend the existing Rules relating to probation officers so that their services would be available to legal advisers and to local committees under the Legal Aid Act, and he undertook to urge the Law Society to see that committees made the fullest possible use of the service of the probation officer.

18. This Association hopes that the Royal Commission will emphasise the need for this undertaking to be implemented, as no action appears, so far, to have been taken.

Matrimonial proceedings in the lower courts

19. This Association is of the opinion that, where this is applicable and practical, the same facilities for obtaining separation orders should be available to both husbands and wives. At present a husband cannot obtain a separation order from the magistrates' court on grounds of desertion by his wife. In such conditions a man must either leave his wife and home, when she may summon him for a separation order or maintenance order; or he must allow a period of desertion to last at least three years before he can take divorce proceedings. The return of a deserting wife within three years rules out the latter possibility. This condition does not help to maintain marriage; it tends to lead to recourse to the Divorce Court, with the finality of decisions there, rather than to the lower courts where orders may later be rescinded or allowed to lapse if the parties come together again.

20. We think therefore that a husband should have the opportunity to seek temporary relief in the lower courts, so that he may not be driven to seek permanent relief in circumstances where, except as a last resort, this might not be desired.

21. Notwithstanding this recommendation, we would also add that in our opinion the law should be so amended that proceedings in the lower courts for a separation order on the grounds of desertion do not constitute a barrier to later proceedings in the Divorce Court if the desertion continues.

22. Conversely, we consider it necessary to amend the law so that proceedings for divorce do not bring to an end any pending proceedings in the lower courts, for maintenance. At present, if a wife issues a summons for maintenance and even in some cases an interim order has been made, any further action in the matter can be brought to an end if the husband commences divorce proceedings against his wife. The lower courts should be allowed to make orders for maintenance which will run until the settlement of divorce proceedings.

Welfare of children

23. As an experimental measure one probation officer has been employed in recent months in the High Court to conduct enquiries and report to the judges in matters affecting the custody and welfare of children, consequent on divorce proceedings. The satisfactory work done in this way was favourably commented on in the House of Lords on 14th February, 1951, and the Lord Chancellor on that occasion expressed a hope that it may be possible to extend this work to other courts hearing divorce proceedings in London and elsewhere (House of Lords Official Report, Vol. 170, No. 30, Col. 350). This Association would strongly recommend such an extension, in full implementation of the Denning Committee recommendations in the matter (para. 28, sub-sections (i) to (vi) and (x)).

24. We are of the opinion that a court welfare officer (or probation officer) should be available in all courts dealing with matrimonial proceedings, to conduct enquiries and give advice to courts as to the welfare of children, means of the parties, etc.

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25. Orders for custody, maintenance and access. We are of the opinion that in all cases of divorce where such questions arise, the Divorce Court granting the divorce should also make orders governing the custody of, maintenance of and access to children of the divorced parties, and should have available to it all the services of a court welfare officer or probation officer, who can on its behalf obtain information and give the courts such advice as may be required.

26. If this cannot be done in all cases through the Divorce Court, legislation should be introduced to provide that, if the Divorce Court does not make an order granting custody, maintenance or access, or if the parties so prefer, the making of such an order shall be referred to the lower courts, where the service of a probation officer should be similarly used.

27. The suggestion is submitted for consideration by the Royal Commission, that in all cases where orders are made for the custody of the children, the children might for a limited period (say, twelve months) be under the supervision of the court through the court welfare officer or probation officer, so that any unsatisfactory features in the arrangements made might be reported to the court with a view to the amendment of the order.

Variation and enforcement of orders made by the Divorce Courts or lower courts

28. We are of the opinion that orders for maintenance made in the Divorce Court should be variable in the lower courts on application by either party to the divorce, if there are changes in circumstances which appear to the court to warrant such a variation. This provision would reduce the delay and cost at present involved in application to the Divorce Court for such variation.

29. We are anxious not to suggest legislation which would reduce the standing of marriage or make for easier divorce or separation, but we cannot avoid the fact that many divorces and separations have been made and others will be made. We feel, however, that where divorce or separation proceedings have been taken and orders have been obtained, the parties should be held fully responsible for the consequences of such proceedings. Any action which allows the parties to escape from their obligations must tend to encourage the taking of proceedings more lightly than will be the case if provision can be made for the strict enforcement of all orders made by the courts in matrimonial proceedings.

30. We would in the first place recommend that the enforcement of maintenance orders obtained in the Divorce Court should be possible through the lower courts, which already have machinery available for the enforcement of orders they have themselves made.

31. We would suggest that in the enforcing of any orders for maintenance or other payments, made either in the Divorce Court or in the lower courts, the full resources of the State should be made available to the courts or to the injured party. Information which would assist in the tracing of missing persons who are avoiding obligations under such court orders should not be withheld if it is in the possession of the Ministry of Food, Ministry of Pensions, the Service Ministries, the National Registration Office or the National Assistance Board, though we are of the opinion that such information should only be given to a bona fide official of the court, and only on authority given by the court after a summons for recovery of arrears of payments has been applied for, and would be granted if any address were known.

32. We believe that similar provision should be made to assist in the serving of summonses on defaulting or allegedly defaulting spouses against whom orders are sought.

33. The prolonged default in payment of many maintenance orders leads to accumulations of debt which are in many cases never met. We consider that assistance in avoiding this situation should be given, by specific action to prevent accumulation of such arrears, and would suggest that if payment on any maintenance order payable through the court falls into arrears to the extent of the equivalent of four weeks' payments, a summons should be issued against the defaulter by the clerk to the court, unless the complainant gives specific instructions to the contrary.

34. We would further urge the Royal Commission to give serious consideration to the possibility, in cases of persistent or wilful default in payments, of arrangements being made for deduction of payments due under maintenance orders, at the source of the income of the person against whom the order is made. More detailed suggestions in this connection will, we understand, be made by other organisations so we do not here enlarge on the proposal.

35. We consider that the regular maintenance of payments under orders made by the courts would be assisted if collecting officers at all courts were available at suitable times so that those who are working irregular hours, shift systems, etc., could have opportunity to make their payments regularly, or collect moneys due to them. We believe that in some cases more care might reasonably be given to the selection of persons who deal with the general public in connection with the work of the courts.

36. We welcome the provisions made by the Maintenance Orders Act, 1950, but would recommend the extension of these to all Commonwealth territories. We believe that it should be possible to devise within the Commonwealth speedier methods than those now in use, for confirming, registering, enforcing and collecting payments under maintenance orders.

37. We would draw attention to the unsatisfactory situation whereby a man may cancel large accumulations of arrears under a maintenance order by serving a prison sentence of three months or less as a debtor. It would appear to us that some opportunity might be given to prisoners serving sentences for debt in this way to earn money which should go to the party to whom moneys are owing under a court order. This matter may not be regarded as coming within the terms of reference of the Royal Commission, but if it is not the case this Association would be glad to refer to it again in oral evidence.

Division of property and protection of wives and children

38. We feel that it is essential to provide that where there is a separation or divorce the first provision in any division of the property of the parties should be to ensure an adequate share of essential goods and chattels of the home to each party.

39. Thereafter, in the division of property to which there is no clear title by either party, the property acquired during marriage should be regarded as the joint property of husband and wife and be shared accordingly.

40. In any settlement of property, due provision should be made for any children of the marriage with a view to ensuring their welfare.

41. We consider that consideration should also be given to the making of provision by law for any children of the union, who are not children of the marriage, if there is a subsequent breakdown of the marriage of the parents.

42. Provision should be made for power to be given to landlords to transfer the tenancy of a house to a wife or husband in cases of legal separation or divorce, if the tenancy is at the time of the making of an order or the granting of a divorce in the name of the party against whom the order or divorce has been made. Under present conditions a wife may obtain a separation order on the grounds of her husband's cruelty (e.g.) and yet have to leave the matrimonial home, with her children, because the tenancy of the house is in the name of her husband.

43. If a husband against whom a separation order has been obtained is the owner of the house in which his wife is living, it should be possible for an order to be made for the wife and children to remain in the home and to pay an agreed rental or one fixed by the Rent Tribunal; or for the husband to provide alternative accommodation in terms of the Rent Restriction Act, if he wishes to retain the house for his own use.

44. We would suggest further protection for aggrieved wives who find it necessary to seek maintenance orders against their husbands. A woman obtaining a maintenance order, or order for maintenance under the Guardianship

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of Infants Act, and remaining in the marital home forfeits, in three months, the right to enforce any such order. We believe the law should be amended in this respect and that a woman obtaining such an order should have the right to such maintenance as the court shall decide, for herself and her children, while remaining in the home. In other words, to obtain maintenance it should not be necessary for her to leave her home and thus completely break the marriage.

Legal age at which marriage should be permissible

43. We have considered a suggestion made by several of our branches, that the legal age at which marriage may be contracted should be raised from sixteen to seventeen or higher. We do not feel able to submit to the Royal Commission any proposal to this effect.

44. We think, nevertheless, that additional safeguards are needed against the hasty contraction of marriage by extremely young people and would suggest that it be provided that, in all cases of the proposed marriage of any persons under the age of eighteen, the consent of the parent or legal guardian of that person, and also of the juvenile court (or possibly the matrimonial or domestic court referred to in paragraphs 49 to 51 below), should be obtained before the marriage can be permitted.

Bigamy

47. We hope the Royal Commission will give consideration to proposals which will make the offence of bigamy much more difficult to commit than it is at present the case. This is a matter on which other organisations will no doubt submit suggestions, and we are content to mention it here and to enlarge on the matter, if so desired, in oral evidence.

Matrimonial (or domestic) courts

45. Probation officers are seriously concerned about the manner in which matrimonial proceedings have to be dealt with in some courts. In some petty sessional divisions there are special arrangements for the holding of separate matrimonial or domestic courts, on special days or at special times when the normal courts are not sitting; and in some places special courts are held in distinct parts of the building or in separate buildings from those where the normal courts sit. In other places, however, it is still either not possible or has not been considered necessary for such arrangements to be made, and matrimonial cases may then come before the court at the end of a long sitting in which the magistrates have given exhaustive attention to a wide variety of major and minor offences and matters arising under the local bye-laws. This cannot help to ensure the best possible decisions in applications for separation or maintenance, and it is often unfair also to the parties concerned, as they may have been compelled to wait for many hours in the precincts of the courts, where the atmosphere is not conducive to reasonableness.

49. This Association suggests that all proceedings concerning matrimonial and domestic affairs should be heard in specially arranged matrimonial (or domestic) courts. If possible these courts should be served by magistrates selected for this duty by virtue of special qualifications, or those who have undertaken a special course of training in the affairs likely to be met in such courts.

50. In any case we would recommend that cases coming before these courts, or in the absence of their establishment, cases coming before the present courts, should be heard by a bench of three magistrates, at least one of whom should be a woman.

51. We suggest that the proposed matrimonial (or domestic) courts should deal with all summonses for separation and maintenance orders: the enforcement of

orders which have been made and on which payments have fallen into arrears; the enforcement of orders made in the Divorce Court on which payments have fallen into arrears (if the recommendation made in para. 30 above is adopted); applications for variation of orders made in lower courts; applications for variation of orders made in the Divorce Court (if the suggestion made above in para. 28 is adopted); and (although these matters may not come within the terms of reference of the Royal Commission) summonses for and proceedings arising out of affiliation orders and orders made under the Guardianship of Infants Act; adoption proceedings; applications for consent to marry by those aged eighteen or over, and possibly by those referred to in paragraph 46 above.

52. We believe that the general public should be excluded from the special matrimonial (or domestic) courts proposed in the preceding paragraph.

53. We do not propose that the Press should be excluded from these courts, but think that limitations of the information it is permitted to publish about proceedings therein should be the same as those now governing reports of matrimonial proceedings.

Preventive and educational measures

54. This Association considers that the utmost importance should be placed on any work which may help to maintain marriage and assist those contemplating marriage to enter into it with understanding and the will to succeed. We consider that it is necessary for facilities to be available and widely known, for assistance and advice to be given to those in whose marriages difficulties have arisen.

55. We therefore endorse the recommendations of the Denning Committee (para. 29, sub-sections (i), (ii) and (iii)) and hope that further consideration will be given to methods whereby the work of the marriage guidance councils may be encouraged. In doing so we consider that emphasis should be given to the advisory and educational work of these bodies, and that continued close care be given to the selection and training of counsellors and advisers likely to be engaged in their work so that this may always be conducted with dignity, complete confidence and privacy.

56. In this connection, while paying our tribute to the work of the marriage guidance movement, we should mention again the long history and established place of the probation service in conciliation work. We believe that the general public should be more widely informed that probation officers are available in an advisory as well as in an official capacity and are always willing to offer their guidance to people who are in difficulties about their marriages or domestic affairs.

57. Probation officers can, and will, never come between any party and his right of access to the law, but most probation officers are consulted freely and frequently for their advice on non-legal matters and are only too willing to continue to be available. It should indeed be a recognised part of the probation officer's duty to give his advice and guidance to those needing it, and while, at present, probation officers are as a whole considerably overworked, this does not lead them to desire any reduction in their duties. The solution of this difficulty is not in any limitation of duties but in making these duties better understood, and extending the number of officers available.

58. We believe that economies are not to be sought in the field of advice, guidance and conciliation in matrimonial affairs, though a strict watch should be maintained over the use of money made available for these purposes. Wise expenditure in this field will, however, ultimately reduce the much heavier expenditure at present involved in the field of divorce (particularly under the Legal Aid and Advice Act).

(Received 3rd January, 1952.)

PAPER No. 32. SUPPLEMENTAL NOTE ON STATISTICS SUBMITTED BY THE
NATIONAL ASSOCIATION OF PROBATION OFFICERS
12 June, 1952] MR. H. W. BIRD, Miss J. E. R. KENNEDY AND MR. FRANK DAWTRY

PAPER No. 32

SUPPLEMENTAL NOTE ON STATISTICS SUBMITTED BY THE NATIONAL ASSOCIATION OF PROBATION OFFICERS

1. *The probation service and matrimonial conciliation.* The matrimonial work undertaken by probation officers in 1950, according to the Home Office Statistical Returns, was as follows:—

Matrimonial conciliation cases referred to probation officers by the courts before issue of summons, 5,684.

Matrimonial conciliation cases referred to probation officers by the courts after issue of summons, 6,763.

Referred by the clerks to the justices, 3,770.

Dealt with by direct application to probation officers, 22,805.

Referred by other social agencies, police, etc., 5,212.

This means a total of cases dealt with of 44,219 in which both parties were seen.

The Home Office figures also give a general heading "Other matrimonial work" totalling 33,763 which refers to enquiry and advice in which only one party was seen.

2. *Applications courts.* From evidence collected covering 256 courts in England and Wales we are informed that there are separate applications courts in 74 places, and no such courts in 115 places.

In the courts where applications for summonses are dealt with the probation officer is present in 136 places, is not present in 62 places, but is called in if necessary in 19 places.

3. *Enforcement of orders.* From all parts of the country we have substantial evidence of this difficulty—there is a refusal and an inability to supply information

from the Ministry of Food, Ministry of Labour, Ministry of National Insurance, Ministry of Pensions, Inland Revenue authorities and from the Army and the Royal Air Force.

Hardship is avoided by help from the National Assistance Board who may then pursue defaulting husbands but the general impression is that this is not done so thoroughly by the National Assistance Board as it was by the former local Public Assistance Committees.

4. *Collecting officers.* From our enquiry covering 256 courts we found that there are 6 in which the collecting officer is available on one evening, 1 in which the collecting officer is available on Saturday afternoon, and only 53 in which the collecting officer is open during the lunch hour.

There are of course adequate postal facilities.

5. *Matrimonial courts.* From the courts covered by our detailed enquiry we find 74 in which matrimonial cases are dealt with by special courts or on special days; 177 in which these cases are dealt with by the ordinary courts.

In the latter cases there is evidence of very serious delay in the hearing of cases and in 94 of them matrimonial cases are always taken at the end of the day's list.

In only 6 cases are the people concerned asked to come at a later hour than that at which the court commences its business, and so there are many cases in which the parties wait from 10 or 10.30 a.m. to 3, 4 or 5 p.m., before their cases are heard.

(Dated 12th June, 1952.)

EXAMINATION OF WITNESSES

(MR. H. W. BIRD, Senior Probation Officer, Bromley Division of Kent, MISS J. E. R. KENNEDY, Probation Officer, Middlesex County, and MR. FRANK DAWTRY, General Secretary of the Association, representing the National Association of Probation Officers; called and examined.)

2612. (Chairman): We have before us Mr. H. W. Bird, Senior Probation Officer for the Bromley Division of Kent; Miss J. E. R. Kennedy, Probation Officer, Middlesex County; and Mr. Frank Dawtry, General Secretary of the National Association of Probation Officers. Shall I address my questions in the first place to Mr. Dawtry?—(Mr. Dawtry): Yes, I think so.

2613. We have been handed a further paper containing additional information relating to certain parts of your memorandum. Is there anything you would like to say by way of addition to your memorandum before we start asking you questions?—We did want to emphasize the important part that the probation service has already played, and is playing, in conciliation work. That is the reason for our submitting a memorandum. You will notice that we have said very little about divorce, but a good deal about the procedure in the lower courts, where our work is done. With regard to the additional information, I apologise for submitting it so late. It is, I think, a useful supplement, and the first set of figures, which have only now been issued, show how much of this work the probation service did in 1950.

2614. In the first paragraph of your supplemental note you state that the number of matrimonial conciliation cases referred to probation officers by the courts before issue of summons was 5,684. I suppose that the case is referred when there is an application for a summons?—That is by magistrates hearing applications and postponing their decision until the probation officer has had an opportunity of seeing the party or parties.

2615. The next heading shows that the number of similar cases referred to probation officers by the courts after issue of summons was 6,763. At what stage is that most usually done?—Very often, early in the hearing of the case; but sometimes on an adjournment when magistrates feel they would like the probation officer to intervene at that stage.

2616. Then the statement shows that the number of cases referred to probation officers by the clerks to the justices was 3,770. What are the sort of cases in which that is done?—The application is very often made in the first place to the clerk, and before he even refers it to the applications court or the public court, he will say, "Perhaps you had better have a talk with the probation officer", or he will ask the probation officer to see the parties. It is very helpful if he feels that here is a case where obviously an attempt should be made at conciliation before it goes any further. We really welcome the fact that clerks take that opportunity when they can.

2617. Many witnesses who have appeared before us have emphasized that reconciliation work should be undertaken at the earliest possible moment. Do you agree with that view?—Yes.

2618. The next figure quoted in your supplemental note is that of cases dealt with by direct application to probation officers. These cases number 22,805. Have you any idea what it is that influences people to go to the probation officers in so many cases?—Just the fact that it is known that the probation officer is available. He is known in every community, and his duty is perhaps better understood than it used to be. He is not regarded as merely an adjunct of the penal system—someone concerned only with offenders. He is the social servant of the court to whom people have learned that they can turn. He is known in this way not merely in industrial districts—in fact he is very often a much better known member of the community in a rural area. It seems to be quite a habit for people to go along to a man or woman whom they know, in whom they have confidence, and discuss their problem.

2619. That sounds a very good idea.—We did want to emphasize that a lot of our conciliation work at present arises from people coming to us voluntarily.

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[Continued]

2620. (Lord Keith): Who is it that generally applies? Is it more often the wife or the husband, or is it fairly equal?—Usually the wife.

2621. (Chairman): The next figure you quote is that of cases referred by other social agencies, police, &c.—5,212. Thus you have a total of 44,219 cases in all, in which both parties were seen. Is that a large advance on the previous year?—It is not a very large advance. The figure has been recently something like 40,000 a year altogether, a steady figure. The 1950 figure does not show any substantial increase. (Mr. Bird): The figure has been fairly static for the last four or five years.

2622. I come to the last heading of your supplemental note—"Matrimonial courts". This morning there was a discussion as to whether it was common for magistrates' courts to take the matrimonial cases at the end of the day. You give some figures about it. You say:—

"From the courts covered by our detailed enquiry we find 74 in which matrimonial cases are dealt with by special courts or on special days; 177 in which these cases are dealt with by the ordinary courts."

Which, in your view, is the more satisfactory way of dealing with this?—(Mr. Dawkin): May I first say that this is a sample of 256 courts—it does not refer to courts throughout the whole country? They are representative courts. But out of that sample of which we have made a survey in the last month, we got these figures, of which 74 have special courts or have special days for hearing matrimonial cases. We would very strongly emphasize the desirability of having special courts or special sittings for the hearing of matrimonial cases. I think I should say that in ordinary courts it seems to be the general habit for there to be considerable delay before the cases are heard. As stated in our note, in 94 of the 177 ordinary courts dealing with them, the matrimonial cases are always taken last on the list.

2623. You say that in only six cases are the parties asked to come at a later hour. That is out of the 941—Out of the 177. In some cases the court does say, "We shall not be ready for your business until 12 o'clock, or until 2 o'clock"; whereas normally the parties are told to come along when the court sits at 10 or 10.30, and then they may have to wait all day, very often in very unsatisfactory conditions. We feel very strongly about that.

2624. I now turn to your principal memorandum. In paragraph 4 you say:—

"The opinion of members of the Association is generally against any major change in the conditions under which divorce may be obtained, but some of its members would support the proposal that the right to petition for divorce should be given to a wife or husband who has been separated for seven years or more from the marriage partner, provided that no innocent party may be compelled to accept divorce."

Does this mean that there is no feeling in your Association in favour of compelling an innocent party to accept a divorce?—That is correct. Our area branches have all submitted evidence to us, and it was the view of only three or four of the branches that this provision might be reasonable. But these branches all qualified the proposal by the phrase which appears in the last sentence, "that no innocent party may be compelled to accept a divorce".

2625. How many branches have you?—Twenty-four.

2626. You make a suggestion in paragraph 5 which has been made by others—I ought to correct the terms of that paragraph, because, as it stands, it might be thought to imply that the whole Association supports that proposal. What we want to say is that there is some support for that proposal, but that it has not the support of our entire membership.

2627. I take it that many of your recommendations cannot possibly be unanimous?—No, but most of them have far more weight than these particular recommendations.

2628. I am not sure what you mean by "these particular recommendations". I am speaking only of paragraph 5 which deals with lesbianism. I understood you to say that in that particular case your Association was rather divided, but that the majority thought that lesbianism should be a ground for divorce?—Yes, that is so.

2629. Would you turn to paragraph 27, where you suggest that:—

"... in all cases where orders are made for the custody of the children, the children might for a limited period (say, twelve months) be under the supervision of the court through the court welfare officer or probation officer, so that any unsatisfactory feature in the arrangements made might be reported in the court with a view to the amendment of the order."

You really think that that is necessary in all cases, because it would involve a good deal of visiting people's houses—which possibly they might resent?—(Mr. Bird): We should say on the whole that it would be a good thing if children of parents who had been separated had the services of a skilled officer available to them. What is often overlooked is that the disruption of the home causes a severe emotional and psychological disturbance in the children. I feel that a probation officer, who is in his normal duties very much concerned with child welfare, could probably be a very great help, particularly in the first few months after the separation, both to the children and to the spouse left with the responsibility of bringing up these children.

2630. I was considering what the practical effect would be. Assume, for example, that the custody of the children is given to the mother. If they are to be under the supervision of the court, for, say, twelve months, what would be done? Would the probation officer go uninvited to the house just to see how things were going on, or would he wait for the magistrate to direct him to do so?—I think what we had in mind, my Lord, was that the court would make an order similar to a supervision order, which can at present be made under the Children and Young Persons Act. The probation officer would thereby be charged with the responsibility for keeping in touch with the children. He would thus need no specific direction about each visit.

2631. It would be left to the probation officer to use his discretion?—Yes, my Lord. (Mr. Dawkin): In making this suggestion we were thinking about the court as well. The court may have a very difficult decision to make about custody, and may like to know twelve months later whether its decision was the right one. If the probation officer were asked to keep in touch, the order could then be reviewed and that might be helpful to the court.

2632. Would you turn to paragraph 37? The first sentence deals with the fact that a man may cancel large accumulations of arrears under a maintenance order by serving a prison sentence of three months or less as a debtor. You go on to make this suggestion:—

"It would appear to us that some opportunity might be given to prisoners serving sentences for debt in this way to earn money which should go to the party to whom moneys are owing under a court order."

That question, as you say, may not be within our terms of reference, but would you like to amplify that at all?—It is really a matter of prison administration. We have experience of prison systems in other countries, in which prisoners are paid substantial earnings, the whole or part of which is accumulated and may be sent to their families. That is done in Switzerland and in Holland, and it may be done in other countries on the Continent. I think that the same sort of thing may very well be possible here in the case of debtors, who in prison are paid, I believe, on a different basis from ordinary prisoners serving sentences imposed by a court. I have no information for the last three years about that, but I think that they are paid on a different basis. It certainly should be possible for them to be put to more useful work if work of a suitable type were available. I know that one of the difficulties of the Prison Commission is to find work of this kind. If it could be provided, however, then the benefit of their work could go to alleviate the prisoners' debts. Whether the whole debt could be paid off in that way I do not know, but if even a small sum were paid over to the aggrieved party it would be a help. It is really a matter of prison administration, but I think it might be worthy of consideration by the Commission.

2633. You go on to deal with division of property and protection of wives and children. One difficulty arising on this matter—which was raised this morning by the Magistrates' Association—is this: that, while all these arrangements might be very desirable, they would involve

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[Continued]

difficult legal questions as to ownership of property, tenancy of houses and flats, and matters of that kind. It was suggested to us that magistrates as a rule had not sufficient legal knowledge to deal with such matters, and that if such arrangements were to be made at all they would have to be decided in some other court. What do you say about that?—(Mr. Bird): I do not think we should raise any serious objection, my Lord, to a matter relating to the division of property being settled, for instance, in the county court, once a separation order had been made by the magistrates' court. What we are very anxious to lay down is the general principle that it should not be possible for a man, whose wife has given him faithful service over a number of years, so to conduct himself that his conduct leads to a breakdown of the home; and then on the material side to come off infinitely better than the wife. If the wife has brought to the home certain of her own property, which was clearly hers in the first instance, and the husband has done the same, then there should be no dispute as to ownership. But where, as a result of their combined efforts, they have been able to build up a nice home, then we think that morally and legally the wife should have a claim to an equal share of the home.

2634. You appreciate that what I am putting forward now is not put in criticism of the suggestion. All that I have been putting to you is that it has been suggested to us that if your proposal were to be carried out then it should be carried out by another court. I gather that your view is that it might be advantageous that it should be done in the county court?—We would raise no objection. (Miss Kennedy): May I say something on that? I feel that the advantage of the decision in such matters being taken in a magistrates' court is connected once again with the question of having a probation officer or trained social worker, who is at hand to investigate the difficulty. For instance, if there is a dispute before the magistrates' court, as to the amount of property in the home, the magistrates would be able to ask the probation officer to investigate, whereas the county court has at present no probation officer to make any kind of investigation or recommendation. I think it would be of assistance to the county court judge and to the parties, if they felt that there was somebody able to verify a wife's statement that "There is so much property and my husband, I feel, is taking too much". In the district in which I have been working up till the last few weeks, the county court judge has been making use of the probation officers in certain cases where he wanted investigations made. We have thus been working for a county court judge. (Mr. Bird): May I add that it is not unknown under the present system for the probation officer to act as a referee on the question of division of property after a separation order has been granted?

2635. The probation officer offers to act as a referee between the parties and they agree to that?—Yes. (Miss Kennedy): I do think, if I may say one more thing, that once it had become legal that the wife, or the husband, for that matter, had a right to some of the property, there would not be so many disputes over the chattels of the home as there are now. The very fact that the husband can now say to his wife, "Well, the home is mine, I am taking it", causes trouble. If he knew that he was legally bound to give his wife a fair portion of the home, then I do not think there would be so many disputes.

2636. Would you turn to paragraph 49? There you suggest that:—

"... all proceedings concerning matrimonial and domestic affairs should be heard in specially arranged matrimonial (or domestic) courts. If possible these courts should be served by magistrates selected for this duty by virtue of special qualifications, or those who have undertaken a special course of training in the affairs likely to be met in such courts."

Other bodies have suggested that it is desirable that all magistrates should take part in the all-round work of the court, and should seek to acquire the knowledge which would enable them to sit for the hearing of matrimonial cases. That is not your view?—(Mr. Dawtry): It is not the view of our members as a whole. They have felt that just as we have a separate juvenile court panel, so also should we have specially selected magistrates for matrimonial work. In fact in some cases you might find that magistrates, specially appointed for matrimonial work,

would not wish, or be best qualified, to deal with the ordinary daily business of the courts, but would concentrate on matrimonial cases. I should think that this is more likely as a result of the new training scheme for magistrates, particularly if that included specialised training.

2637. What effect, if any, would your proposal have on the position of the metropolitan magistrates?—I hope it will mean a special matrimonial court in metropolitan areas, as well as an end of the system whereby matrimonial proceedings may be heard by a single stipendiary magistrate. I am, however, expressing a personal view here. The matter has not been discussed by the Association.

2638. In paragraph 54, you say:—

"... the utmost importance should be placed on any work which may help to maintain marriage and assist those contemplating marriage to enter into it with understanding and the will to succeed."

Would you care to amplify that?—(Mr. Bird): I think, my Lord, that we should welcome any move which made it more abundantly clear to the public that probation officers are specially trained and available to give this kind of service, not only once proceedings have started, but preferably before they have started. We have, as a service, welcomed the advent of marriage guidance. We feel that it is absolutely essential. But, I think, many of us feel that the value of marriage guidance is in the direction of education and prevention, and that in the field of conciliation probation officers, particularly, have a special function to perform. We do not want to suggest by that that we think that the marriage guidance councils cannot help in the field of reconciliation. We recognise that there will always be a solid core of men and women who do not want to deal with the probation officer because they feel that he severs of the law and of the magistrates' court. But we do feel that the public might be made more aware of the fact that probation officers are available to advise, assist and befriend in cases of matrimonial disharmony, and are very glad to do so.

—(Miss Kennedy): My Lord, may I say something that I had intended saying in answer to an earlier question. I cannot remember any case where people, having dealt with probation officers, have felt any resentment towards them. It has been my experience, and I have been a probation officer for sixteen years, that in a great many cases, where custody has been given to one or other party, he or she has volunteered co-operation by saying,

"I would be very glad if at any time you are my way you would care to call in and see how I am looking after the children". I think that when you have personal contact with the people who come to the courts you very quickly realise that there is no resentment towards the probation service. People have great confidence in probation officers.

2639. (Lord Keith): Mr. Bird, your association includes approximately ninety per cent. of the probation officers in England, Wales and Scotland?—(Mr. Bird): Yes, Sir.

2640. I want to get quite clear the position of the Scottish probation service. There are certain differences in the probation service in Scotland as compared with the service in England?—Yes, Sir.

2641. Am I right in thinking that in England the probation officers are appointed by the magistrates' courts?—(Mr. Dawtry): Yes, that is correct.

2642. In Scotland, I think the position is that they are appointed by probation committees, which are largely composed of persons appointed by local authorities?—I believe that that is so.

2643. Whereas in England they are directly under the magistrates' courts?—Yes.

2644. Then, in Scotland probation officers do nothing like the amount of conciliation work that is done by probation officers in England. That is the position, is it not?—I think that is the position, though their work is growing in that respect.

2645. Am I right in saying that in Scotland there is no statutory obligation on probation officers, as there is in England, to do conciliation work?—That is correct.

2646. Would you turn to paragraph 10 of your memorandum? There you deal with the question of conciliation in divorce cases, and you suggest that an act which might be regarded as conciliation should not be treated

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as condonation if a petition is brought within twelve months after that act. Is that right?—(Mr. Bird): Yes, that is our intention.

2647. That would not really work in all cases. Take desertion, for instance. Supposing you had a year's desertion, then you have the parties coming together for three months, and then you have the desertion resumed. You could not bring an action for divorce for desertion within twelve months of the resumption of cohabitation because three years' desertion would not have elapsed?—I think that on this matter of condonation we had in mind the question of adultery rather than desertion.

2648. But your point is just as feasible if applied to desertion. You would say that if there is merely an attempt to come together which breaks down, then that should not debar a party from his right to divorce for desertion?—The point is well taken, and we are very grateful for it.

2649. There would have to be some amendment of your proposal on that point?—Yes, Sir.

2650. In paragraph 41 you say:—

"We consider that consideration should also be given to the making of provision by law for any children of the union, who are not children of the marriage..."

What exactly is meant by that?—(Miss Kennedy): My Lord, as the law stands at present, in a magistrate's court an order can only be made for the children of the marriage, and in so many cases the parties have often lived together and have had children before marriage. They have subsequently married and the marriage has broken down. The wife comes to the court, and she can only claim for children born subsequent to that marriage.

2651. (Chairman): But would they not be legitimated by the subsequent marriage, and thus would they not count for this purpose as children of the marriage?—(Mr. Bird): Not necessarily, my Lord.

2652. They would not, of course, if the parties were not free to marry when the children were born. Is that the case you had in mind?—Yes.

2653. (Lady Bragg): Mr. Dawtry, would it be fair to say that about a third of a probation officer's time is spent on matrimonial work?—(Mr. Dawtry): I think quite that, now.

2654. It is increasing?—It is. It does vary according to the district, depending on whether the magistrates take applications and so on. Where they have an applications court they usually make use of the services of probation officers.

2655. It depends on the court?—I should say that, in general, fully one-third of the time now is taken up in this sort of work.

2656. Does that correspond with the amount of initial training that a probation officer has in matrimonial work?—I would say that it does not. Our Association feels that the training scheme still has many gaps, and one of them is that more attention should be devoted to training on this aspect of our work. At present, this side of the work is learned much more by working with experienced officers in the field than by theoretical training. It is the more experienced officers who do the work, and the younger officers coming into the probation service learn how to tackle the difficulties from their colleagues who are doing the work. That is not a satisfactory solution, but it is what happens in practice. Our Association's view is that we would like to see greater attention being paid in the Home Office training scheme to this part of the probation officer's work.

2657. The probation officers feel that the Home Office scheme does not emphasise that sufficiently?—I think that is so.

2658. In a place which is not a country district, and not a big city, say a small town, do you think it right that the only conciliation officer available should be a young probation officer?—It has to work. The officer of the other sex may very well be old. It would be very unusual if both officers—there must be at least one male officer and one female officer available in each area—were new and inexperienced people. While, say a young woman officer may have a difficult case, she has an older male colleague who may be brought in and consulted. I am not suggesting that that is satisfactory. We do not think it is satisfactory, but we think it is the best we can do.

2659. Would you think it satisfactory if the young probation officer had had more training before she came, or do you think it is really a matter of experience of life?—It would help to have more training, but you must remember that the young officer may have had other experience. She cannot become a probation officer until the age of twenty-three, and it is unusual for her to become one until the age of twenty-five or twenty-six. One of her qualifications for acceptance to the training scheme may well be that she has had previous experience of social work, which is all going to be helpful. What surprises me as Secretary of the Association—I am not myself a probation officer—is the acceptance of the young officer by the parties even in most difficult cases. I have in mind a young officer, in one of the northern industrial towns, about whom I was very hesitant, she looked so young. But the old ladies of the district just flock to see her. She is highly successful in her handling of people. Her success is attributable partly to personality, partly to training and partly to experience. A probation officer's success does not depend on any one qualification alone.

2660. In paragraph 12, you deal with applications courts. In your experience have you found that in certain courts, particularly the smaller courts (though not perhaps country courts), the idea of applications courts has rather been abandoned because of the difficulty of their meeting at fixed intervals? A woman wants to be able to have a summons issued and her case heard with the minimum delay?—I think we would say that the existence of an applications court should not rule out the possibility in an emergency of such a case being dealt with by the ordinary court on the morning of the application. But a special applications court is helpful from the point of view of reconciliation. In the survey we have summarised in our supplemental note you will see that there are applications courts in 74 districts, and no applications courts in 115. We have no reply from the other areas on that particular question. In the comments on this matter, so far as I recollect, there is no evidence that where applications courts have been tried they have been found unsuccessful.

2661. Would you agree that if they had been unsuccessful, then that fact might not be disclosed in the replies to your questionnaire?—I think it would have been disclosed. Our first question was, "What is your experience in this matter?"—A definite question as to whether or not there were one. We certainly favour the use of applications courts, and find them very helpful and, as I was saying, they do not rule out the possibility of any emergency application being dealt with by the ordinary court.

2662. When you say that you find them very helpful, is that entirely from the point of view of reconciliation?—Yes. A request is made by the magistrates for the probation officer to see the parties. That very often means that nothing more is heard of the case, because thereafter the application is not proceeded with. That bears out what was said at the outset, that the earlier we can start the better the chance of conciliation.

2663. The earliest stage of all is when the man or woman comes in and asks the clerk about the summons?—Yes.

2664. And the clerk refers it at once to the probation officer?—Yes, although if there is an applications court regularly, the clerk may leave the matter to the applications court. (Mr. Bird): There is another aspect of the matter. In quite a number of cases the intended applicant sees either the probation officer or the clerk. At that stage the applicant is quite determined that he must have a summons. But quite often, on application to the justices, when the justices themselves begin to say, "Do you not think so and so and so and so" the parties get second thoughts even at that stage. Thus you come back to the question of conciliation, and hence the value of the applications court from that point of view.

2665. In paragraph 51, you deal with the question of enforcement of orders. Would you not want that to be done in public? I have heard people say that they felt that if a man was going to be sent to prison that should be done in a court to which the public have access. You suggest, however, that the enforcement of orders on which payments have fallen into arrears should be heard in matrimonial or domestic courts and, as I understand it, you consider that the public should be excluded from those courts? Do you stand by that?—I think we should prefer to stand by that. It may well be that where

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an order is not being complied with there are certain aspects which are of a personal and private nature, and not the public's business at all, and a private court of that kind can quite often get to the root of a matter. Even where there has been an order, the probation officer may still be able to do a great deal towards altering the general outlook of the party concerned. Where you get the public present you get all sorts of stresses and strains which would otherwise not develop. (Mr. Kennedy): I entirely agree with my colleagues on that point. I feel that the hearing of maintenance arrears in private is a matter that is of very great importance. At present details come out, neighbours are listening in court, and I feel it is not in the interests of either of the parties for the neighbours to hear what goes on.

2666. (Chairman): Maintenance and separation cases are at present heard in public?—Yes, my Lord.

2667. (Mrs. Brace): In paragraph 49, referring to matrimonial cases, you say:—

"If possible these courts should be served by magistrates selected for this duty by virtue of special qualifications . . ."

Could you let us have an idea of what you consider to be special qualifications?—I feel that magistrates selected for juvenile courts are always those with special qualifications. I think that magistrates themselves can see which of their colleagues are specially suited for matrimonial work—just as we can see which of our colleagues in the probation service are best suited for it. There are, I know, magistrates who say that matrimonial work is difficult to them. One metropolitan magistrate—he is dead now, but I am sure he would not mind my saying it—told me that any kind of matrimonial work was distasteful to him. I think that you cannot put your best into work that is distasteful to you.

2668. Does it come to this, that by "special qualifications" you mean people whose inclination and habits incline them to do that sort of work efficiently? You are not referring to special training, which you mention in the next sentence?—There are magistrates who are appointed because they have very wide experience of dealing with human and social problems. Magistrates of that kind are obviously best qualified to deal with this kind of case. (Mr. Dawtry): We feel that the bench should preferably include some married magistrates and women magistrates, and particularly those with experience of the local social services, or church work, and that sort of thing. If there are any doctors, or people of that sort, appointed to the bench—that is uncommon at present—but if there are, they are the sort of people who would be very helpful, who can see the sort of things that lie behind the matrimonial troubles they are dealing with.

2669. (Mr. Belfor): In your memorandum you say that at least one of the magistrates should be a woman. I take it what you really mean is that there should always be a mixed bench?—Yes.

2670. May I ask you some questions which we have put to other witnesses. As an organisation, you probably have an unrivalled experience from which to answer them. One of the questions we have asked—it is oversimplified, and we cannot expect you to give a short answer—is this: is a bad home worse for children than a broken home?—(Mr. Bird): I should say from my own experience that the home in which there is continual friction is in the long run much more damaging to the children than a home in which there has been an outright break. In the latter case, the child has a chance to adjust himself to the fact that one of the parents has gone, but where there is continual friction his loyalties are so strained that the consequences on the child are more serious.

2671. Is that the general view?—(Mr. Kennedy): I would agree with my colleague that the home that is in a constant state of dispute, where the children are dreading the return of one or other parent, is much worse for the children than a home where there is peace and only one parent.

2672. What view would you take about access? Would you think it right and just, in the interests of the children, to prevent one parent having access to the children?—(Mr. Bird): I should say that where access is being used as a means of perpetrating the dispute, it would

be a good thing if the court took steps to put an end to any such order for access. I came across one such case only this morning.

2673. But probably you are not against such parents seeing the children if they behave themselves?—No, Sir, we are all for it.

2674. Do you find that a sense of responsibility in parents towards their children tends to make them more anxious to maintain the marriage?—Yes, by and large, I should say that quite a number of marriages are kept together because there is common ground between the parents that nothing must be done to injure the children. In other words, the children are quite often one factor which saves the situation, and even if there is a breakdown, one finds, over and over again, that both parties are most anxious to look after the interests of the children so far as that is possible under the unfortunate circumstances. I do not think that there is nearly so much callous disregard of the welfare of the children as one might be led to believe.

2675. May I ask you one or two questions about the social services? You know so very well that you are only one service among several which have the interests of the family at heart. Do you think that, in the interest of the family, it is possible to obtain more co-operation between those services than exists at present?—(Mr. Dawtry): We should very much hope so. We do not like any feeling that there is any vested interest or rivalry between the social services. It cannot be avoided in some cases, and, most unfortunately, duplication is also unavoidable in some cases. We would welcome any opportunity for co-operation in dividing the responsibilities, so that there was the least possible overlapping and duplication. It is not going to be easy and we certainly welcome anything that would help to achieve that end.

2676. I had particularly in mind the possibility of the probation officer and the children's officer in some cases doing pretty well the same job?—(Mr. Bird): If I may express a personal view on that, I should like to say that, where a court is seized of a matter in relation, for instance, to the welfare of the children, I feel most strongly that the court should keep the matter in its own hands and use its own social worker, rather than place some measure of responsibility in the hands of what is, after all, another authority, namely, a local authority department.

2677. Does it not depend upon whether the officer nominated is made responsible to the court or not?—Yes, it does, but I would point out that at the moment the probation officer is responsible to the court and to nobody else. For that reason he is in a singularly fortunate position in discharging his duty in relation to the court. Any servant of a local authority must necessarily enquire, "What does a certain person at County Hall feel about a certain matter?" In other words, he cannot have other than a divided loyalty, which, I think, is a bad thing for the administration of justice.

2678. Are you not really forgetting what we are all ultimately seeking, that is, the welfare of the family and the children?—No, I do not think so. I think it is common ground that we are all concerned with the welfare of children. The question is, how far the court is going to exercise responsibility. At a given stage in any proceedings, the welfare of the child comes to be the court's responsibility, and becomes the responsibility of some officer, let us say the children's officer. I do not think that probation officers or anybody else would be perturbed about that. What we do say is that it is rather anomalous to expect a servant of a local authority to be responsible to the courts in the same way as a probation officer, who owes no loyalty to anyone other than the court.

2679. So you would not agree to the children's officer being appointed guardian ad litem?—By and large I should say, and this is a purely personal view, that if the court has accepted responsibility for the welfare of the children it should use its own officer for that purpose.

2680. We are in danger of getting into narrow compartments, are we not?—(Mr. Dawtry): We are, but the real point is that the court does have its own trained social worker attached to it. It is true that the probation service is now carrying out many duties in addition to that

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of probation of offenders, but they are all duties associated with the work of the court. The name court welfare officer (a title suggested not by our Association, does imply that there is a welfare service directly responsible to the court, which is above any elected local authority. I should like to emphasise what I have said before about co-operation, but I also think co-operation should lead to some clear division of responsibility. We feel that, in all matters coming before the court, it would be better for the court and for everybody concerned if the court were to use an independent service of its own, and our trained service is available for that purpose.

2681. Do you not think that there might be a danger of both services trying to enlarge themselves unnecessarily, while there was only a limited pool from which people like probation officers and children's officers could be drawn?—(Mr. Kennedy): I should like to say that it has been my experience in quite a number of cases that a servant of a local authority has been prevented from giving information to the court by the head of his department. That is rather a grave matter. The probation officer, if in possession of information concerning the welfare of the child, can give that information to the court without being told by the head of his department that that information must be taken out of the report. (Mr. Bird): I should not like anything I have said to be construed as arising from animosity to children's officers, who are doing a splendid job, in many cases under the most difficult circumstances. We recognise that, I think the fundamental principle we are concerned with is this, that quite often a local authority, through its officers, must itself become a party to certain matters which must appear before the justices. If that arises over, shall we say, the question of the welfare of a child, it is obviously very much better for everybody concerned that the matter should have been dealt with by the court in the first place, should have been handled by an officer who is responsible to the court and to nobody else, because he is then in a completely unbiased and impartial position.

2682. If an officer is appointed as guardian ad litem, is he not responsible in that capacity to the court and to no one else?—Yes, I should say he is as guardian ad litem, and that makes me wonder whether we are not talking at cross purposes.

2683. I was wondering what place there was for the probation service and the children's service and other services to work together in the court?—I am happy to say that at the moment children's officers and probation officers quite often work together for the court. But I do feel that where parents have come before the court, and a separation order has been made, and it is considered desirable that some supervision should be exercised over the children, that that should be done by the probation officer who, as I have already said, is responsible to the court and nobody else, who is seized of all the factors in the matter, and who is not a representative of the local authority. If at that stage you then introduce the children's officer you introduce yet another agent into the situation who may, because of personal qualities, be a very great help, but who may equally, because he is another agent, be another irritant.

2684. (Dr. Baird): Mr. Dawtry, in paragraph 4 of your memorandum you say that some of your members support the proposal contained in Mr. White's Bill. On what grounds do they support it? From your experience, have you found that there are a large number of black unions for which there is no remedy, because there is not such a provision in law as is envisaged in this Bill?—(Mr. Dawtry): Some of our branches supported the proposal because they were aware that there were some cases in which there were people now living happily but in idleness; freedom to obtain divorce would enable such people to marry and regularise what was an irregular union.

2685. Do you think that it is a grave social evil?—I would not say it was a grave social evil. But there are cases known to our people up and down the country, and it was only because of such cases that we had the limited support we offer to this proposal.

2686. (Mr. Young): Am I right in assuming that your proposals in regard to conciliation are based on the principle that the parties must seek help voluntarily?—Yes, no compulsory conciliation under any circumstances.

2687. What steps are taken to bring to the notice of the public the fact that probation officers are available to help in reconciliation?—(Mr. Bird): I think it is very largely that success breeds success. People have a habit of talking. An anxious wife goes and sees the probation officer and finds the answer to her problem. She tells all her neighbours, who, unhappily, are almost as unhelpful with her difficulties as she is herself, and consequently the news gets around. There is at the moment no means by which public attention can be drawn to the existence of the probation service, except that in many areas probation officers are asked to talk about their work, and usually do so if they can find time.

2688. I was rather interested in the figures which show that 50 per cent. of the people who come to you come of their own volition, and that 54 per cent. come before the issue of a summons.—Yes.

2689. Would it be a fair inference that if the service which exists today were more publicised there would be more chance of reconciliation even under the existing laws?—(Mr. Dawtry): I think that is highly possible. The real danger is that the service is already working very hard. I do not know how we should cope with much more than we now have to deal with, but that is not an argument against trying to do it. It is one of the duties of this Association to carry out publicity wherever it has any opportunity of doing so, and particularly to let it be generally known that the probation service is not something which deals only with delinquency of children—as some people still think. General publicity does come (a) from the passing on of information by people who have been to the probation officer and (b) from the fact that the probation officer is increasingly accepted nowadays as a member of the community who is always about and knows everybody, and everybody knows him.

2690. You have no public relations officer?—No public relations officer except in so far as the Home Office occasionally makes a statement. The Home Secretary may make a speech about the probation service or the Association may write to the newspapers, or one of its officers makes a speech, or gets on the air now and again. We should like people to know that we are available, and are always very happy when they decide to come and see us.

2691. (Dr. Robertson): Are children's officers deliberately excluded by your Association as suitable persons to look after the welfare of the children? And do you feel that as the Children Act has been in operation for barely four years, children's officers have not yet had sufficient experience? You have already said you are not in any way antagonistic to them, but there is the risk of overlapping, is there not?—There is always that risk. No doubt the children's officer would be quite able to act in such cases if the court so preferred. But the probation officer is equally able to deal with children of any age. I have a London probation officer colleague who has taken the care of a child of two.

2692. You recognise that in certain cases children's officers already have statutory duties to the court?—Yes. (Mr. Kennedy): I should like to stress that the added advantage of the matter still remaining in the hands of the probation officer is twofold. First, that if there are going to be any further proceedings it is the probation officer to whom the parties will probably come for advice, and secondly, if, through the supervision of the children, there is any opportunity for reconciliation even after the orders have been made, then the probation officer is, by his training and experience, more fitted to attempt a reconciliation. These two points should be borne in mind when considering where the advantages lie as between a probation officer and a children's officer, I can join with my colleague in saying that I admire very much the work done by the children's officers. But, of course, their work is more limited where the court is concerned; it is the probation officer who is better fitted for reconciliation work.

2693. (Mr. Maddocks): Would you turn to paragraph 16, where you refer to the Legal Aid and Advice Scheme? Are you rather afraid that the introduction of the provisions of the Legal Aid and Advice Act in the lower courts may injure your work?—(Mr. Dawtry): We think that that may reduce the chances of contact and thus lessen the possibility of conciliation being undertaken sufficiently early.

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an order is not being complied with there are certain aspects which are of a personal and private nature, and not the public's business at all, and a private court of that kind can quite often get to the root of a matter. Even where there has been an order, the probation officer may still be able to do a great deal towards altering the general outlook of the party concerned. Where you get the public present you get all sorts of stresses and strains which would otherwise not develop. (Miss Kennedy): I entirely agree with my colleague on that point. I feel that the hearing of maintenance orders in private is a matter that is of very great importance. At present details come out, neighbours are listening in court, and I feel it is not in the interests of either of the parties for the neighbours to hear what goes on.

2666 (Chairman): Maintenance and separation cases are at present heard in public?—Yes, my Lord.

2667. (Mrs. Bruce): In paragraph 49, referring to matrimonial courts, you say:—

"If possible these courts should be served by magistrates selected for this duty by virtue of special qualifications."

Could you let us have an idea of what you consider to be special qualifications?—I feel that magistrates selected for juvenile courts are always those with special qualifications. I think that magistrates themselves can see which of their colleagues are specially suited for matrimonial work—just as we can see which of our colleagues in the probation service are best suited for it. There are, I know, magistrates who say that matrimonial work is difficult to them. One metropolitan magistrate—he is dead now, but I am sure he would not mind my saying it—told me that any kind of matrimonial work was distasteful to him. I think that you cannot put your best into work that is distasteful to you.

2668. Does it come to this, that by "special qualifications" you mean people whose inclination and habits incline them to do that sort of work efficiently? You are not referring to special training, which you mention in the next sentence?—There are magistrates who are appointed because they have very wide experience of dealing with human and social problems. Magistrates of that kind are obviously best qualified to deal with this kind of case. (Mr. Dawtry): We feel that the bench should preferably include some married magistrates and women magistrates, and particularly those with experience of the local social services, or church work, and that sort of thing. If there are any doctors, or people of that sort, appointed to the bench—that is uncommon at present—but if there are, they are the sort of people who would be very helpful, who can see the sort of things that lie behind the matrimonial troubles they are dealing with.

2669. (Mr. Seloe): In your memorandum you say that at least one of the magistrates should be a woman. I take it what you really mean is that there should always be a mixed bench?—Yes.

2670. May I ask you some questions which we have put to other witnesses. As an organisation, you probably have an unrivalled experience from which to answer them. One of the questions we have asked—it is oversimplified, and we cannot expect you to give a short answer—is this: is a bad home worse for children than a broken home?—(Mr. Bird): I should say from my own experience that the home in which there is continual friction is in the long run much more damaging to the children than a home in which there has been an outright break. In the latter case, the child has a chance to adjust himself to the fact that one of the parents has gone, but where there is continual friction his loyalties are so strained that the consequences on the child are more serious.

2671. Is that the general view?—(Miss Kennedy): I would agree with my colleague that the home that is in a constant state of dispute, where the children are dreading the return of one or other parent, is much worse for the children than a home where there is peace and only one parent.

2672. What view would you take about access? Would you think it right and just, in the interests of the children, to prevent one parent having access to the children?—(Mr. Bird): I should say that where access is being used as a means of perpetuating the dispute, it would

be a good thing if the court took steps to put an end to any such order for access. I came across one such case only this morning.

2673. But probably you are not against such parents seeing the children if they behave themselves?—No, Sir, we are all for it.

2674. Do you find that a sense of responsibility in parents towards their children tends to make them more anxious to maintain the marriage?—Yes, by and large, I should say that quite a number of marriages are kept together because there is common ground between the parents that nothing must be done to injure the children. In other words, the children are quite often one factor which saves the situation, and even if there is a breakdown, one finds, over and over again, that both parties are most anxious to look after the interests of the children so far as that is possible under the unfortunate circumstances. I do not think that there is nearly so much callous disregard of the welfare of the children as one might be led to believe.

2675. May I ask you one or two questions about the social services? You know so very well that you are only one service among several which have the interests of the family at heart. Do you think that, in the interests of the family, it is possible to obtain more co-operation between those services than exists at present?—(Mr. Dawtry): We should very much hope so. We do not like any feeling that there is any vested interest or rivalry between the social services. It cannot be avoided in some cases, and, most unfortunately, duplication is also unavoidable in some cases. We would welcome any opportunity for co-operation in dividing the responsibilities, so that there was the least possible overlapping and duplication. It is not going to be easy and we certainly welcome anything that would help to achieve that end.

2676. I had particularly in mind the possibility of the probation officer and the children's officer in some cases doing pretty well the same job?—(Mr. Bird): If I may express a personal view on that, I should like to say that, where a court is seized of a matter in relation, for instance, to the welfare of the children, I feel most strongly that the court should keep the matter in its own hands and use its own social worker, rather than place some measure of responsibility in the hands of what is, after all, another authority, namely, a local authority department.

2677. Does it not depend upon whether the officer nominated is made responsible to the court or not?—Yes, it does, but I would point out that at the moment the probation officer is responsible to the court and to nobody else. For that reason he is in a singularly fortunate position in discharging his duty in relation to the court. Any servant of a local authority must necessarily inquire, "What does a certain person at County Hall feel about a certain matter?" In other words, he cannot have other than a divided loyalty, which, I think, is a bad thing for the administration of justice.

2678. Are you not really forgetting what we are all ultimately seeking, that is, the welfare of the family and the children?—No, I do not think so. I think it is common ground that we are all concerned with the welfare of children. The question is, how far the court is going to exercise responsibility. At a given stage in any proceedings, the welfare of the child comes to be the court's responsibility, and becomes the responsibility of some officer, let us say the children's officer. I do not think that probation officers or anybody else would be perturbed about that. What we do say is that it is rather anomalous to expect a servant of a local authority to be responsible to the courts in the same way as a probation officer, who owes no loyalty to anyone other than the court.

2679. So you would not agree to the children's officer being appointed guardian of them?—By and large I should say, and this is a purely personal view, that if the court has accepted responsibility for the welfare of the children it should use its own officer for that purpose.

2680. We are in danger of getting into narrow compartments, are we not?—(Mr. Dawtry): We are, but the real point is that the court does have its own trained social worker attached to it. It is true that the probation service is now carrying out many duties in addition to that

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[Continued]

of probation of offenders, but they are all duties associated with the work of the court. The name court welfare officer (a title suggested not by our Association, does imply that there is a welfare service directly responsible to the court, which is above any elected local authority. I should like to emphasise what I have said before about co-operation, but I also think co-operation should lead to some clear division of responsibility. We feel that, in all matters coming before the court, it would be better for the court and for everybody concerned if the court were to use an independent service of its own, and our trained service is available for that purpose.

2681. Do you not think that there might be a danger of both services trying to enlarge themselves unnecessarily, while there was only a limited pool from which people like probation officers and children's officers could be drawn?—(Mr. Kennedy): I should like to say that it has been my experience in quite a number of cases that a servant of a local authority has been prevented from giving information to the court by the head of his department. That is rather a grave matter. The probation officer, if in possession of information concerning the welfare of the child, can give that information to the court without being told by the head of his department that that information must be taken out of the report. (Mr. Bird): I should not like anything I have said to be construed as arising from animosity to children's officers, who are doing a splendid job in many cases under the most difficult circumstances. We recognise that. I think the fundamental principle we are concerned with is this, that quite often a local authority, through its officers, must itself become a party to certain matters which must appear before the justices. If that arises over, shall we say, the question of the welfare of a child, it is obviously very much better for everybody concerned that the matter should have been dealt with by the court in the first place, should have been handled by an officer who is responsible to the court and to nobody else, because he is then in a completely unbiased and impartial position.

2682. If an officer is appointed as guardian ad litem, is he not responsible in that capacity to the court and to no one else?—Yes, I should say he is as guardian ad litem, and that makes me wonder whether we are not talking at cross purposes.

2683. I was wondering what place there was for the probation service and the children's service and other services to work together in the court?—I am happy to say that at the moment children's officers and probation officers quite often work together for the court. But I do feel that where parents have come before the court, and a separation order has been made, and it is considered desirable that some supervision should be exercised over the children, that that should be done by the probation officer who, as I have already said, is responsible to the court and nobody else, who is seized of all the facts in the matter, and who is not a representative of the local authority. If at that stage you then introduce the children's officer you introduce yet another agent into the situation who may, because of personal qualities, be a very great help, but who may equally, because he is another agent, be another irritant.

2684. (Dr. Baird): Mr. Dawtry, in paragraph 4 of your memorandum you say that some of your members support the proposal contained in Mrs. White's Bill. On what grounds do they support it? From your experience, have you found that there are a large number of illicit unions for which there is no remedy, because there is not such a provision in law as is envisaged in this Bill?—(Mr. Dawtry): Some of our branches supported the proposal because they were aware that there were some cases in which there were people now living happily but illicitly; freedom to obtain divorce would enable such people to marry and regularise what was an irregular union.

2685. Do you think that it is a grave social evil?—I would not say it was a grave social evil. But there are cases known to our people up and down the country, and it was only because of such cases that we had the limited support we offer to this proposal.

2686. (Mr. Young): Am I right in assuming that your proposals in regard to conciliation are based on the principle that the parties must seek help voluntarily?—Yes, no compulsory conciliation under any circumstances.

2687. What steps are taken to bring to the notice of the public the fact that probation officers are available to help in reconciliation?—(Mr. Bird): I think it is very largely that success breeds success. People have a habit of talking. An anxious wife goes and sees the probation officer and finds the answer to her problem. She tells all her neighbours, who, unhappily, are almost as daft with her difficulties as she is herself, and consequently the news gets around. There is at the moment no means by which public attention can be drawn to the existence of the probation service, except that in many areas probation officers are asked to talk about their work, and usually do so if they can find time.

2688. I was rather interested in the figures which show that 50 per cent. of the people who come to you come of their own volition, and that 85 per cent. come before the issue of a summons.—Yes.

2689. Would it be a fair inference that if the service which exists today were more publicised there would be more cases of reconciliation even under the existing laws?—(Mr. Dawtry): I think that is highly possible. The real danger is that the service is already working very hard. I do not know how we should cope with much more than we now have to deal with, but that is not an argument against trying to do it. It is out of the duties of this Association to carry out publicity whenever it has any opportunity of doing so, and particularly to let it be generally known that the probation service is not something which deals only with delinquency of children—as some people still think. General publicity does come (a) from the passing on of information by people who have been to the probation officer and (b) from the fact that the probation officer is increasingly accepted nowadays as a member of the community who is always about and knows everybody, and everybody knows him.

2690. You have no public relations officer?—No public relations officer except in so far as the Home Office occasionally makes a statement. The Home Secretary may make a speech about the probation service or this Association may write to the newspapers, or one of its officers makes a speech, or gets on the air now and again. We should like people to know that we are available, and are always very happy when they decide to come and see us.

2691. (Dr. Robertson): Are children's officers deliberately excluded by your Association as suitable persons to look after the welfare of the children? And do you feel that as the Children Act has been in operation for barely four years, children's officers have not yet had sufficient experience? You have already said you are not in any way antagonistic to them, but there is the risk of overlapping, is there not?—There is always that risk. No doubt the children's officer would be quite able to act in such cases if the court so preferred. But the probation officer is equally able to deal with children of any age. I have a London probation officer colleague who has taken the care of a child of two.

2692. You recognise that in certain cases children's officers already have statutory duties to the court?—Yes. (Mrs. Kennedy): I should like to stress that the added advantage of the matter still remaining in the hands of the probation officer is twofold. First, that if there are going to be any further proceedings it is the probation officer to whom the parties will probably come for advice, and secondly, if, through the supervision of the children, there is any opportunity for reconciliation even after the orders have been made, then the probation officer is, by his training and experience, more fitted to attempt a reconciliation. These two points should be borne in mind when considering where the advantages lie as between a probation officer and a children's officer. I can join with my colleague in saying that I admire very much the work done by the children's officers. But, of course, their work is more limited where the court is concerned; it is the probation officer who is better fitted for reconciliation work.

2693. (Mr. Maddocks): Would you turn to paragraph 16, where you refer to the Legal Aid and Advice Scheme? Are you rather afraid that the introduction of the provisions of the Legal Aid and Advice Act in the lower courts may injure your work?—(Mr. Dawtry): We think that that may reduce the chances of contact and thus lessen the possibility of conciliation being undertaken sufficiently early.

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[Continued]

2694. That is because you think somebody might apply for a legal aid certificate and once he has got it you have virtually no chance of attempting reconciliation?—Yes.

2695. Do you think that that will be avoided if legislation were passed which gave the magistrates power to certify for legal aid?—That might be a considerable help.—(Mr. Bird): I personally should prefer that, but if that were not possible, I should like to see arrangements introduced by which probation officers could be available to the legal aid committees. (Mr. Dawtry): Which has already been promised.

2696. Generally, if a woman goes to a country court and says she wants to apply for a summons against her husband for an order on the ground of persistent cruelty, she will say that to a policeman or to a warrant officer who will be inside the door, will she not? In the ordinary course do these officers not refer such cases to the probation officers?—In quite a number of cases, yes, Sir.

2697. I should have thought that that was the usual practice in our courts in the metropolitan districts. Parties never come to ask for a summons until after they have seen the probation officer.—The difficulty is that there is no standard practice throughout the country. If we could have a standard practice by which it was understood that intending applicants should first of all see a probation officer that would be a good thing, provided the public were not given the impression that they had to get the probation officer's approval for application. (Mrs. Kennedy): There is, I know, a practice in some courts whereby intending applicants are directed straight into the clerk's office. On the other hand, in many areas, where the parties themselves go to the clerk's office, they are always referred back to the probation officer. The system varies very much up and down the country.

2698. (Mr. Mace): Are you suggesting that it should be obligatory that the clerk to the magistrates should force the person to go and see the probation officer?—(Mr. Bird): No, Sir, I should object to the word "force", at any stage. I do think it desirable, however, that, whenever there is the question of an application for a summons with regard to matrimonial affairs, the person listening to the applicant should make a practice of suggesting that perhaps the intending applicant might like to see the probation officer. I do not think it ought to be taken any further than that.

2699. Is there any evidence that the clerk to the magistrates, when seeing an applicant, does not do so?—[It is within my experience. And my experience is that once that has been done, a summons has been granted, and proceedings started, many cases which perhaps we might otherwise have been able to reconcile have in fact proved irreconcilable.

2700. With regard to the 256 courts in England and Wales from which you have extracted these helpful figures, have you any objection to giving us a list of the courts?—(Mr. Dawtry): I could not give you the list immediately, but I could let you have it later. They are from all over the country.

2701. I wanted to know whether they were extracted from a geographical area, or whether they were selected at random all over England and Wales?—I can tell you briefly where they are, in rough geographical areas.

2702. (Chairman): Would it not perhaps be better if you supplied the Commission with a list of them?—I will certainly let you have a list.

2703. (Mr. Mace): There are other courts from which you asked for information and did not get it?—We sent a general questionnaire out to all our branches and they in some cases passed it on to individual members. We did not expect replies from all, as there was not a great deal of time, but we had replies from 256.

2704. You did not make a selection of 256 courts and say, "We will ask these"?—No. We made a general survey, and this is what the result is.

2705. (Mrs. Jones-Roberts): I should like to hear you discuss a little further the question of the court welfare officer. You record the position very clearly in paragraph 8, where you say:—

"The National Association of Probation Officers welcomes the recommendations of the Denning Committee and at the time these were published offered its

fullest support to any scheme for the use of the probation service for the court welfare work proposed, whether that work was to be placed in the hands of a separate group of officers recruited from the probation service, or in the hands of the probation officers already available. It was pointed out then, and is repeated now, that if court welfare officers, as suggested, are appointed, their work cannot be confined to their personal contact in the courts with applicants for divorce, but must involve enquiries and contact with the home districts of one or both of the parties concerned, and for this purpose they could use the services of colleagues in these home districts."

The point that is troubling some of us is the danger of overlapping between these two services. I have no doubt that it has been very much before your mind also. Do you envisage the court welfare officers being attached only to the Divorce Court in London? Or would there be a court welfare officer attached to the Divorce Court when it goes on circuit? Then, again, you refer to the fact that these officers would have great difficulty in covering the whole country, and they would probably have to come to you for local reports. If they are going to get their reports through your service, then these reports go before the Divorce Court at secondhand, as it were. The court welfare officer is simply passing on something which your service has given him. Presumably the local probation officer could not be expected to attend and give this information in person to the Divorce Court—whichever court that may be in the future—because it would involve too great a strain on the service. I have made a very long question of it. But what I would like to know is, how exactly you have approached this question?—I think the first point is that we have used the term, "court welfare officer", simply because it was used in the Denning Report. But, as the Denning Report suggested, these officers might well be a part of the probation service. We should prefer to see the whole thing in the hands of the probation service. The title of the officer attached to the Divorce Court does not really matter very much, but if he were called a probation officer that might be misunderstood. We would like to see all these services being carried out on behalf of the court by the probation service. The court welfare officer would thus be a probation officer, who could, where necessary, gather information from his colleagues to give to the court—for whoever has to serve the court most sometimes have to give secondhand information. We cannot expect the local probation officers to attend. That procedure already does apply in the quarter sessions courts and in the assize courts, in criminal matters. There is a probation officer attached to the court who gathers information from his colleagues in the area covered by the court. In the same way, the court welfare officer would really be a liaison officer, attached to the Divorce Court, and working as a member of the probation service. What we seek to emphasise is that it is better that this work should be done by the probation service, because we already have a network of colleagues in every part of the country from whom information can be obtained in confidence. But we go on to suggest that a probation officer should be attached to every Divorce Court. In the provinces he might do divorce court work as an additional part of his duties, just as it is often part of his duties now to be attached to the assize court when the assize court is sitting. I think we might even use the phrase, "court welfare officer", and add, in brackets, "or probation officer". What we should like to imply is that the court welfare service should be merely an extension of the probation service.

2706. Would you find any difficulty, supposing there was a local barrister sitting as a special commissioner—from the district of a particular probation officer—would you see any difficulty in that probation officer attending the court in that case?—Not at all, if it were necessary.—(Mr. Bird): I think there would be no difficulty, but I would suggest that what ought to happen really would be that his report and information would be sent to the collating officer, in other words the court welfare officer. Certainly the parties in the case would have the right to require the presence of that probation officer in the matter.

2707. You have helped me very much by calling him a collating officer or liaison officer, and I think I understand much better what you intended.—(Mr. Dawtry):

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[Continued]

I think that, as an experiment, a probation officer is now attached to the Divorce Division in London, and investigates custody cases in the interests of the children, wherever the judge requires this.

2708. (Mr. Justice Pearce): Perhaps it is within your knowledge that divorce judges use your service on circuit—I know that I personally do, and I know that a colleague of mine does it. We ask the magistrates' court, as a matter of courtesy, whether they object to a requirement being made in the Divorce Court order to the effect that the matter must be discussed with the local probation officer. Thus, to that extent, we can and do frequently use the probation service. The local officer's services may also be needed by the court welfare officer in London. I have such a case on hand at the moment, where the district probation officer has investigated locally. He has been good enough to come up to the Divorce Court with our own court welfare officer, so that one has the advantage of both of them, and they are working in complete harmony. I think possibly it saves time if I tell you that, because that may be an answer to the question.—What I was trying to say is that the services of probation officers in the provinces are used now.

2709. (Mrs. Jones-Roberts): In paragraph 21 you say:—

“... in our opinion the law should be so amended that proceedings in the lower courts for a separation order on the grounds of desertion do not constitute a barrier to later proceedings in the Divorce Court if the desertion continues.”

You recognise that the great majority of orders now made are maintenance orders? In 1950 16,000 maintenance orders and 500 separation orders were made. One witness who gave evidence before us suggested that the magistrates might make a maintenance order, rather than a separation order, in order to give the parties time for reconciliation. From your experience would you say that the average woman who comes to the court has no idea what the difference is between a separation order and a maintenance order?—Yes.

2710. Magistrates are very much aware of this difficulty to which you refer. Wherever possible, they would prefer to make a maintenance order, unless circumstances in the home are such that a separation order is definitely called for to protect the person, or for some other reason. Thus, frequently, fearing that a separation order might constitute a bar to subsequent divorce proceedings the magistrates make a maintenance order?—Yes.

2711. I wondered if that covered your point to a large extent. But nevertheless you feel that there is a sufficient residue to call for an improvement of the law?—(Mr. Bird): You are absolutely right in the analysis of the situation as it applies. There are very few women who do realise that a maintenance order is not the same thing as a separation order, and in most cases where the grounds are desertion the justices prefer to make a maintenance order so that there should be no bar to divorce at a later stage. Unfortunately the difficulty, from the wife's point of view, is that if the husband chooses to return he can do so. And you may get a situation in which it would be very desirable that the wife should have a clause in the order saving her from any necessity for cohabiting with him, but this would automatically bar her from going to the Divorce Court later.

2712. (Mr. Justice Pearce): You recognise that the bar of condonation is at present a hindrance to reconciliation. The point is, of course, that if, say, a wife who has grounds on which to divorce her husband decides to go back and try to live with him, that is to say living in the fullest sense, even for a few days, she then loses her right to divorce. Do you think a better way of overcoming that difficulty would be to make condonation a discretionary bar, so that a judge could help the parties if the attempted reconciliation had turned out a failure? It might perhaps be necessary to have a proviso that if the parties had lived together for more than three months or six months, or if a child had been conceived, then that would in any event be held to be condonation. Do you think that letting two parties really try to live together for some weeks, or possibly some months, without that necessarily being fatal to the innocent party's right to a divorce if reconciliation failed—would that not be the best way of curing the difficulty?—(Mr. Dawtry): We should welcome any such provision.

2713. That provision would be sensible and reasonable?—Yes.

2714. What do you think would be a reasonable period for such attempts? It should not be so long a period that they have really started off married life again, and then quarrels develop afresh. Yet it must be sufficiently long to let them try living together properly. Do you agree that the period should be somewhere between three and six months?—I think we should say three months would be a reasonable period.

2715. You think six months would be too long?—I would like the period to be, within limits, a discretionary one. Three months is a good average period which we would suggest is sufficient. I personally would be sorry to rule out all chance of divorce merely because a child had been conceived, because reconciliation may have been attempted up to a late stage. If that were introduced, it would be a serious bar.

2716. You would give divorce even although a child had been conceived—on the ground that the parties were attempting to get together again? And despite the difficulties which that in turn would create?—If the matter were in the discretion of the judge, then the fact of conception might not automatically be a bar anyhow.

2717. (Chairman): Is there anything you wish to add at this point?—(Mr. Kennedy): There is one point, my Lord, I would like to stress. It arises on paragraph 36, in connection with the enforcement and registering of Commonwealth orders. There is considerable evidence of the delays and difficulties experienced by wives whose husbands have proceeded overseas prior to the making of the order, or even after the order has been made. There seems to be a long period of time before any money comes through, and it comes through very irregularly. In Australia, the orders, on being confirmed out there, are confirmed in Australian currency. That means that the woman is going to lose on it every time the money comes to this country.

2718. You want the Commission to have that before them as a matter for consideration?—Yes, my Lord.—(Mr. Dawtry): You may care to note, my Lord, that we have given a little further information on this matter of enforcement of orders generally in our supplemental note.

(Chairman): We will certainly note it. Thank you very much for all the help you have given us, both in your memorandum and in your evidence.

(The witnesses withdrew.)

(Adjourned to Monday, 16th June, 1952, at 2.0 p.m.)

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MINUTES OF EVIDENCE **12-13**

TAKEN BEFORE THE

ROYAL COMMISSION ON MARRIAGE AND DIVORCE

TWELFTH AND THIRTEENTH DAYS

Monday, 16th June, 1952

AND

Tuesday, 17th June, 1952

WITNESSES

MR. JOHN P. WILSON	}	representing the Justices' Clerks' Society.
MR. A. MARSHALL		
MR. B. J. HARTWELL, LL.M.		
MR. ROBERT BIRLEY, C.M.G., M.A., D.C.L., F.S.A.	}	representing the Headmasters' Conference.
MR. G. C. TURNER, C.M.G., M.C., M.A.		
MR. H. W. HOUSE, D.S.O., M.C., M.A.		
MISS M. J. BISHOP, M.A.	}	representing the Association of Head Mistresses.
MISS A. CATNACH, C.B.E., B.A.		
MISS N. W. WOOLDRIDGE		representing the Association of Assistant Mistresses.
MR. CLAUD MULLINS.		



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AND DIVORCE

TWELFTH DAY

Monday, 16th June, 1952

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Dr. MAY BAKER, B.Sc., M.B., Ch.B.
Mr. R. BELCH, M.A.
Mrs. E. M. BRACE
Lady BRAGO
Sir WALTER RUSSELL BRAIN, D.M., P.R.C.P.
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Sir FREDERICK BURROWS, G.C.S.J., G.C.I.E.
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Miss M. W. DENNERY, C.B.E. (Secretary)
Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 33

FIRST MEMORANDUM SUBMITTED BY THE JUSTICES' CLERKS' SOCIETY

INTRODUCTION

1. The Justices' Clerks' Society was founded in 1839 and incorporated in 1903. It has a membership of 662 clerks to justices in England and Wales. The precise total number of such clerks is not known but is believed to be about 750. There are twenty-five branch societies covering thirty-four counties. The Justices' Clerks' Society is the only national body representing exclusively clerks to lay justices sitting in magistrates' courts throughout England and Wales. Clerks serving the metropolitan magistrates' courts are not members of the Justices' Clerks' Society. Like most professional bodies, the Society has never limited its activities to the interests of its members, and one of its main objects is "to watch the operation of the law . . . administered by justices of the peace in the United Kingdom, and to note defects therein, and to suggest and promote improvements in such law". It is in pursuance of those objects that the Society respectfully submits this memorandum for the consideration of the Royal Commission.

2. No one can sit in a magistrates' court day by day watching the long procession of unhappy husbands and wives which passes before the bench without experiencing feelings almost of horror at the sordidness of the marital relations disclosed in these cases—of a sense of the futility of attempting to solve these problems by legal machinery—and of grave disquiet because of the effect such proceedings must have on the lives of the many hundreds of children who stand behind the scenes like a ghostly army, usually unseen and unheard. The influence of this unhappiness extends in the work of the courts far beyond the cases themselves, and its influence is clearly seen in both juvenile delinquency and adult crime, in adoption applications and in bastardy cases.

3. Faced with this situation it would be both easy and tempting to paint a lurid picture of the unhappiness revealed in magistrates' courts, and to embark upon a detailed analysis of the causes which bring these people to the courts. The Society feels, however, that these tasks are better left to the many religious and social bodies who can view the situation on a wider basis. Unless the Royal Commission wishes otherwise, this Society proposes to devote its attention to a number of practical suggestions which it is believed would enable the justices to discharge their onerous duties more effectively and in a manner more likely to alleviate the situation and to give greater satisfaction both to the parties concerned and the justices themselves.

4. It is understood that a memorandum will be submitted by the Home Office setting out the law as to the jurisdiction of the justices and the procedure in their

courts, together with such statistics as are available, and these matters will not therefore be referred to unless otherwise necessary.

5. It may be convenient at this stage to summarise the more important matters to which the Society desires to call attention, as follows:—

(a) The need for a consolidating measure (i) as to the substantive law and (ii) as to procedure. (Paragraphs 6-8.)

(b) Difficulties arising out of the concurrent jurisdiction possessed by the High Court and the justices. (Paragraphs 9-16.)

(c) Suggestions for the extension of such concurrent jurisdiction. (Paragraphs 17-22.)

(d) Matters affecting orders for the custody of children. (Paragraphs 24-27.)

(e) Difficulties arising in connection with interim orders for maintenance. (Paragraph 28.)

(f) The need for the Legal Aid and Advice Act, 1949, in connection with domestic proceedings. (Paragraph 29.)

(g) The question whether the third party should be brought into proceedings on the ground of adultery in magistrates' courts. (Paragraph 30.)

(h) Enforcement of maintenance orders with particular reference to suspended commitments and transfers between courts. (Paragraphs 31-36.)

(i) Suggestions for the improvement of the law relating to the variation of maintenance orders. (Paragraph 37.)

(j) The future of the non-cohabitation clause. (Paragraph 38.)

(k) Any conciliation in divorce actions should be undertaken by the probation service. (Paragraph 40.)

(l) The work of the collecting officer. (Paragraph 41.)

THE JURISDICTION OF JUSTICES GENERALLY

6. The substantive law as to the powers of justices in matrimonial matters is based on the one hand on the Summary Jurisdiction (Married Women) Act, 1895, and on the other on the Guardianship of Infants Act, 1886. Both these Acts have been considerably amended, and the law is now to be found in a total of fifteen statutes. The procedure as to the making, enforcement, variation and discharge of orders is under the Summary Jurisdiction Acts, and here a total of twelve statutes is involved, together with a number of statutory rules.

7. It is understood that a Bill is contemplated to consolidate the Summary Jurisdiction Acts, though it is not known whether this will be limited to the Acts properly included in that short title or will embrace all the statutes referred to in the last sentence of the preceding paragraph.

8. In any event, the Society would strongly urge the desirability of consolidating measures to deal with both substantive and procedural law. This is perhaps particularly desirable in the case of guardianship orders, where the jurisdiction was extended to the justices in 1925 by the simple expedient of including a "court of summary jurisdiction" in the existing definition of "the court" and little provision was made for the adaptation of the machinery of the lower court to this new type of work.

CONCURRENT JURISDICTION OF THE HIGH COURT AND JUSTICES

(A) THE PRESENT POSITION

9. The Commission will be aware that the Divorce Court can dissolve a marriage on the grounds (*inter alia*) of (a) adultery (b) desertion of three years' duration and (c) cruelty. All these are also grounds upon which justices can make separation and/or maintenance orders, with provision for the custody of, access to, and maintenance of children, though the three years' limit does not apply in desertion, and cruelty must be persistent. Since the Law Reform (Miscellaneous Provisions) Act, 1949 (now Section 23 of the Matrimonial Causes Act, 1950), the Divorce Court can also make maintenance orders on the ground of wilful neglect, this strangely being a power which previously rested with the justices alone. Under the Guardianship of Infants Act, 1886 to 1925, the justices have power to make orders for the custody of, access to, and maintenance of infants similar—though restricted in the amount of maintenance—to those of the county court (probably rarely used) and of the Chancery Division of the High Court. The justices have no jurisdiction comparable to that of the Divorce Court to annul a marriage on the ground of non-consummation, but this ground can be raised before the justices as a defence to desertion.

10. Closely linked with the matrimonial jurisdiction is the power to consent to the marriage of an infant where consent is withheld by one or both parents. These are cases of considerable difficulty. Since the Marriage Act, 1949, they have ceased to be "domestic proceedings" which must always be heard in semi-privacy, though they can still be held *in camera* if the bench so decides.

11. While the justices meet, and gladly do, how to the superior jurisdiction of the higher court, the development of legal aid and the increase of divorce among people whose finances previously limited them to the magistrates' courts, made it obvious some years ago that difficulties would arise as to the conditions under which the justices were entitled to act under this concurrent jurisdiction.

12. Two matters had been made abundantly clear, namely (a) that the magistrates ought not to entertain an application for a maintenance order while proceedings were pending in the Divorce Court (*Croston v. Croston* (1907) 71 J.P. 399) and (b) that the dissolution of a marriage did not *ipso facto* discharge an existing magistrates' order or compel them to discharge it (*Wray v. Wray* (1925) P. 20 and *Wood v. Wood* (1949) W.N. 55).

The questions which arose were not usually so clear-cut, and attention was really focussed upon them by the decision in *R. v. Middlesex Justices ex parte Bond* (1932) 96 J.P. 487 and, on appeal, (1933) 2 K.B. 1.

13. In August, 1948, the Society ventured to submit a memorandum to the Lord Chancellor on these difficulties and urged that they should be clarified or some guidance given to magistrates. A copy of this memorandum (Appendix I) is attached hereto (revised to show changes since its preparation).

14. As the Society recognises the difficulties facing the Lord Chancellor's Department in dealing with this matter, we content ourselves by saying that the position has not been clarified. It may amuse the Commission if we put into simple form something of the background against which the justices have to act.

(a) On the human side, it must be remembered that comparatively few parties are legally represented; they are often illiterate and quite unversed in legal formalities; sometimes they do not really know whether they are divorced or not and even more frequently are completely ignorant as to the decision of the Divorce Court (if any) as to the custody of children; any papers they may have had are lost; they do not remember in which divorce registry proceedings were had; and it is possible for justices to be in the middle of a case and find out by accident that the parties are divorced or have commenced divorce proceedings.

(b) On the legal side of the problem, the Commission will be aware that Section 26 (1) of the Matrimonial Causes Act, 1950, as to maintenance of children is in very wide terms, and the Divorce Court "may from time to time, either before . . . or after the final decree" make provision for custody and maintenance, and it is often difficult to establish whether or not the Divorce Court has ever been or is still seized of the issue in these matters. This is of importance not only in applications for new guardianship orders or the variation or discharge of existing married women or guardianship orders, but also in the juvenile court in connection with adoptions and contribution orders against parents under fit person and approved school orders.

15. Fortunately a happy liaison has been established between the officers of the two courts. It has become the practice for the justices' clerk, when in doubt and where he can discover the appropriate registry, to write to the registrar enquiring whether there is anything to prevent the justices acting, and we are glad to record our appreciation of the assistance our members have always received from the registrars. Such enquiries of course entail additional work in both offices, and not only resolve the main question, but also reveal vital information of which the party with whom we are concerned is apparently ignorant, as for example where the judge has given a specific direction that the question of custody of a child was to be dealt with by him alone.

16. The Society would therefore repeat the suggestion made in their memorandum of August, 1948, and urge that the position should be clarified, so that justices should be left in no possible doubt whether their jurisdiction is ousted by that of the superior court.

(B) SUGGESTIONS FOR DEVELOPMENT

17. Notwithstanding the affinity existing between the High Court and magistrates' courts by reason of the similarity of the law they administer and the problems they have to decide, they remain entirely separate organisations. The only real links are (a) the Lord Chancellor in his capacity as rule-making authority, and (b) the Divisional Courts of the Divorce and Chancery Divisions sitting to hear appeals from the justices in married women and guardianship cases, respectively.

18. There are three occasions when Parliament appears to have visualised a somewhat closer relationship: (a) Section 10 of the Summary Jurisdiction (Married Women) Act, 1895, empowers justices to refuse an order if the matter could "be more conveniently dealt with by the High Court" (the marginal note being "more fit for the High Court"); (b) Section 7 (3) of the Guardianship of Infants Act, 1925, contains a similar provision, though without any such proviso as appears in the said Section 10; and (c) by Section 7 (2) of the Matrimonial Causes Act, 1937, the Divorce Court can accept a justices' order as sufficient proof of the adultery, desertion or other ground on which it was granted.

19. Little use appears to have been made of the first two provisions mentioned, probably (if we may venture to say so without disrespect) because such few cases as have been reported under Section 10 hardly encouraged justices to interpret it in the sense of the marginal note and to refuse to adjudicate upon difficult points of law which might more

being decided by the High Court in the first place rather than by appeal from the justices. See for example *Perks v. Perks* (1945) 2 All E.R. 593 (C.A.). On the other hand, the third provision referred to is being extensively used. Many wives now use a magistrates' order as one stage on the road to divorce, a procedure which not only reduces costs but is also a safeguard in desertion cases against witnesses not being available at the end of the three-year period. On a petition being lodged, the justices' clerk is called upon to provide copies of the order, of exhibits, and of his notes of the evidence given before the justices, all which are later used in the trial by virtue of the Matrimonial Causes Rules, 1950.

20. We now venture to ask the Commission to turn to another matter which is common to both courts, namely, the fixing of the amount and the recovery of maintenance. It is not for us to criticise the machinery of the High Court, but we would refer to the Final Report of the Denning Committee on Procedure in Matrimonial Causes (1947 Cmd. 7024), paragraphs 35 to 48, where it is said that "there is great delay in the applications coming on for hearing and in consequence a wife may be left by the law's delay without means of subsistence . . . a responsible witness . . . described the position as 'almost scandalous' . . ." (paragraph 36 (i)). In the subsequent paragraphs the simpler and speedier machinery of magistrates' courts is favourably contrasted with that of the Divorce Court, and stress is laid on a suggestion that magistrates should be able to make interim maintenance orders while a divorce petition is pending, a subject with which we deal later.

21. It will be seen that in the type of cases mentioned in paragraph 9 above the relationship between the justices and the Divorce Court tends to become somewhat similar to that existing in criminal cases between the examining justices and the judge at assize, and the Society ventures to suggest that consideration be given to its extension to the advantage of both courts and the convenience of the parties. The Commission would not expect us to develop this theme fully at this stage, and we merely give a brief outline of our suggestions:—

(a) Matrimonial cases in the justices' courts should be a matrimonial case, and in such cases—

(i) the justices should find the facts, and

(ii) whether or not the matter moves on to divorce, make maintenance or separation orders, including interim orders at any time prior to the hearing of the petition, and orders for custody of and access to children;

(iii) difficult questions of law could be referred to the judge for decision under what we believe to have been the intention behind the two Sections mentioned in paragraph 18 above.

(b) In any divorce suit, the judge should be free to deal with questions of maintenance, custody, or access himself, or leave them to be dealt with in chambers as at present, or remit them to the justices for decision.

(c) Whether the above suggestions are adopted or not, and unless the parties wish otherwise, all "small maintenance orders" as defined by Section 25 of the Finance Act, 1944, by whichever court made should be payable to the collecting officer and enforceable as a justices' court.

22. If the matters mentioned are regarded as having any merit, the Society would be glad to assist in exploring the suggestions in greater detail.

23. We shall deal more fully with the question of interim orders, and with the work of the collecting officer in later paragraphs (see paragraphs 38 and 41).

CUSTODY OF CHILDREN

24. The Society would wish to associate itself in the fullest possible measure with the Final Report of the Denning Committee on this subject (paragraphs 39 to 34 of such Report). We feel certain that we are justified in describing it as a matter which causes the justices whom we serve great anxiety, and we ourselves regard it as the major problem raised in this memorandum.

25. It is true that often both the Divorce Court and the justices can only choose the lesser of two evils. We would suggest that two main principles should be clearly established:—

(a) The question of custody should never automatically follow the granting of a decree or the making of a maintenance order or be merely ancillary thereto, but should always be treated as a specific issue and dealt with under conditions which permit of the fullest consideration of the interests of the child; and

(b) Any court before deciding the question of custody should have the right to call for an independent report of the circumstances as they affect the welfare of the child. In all matters affecting an infant's property the law requires that his interests shall be watched by a guardian of him or next friend. This also applies in adoption applications. We are of opinion that all courts should have the power to require such an appointment in matrimonial cases. The decision on the main issue between the parties should be deferred if necessary until the court is satisfied that the parties are making the best possible arrangements within their power for the children affected. Many judges have referred to the interest of the State in the marriage contract and it is surely in connection with the safeguarding of the children that this interest chiefly lies. A similar suggestion was made in the Report of the Denning Committee (paragraph 36) but we differ from that Committee in that we feel that the decision as to a decree or order between the parties should follow and not precede the decision as to custody. Even where the question is or appears to be agreed between the parties it should be critically examined, and there should be no risk of the court approving an arrangement under which one says, "You can have the custody if you give me a divorce" unless it is satisfied beyond all doubt that the order is in the interests of the child concerned.

26. In this connection the Commission will doubtless remember that the Denning Committee said that "the magistrates have distinct advantages over the Divorce Court" (paragraph 32 (ii)). We would respectfully suggest that consideration might be given whether the Divorce Court should not be empowered to make use of those advantages, either on the lines indicated in paragraph 21 above or by referring specific cases or questions to the justices. Magistrates already have much experience of these problems; they have their own probation officers and are usually in close touch with the children's officer of the local council; the parties' homes would be within easy reach, and the children could be seen if necessary.

27. We are of opinion that the magistrates' domestic court forms a suitable forum for the settlement of these problems, and that (subject to any necessary safeguards) they could render considerable assistance to the Divorce Court, and thus meet most of the criticisms of the Denning Committee.

INTERIM ORDERS FOR MAINTENANCE

28. Quite apart from the suggestions we made in paragraph 21 above, the Society would wish to put forward two specific proposals as to interim orders for maintenance.

(a) It frequently happens that while proceedings are pending by a wife in the magistrates' court the husband will file a petition in divorce, and thus bar any further action by the justices. The wife can apply for alimony pendente lite, but this takes time and often a preliminary application by her for legal aid. As she may well be without means there is hardship to her and any children unless she is helped by the Assistance Board, in which case there may be an unnecessary call on public funds. Experience has shown that it would be far more satisfactory if the justices were entitled to make an interim order at any time prior to the hearing of the divorce petition, and we therefore support the recommendation of the Denning Committee in this respect (paragraph 45, Final Report).

(b) The existing power to make an interim order is in Section 6 of the Summary Jurisdiction (Separation & Maintenance) Act, 1935, and it was decided in *Fulker v. Fulker* (1956) 3 All E.R. 636 that such an order cannot be made once the justices find the facts proved. It seems doubtful whether this decision has not been over-ruled by the Summary Procedure (Domestic Proceedings) Act, 1937, which apparently contemplates a reference by the justices to a probation officer with a view to cohabitation at any stage of the proceedings, even after all the issues have been determined. In the

view of the Society, it is desirable that the power should continue even after the issue have been settled. Conciliation is possible even at the eleventh hour, and it is often good for the parties to have a period of reflection before the final step is taken by the justices. Interim orders can only be made in married women cases, and the power to do so might usefully be extended to guardianship cases.

LEGAL AID AND THE SEARCH FOR THE TRUTH

29. The Society would urge with all the strength at its command that the Legal Aid and Advice Act, 1949, should be brought into operation in magistrates' courts in domestic proceedings. Although the legal problems to be decided are similar in the Divorce Court and that of the magistrates, in a high percentage of these cases the parties are not legally represented before the justice. It has long been the proud tradition of magistrates' courts that every assistance is given to the parties to overcome this handicap, and this is now incorporated in the Summary Procedure (Domestic Proceedings) Act, 1937. Notwithstanding this, the task of the justices is rendered far more difficult: data when advocates are responsible for presenting a case. The parties are usually unversed in legal procedure, and are in strange surroundings. The result is that they endeavour to lay bare and in great detail minor matters which are of no significance and often entirely irrelevant, while major matters may emerge only by accident. The Society gratefully acknowledges the public spirit of very many advocates in all parts of the country who will undertake these cases without fee or for a nominal charge only, but many cases still remain where legal representation is desirable if justice is to be done. The attention of the court should be concentrated on the problem it has to decide, not on the presentation of that problem.

ORDERS ON THE GROUND OF ADULTERY

30. There are four matters in connection with these orders to which the Society desires to call attention.

(a) In the Divorce Court the co-respondent must always be named and made a party where possible, and thus always has full knowledge of the proceedings. There is no corresponding provision in the justices' court, where the only requirement is that full details of the alleged adultery must be given to the defendant, and even this rests only on other days, see for example *Duffield v. Duffield* (1949) 1 All E.R. 1105, and many other cases. The Society would suggest that to avoid any risk of collusion the third party should either be given notice of or joined in the application and afforded an opportunity to give evidence and defend the accusation if desired.

(b) By Section 11 (3) of the Matrimonial Causes Act, 1937, the justices are not to make an order on this ground unless they are satisfied (*inter alia*) that the application is not made in collusion with the opposite party. We would point out that in undefended cases, and especially in the absence of the third party, it is difficult to see how the justices can be so satisfied.

(c) Section 11 of the Summary Jurisdiction Act, 1948, requires that the alleged adultery must have taken place or continued until within six months of the commencement of the proceedings. (See also *Teele v. Teele* (1938) P. 250.) Often adultery is not revealed until months afterwards and this rule can operate harshly. We invite consideration whether adultery should not be made an exception to the general rule.

(d) Where a husband applies for an order on the ground of his wife's adultery, the court can make provision for the legal custody of any children, but though it can order a weekly payment up to £2 for the adulterous wife herself, it cannot order him in those proceedings to pay maintenance for the children. The wife can of course apply separately under the Guardianship of Infants Acts, but the position seems somewhat anomalous.

ENFORCEMENT OF MAINTENANCE ORDERS

31. Two preliminary problems are often encountered in the enforcement of orders—(a) the defendant may be difficult to locate, and (b) the complainant may be reluctant

again to face what she often regards as the "ordal" of appearing in court.

(a) As to the first, failure to enforce the order generally results in the wife and her children becoming a charge on the funds of the Assistance Board. If the man's address is in the possession of any public authority, we submit that there ought not to be any regulation preventing such address being disclosed, and it ought at least to be placed at the disposal of the police in possession of a warrant for his arrest as readily as if he had committed a crime.

(b) With regard to the second, the situation may be gradually eased by the provisions of Section 4 (2) of the Married Women (Maintenance) Act, 1949, under which the collecting officer is bound to take proceedings at the complainant's request.

SUSPENDED COMMITTALS

32. When the defendant is before the court, the justice can remit the whole or any part of the arrears if they think fit, and as to the remainder the ultimate sanction is imprisonment up to a maximum of three months, except where the court is satisfied that failure to pay is not due to wilful refusal or culpable neglect. A frequent practice is to adjourn the matter to give the defendant an opportunity to pay, and when a committal order is made it is usually suspended on terms that he pays the normal weekly payment plus some payment towards arrears. We have been asked to express a view as to this procedure and, before doing so, should like to obtain further information from our members. We therefore propose to submit a supplemental memorandum on this topic, with factual details and our recommendations, in the New Year.

TRANSFERS BETWEEN COURTS

33. In 1934, a Departmental Committee appointed by the Home Secretary made many helpful suggestions with regard to the enforcement and variation of maintenance orders. Some have been incorporated in the Summary Procedure (Domestic Proceedings) Act, 1937, and the Emergency Laws (Miscellaneous Provisions) Act, 1947; others are in the Justices of the Peace Act, 1949, but not yet in operation; and others which did not require legislation are now generally adopted in practice.

34. One of such suggestions (now the Act of 1947) was to enable a court to transfer the enforcement of an order to another court for the district where the defendant resides. Considerable use is now being made of this provision, and owing to the movement of population during and since the war it has become of importance. On the whole we believe it to be working with reasonable satisfaction. Suggestions have been made to us that some courts delay any final action and adjourn for very long periods. If there is any substance in these suggestions, we consider this course unsatisfactory. If the amount of the order is quite outside the defendant's capacity for payment there is usually a good case for variation, and possibly remission of arrears, and these courses should be taken rather than allow arrears which are obviously irrecoverable to continue to accumulate.

35. We shall deal later (paragraph 37) with transfers for variation between courts.

ATTACHMENT OF INCOME

36. The only major proposal made by the Departmental Committee as to which nothing has been done is that of attachment of income. (See paragraphs 114, 115 and 179 to 193 of the Report.) This is a matter on which conflicting views were (and no doubt still are) held, and the Report of the Committee adequately sets out such views. We have no wish to express an opinion on this controversial question, but in view of the passage of time, the changed circumstances since 1934, and the fact that the inquiry of the Royal Commission is to cover the law of Scotland, we would suggest that the problem might now be re-examined from two angles:—

(a) The fact that attachment of income is possible and apparently regularly used in Scotland seems to be the only basic difference between the law as to enforcement in the two countries, yet while the number of actual committals in default of payment in England is

considerable and shows little sign of abatement in spite of the fact that justices are usually reluctant to commit except as the last resort, the number of commitments in Stafford was shown by the Report of the Departmental Committee (paragraph 113) to be negligible. Enquiry by the Commission might reveal the cause of this contrast, and whether the power to attach income has any bearing upon it.

(b) The Departmental Committee viewed the question in the light of the effect such provisions might have on the relations between a private employer and the defendant. Now that many more men are employed by public boards or other national authorities, the objections which were valid in 1934 might not now carry the same weight.

VARIATION OF MAINTENANCE ORDERS

37. The power to vary an order as to such matters as custody of and access to children remains with the original court, but variation of the weekly payment can be made by other courts. The applicant for variation makes his complaint to the justices in his own town, and this is transmitted to the "original" court, which has the right to decide whether the application shall be heard by itself, or by any other court where either the applicant or respondent resides. Considerable use is now being made of this provision, and in general we believe that the machinery provided is adequate and gives satisfaction. We only wish to call attention to three minor points.

(a) It is often difficult to make an equitable decision as to which court shall hear the application. In general it seems reasonable that the applicant should travel to the court where the respondent resides but cases do arise where there is considerable financial stringency on both sides, and for either to travel a distance not only adds to the hardship, but involves expenditure which might be better applied in payments under the order. The net result is that one party or the other is unable to attend. Let us assume a case of a husband living at court A with a reasonable case for reduction judged on his own means; and a wife living at court B perhaps 100 miles away. Neither can afford to travel to the other court. If the application is heard at court A the wife will not attend and the court is left in ignorance of her financial position and cannot, as it should do, equitably relate the husband's means to the reasonable needs of both. On the other hand, if the court decides that the application must be heard by court B the effect is often to make the husband's application impossible, and arrears accumulate. The absent party is at a great disadvantage. It is so easy for the party giving evidence, not subject to cross-examination, to project something of his unsharpened notion that only he has financial worries, and that the other party enjoys comparative freedom from them. It is suggested that provision could be made for evidence of means to be given by statutory declaration by a party unable to attend before the justices for his or her own district and transmitted to the court hearing the application. A precedent for this is to be found in the Maintenance Orders (Facilities for Enforcement) Act, 1920.

(b) When an order has been made by court A and made payable to the collecting officer of court B or is later varied and made so payable, doubts seem to be entertained whether court A or court B is the "original" court which has the right to decide where an application for variation is to be heard. If there is any substance in these doubts, we suggest that the position should be clarified (in favour of court B). If the varying order becomes an integral part of the first order it would seem that court A remains the "original" court, but if it is properly regarded as a separate order then court B acquires the right to decide the locus of any subsequent application for variation. These doubts apply equally to transfers for enforcement.

(c) It would be an advantage in some cases if the "original court" were authorised to transfer applications for variation to a court in whose district neither party resides, as, for example, where one party is in the South, and the other in the North, a Midland court might be more convenient. The burden of travelling expenses could then be shared equitably.

THE NON-COHABITATION CLAUSE

38. The average woman desiring matrimonial relief from the justices seeks what she calls a "separation order" and has little or no idea of the subtle difference between that order and a maintenance order. The Society would suggest that consideration might now be given as to the proper use of the non-cohabitation clause. On merely reading the Act of 1935, it would appear that the justices were given a wide discretion to use it in all cases, but a long series of cases have shown (a) that it brings very exciting desperation to an end, (b) that it should only be inserted when there is reasonable cause to anticipate physical violence against the wife, and (c) it should not be inserted unless desired by her. As an unrepresented wife has no conception of the effect of the clause, nor can it be simply explained, the result is that in practice it is usually ignored. The absence of the clause, plus the modern view that an offer to resume cohabitation need not necessarily be accompanied by any expression of regret, may well place an injured wife in a difficult position when faced with an offer by the husband, which though superficially bona fide is in reality quite insincere. Since the repeal of the last Married Women's Property Act it is probably true to say that this clause has had no meaning except the artificial meaning attached to it by case law, namely, that it operates to bring desertion to an end. It is not true to say that in the absence of the clause the wife is bound to cohabit with her husband. Further, to say that in the absence of the clause a wife who refuses to cohabit with her husband loses her right to be maintained by him is an over-simplification that is quite unrealistic.

RECENT PROPOSED LEGISLATION

39. The Society does not wish to express opinion on matters which may become political issues, and would merely make the following comments on two recent Bills.

(a) The Deserted Wives Bill of 1936 dealt with two problems—the transfer of auxiliary sentences, and the appointment of chatales—which undoubtedly have caused much hardship among parties in magistrates' courts, and if any effective solution could be found much unpleasantness might be avoided. The adjustment of hire-purchase payments can be equally difficult.

(b) The Matrimonial Causes Bill of 1936, providing, as a new ground for divorce, separation for seven years, would affect many existing orders in magistrates' courts, and would certainly call for consideration in the light of our paragraphs (9-16) on concurrent jurisdiction.

CONCILIATION IN DIVORCE ACTIONS

40. It is hardly within our province to suggest whether or not facilities for conciliation should be made available even when a divorce action is pending, but we think it proper to make the following comments. Our experience has clearly shown that even at the eleventh hour, and when superficially everything appears to suggest the opposite, reconciliation is still possible in some cases. The existing probation service is already well equipped to undertake this work; it has proved its worth in magistrates' courts; and it is sufficiently flexible to allow for expansion to cover this work. In many cases the local probation officer may be well acquainted with the family concerned, and thus have a great advantage over someone coming fresh to their problems. We are of opinion that the country would gain much by the extension of the probation system to cover this work, rather than by the creation of some new body of workers, either official or unofficial. With regard to conciliation work generally in both the Divorce Court and in magistrates' courts, in areas where the load of work is considerable, it might be advantageous if the work were subdivided, so that matrimonial work could be conducted from a separate office and in different surroundings from ordinary probation work. We do not suggest that particular officers should be engaged exclusively on one branch or the other, as this would tend to narrow their approach to social problems generally, but merely that the surroundings in which the work is conducted should be different wherever possible. In 1948 the Home Office issued a memorandum

on "The Principles and Practice in the Work of Matrimonial Conciliation in Magistrates' Courts". We believe this to have been of great interest and service both to magistrates' and probation officers, and should receive consideration by anyone who engages in the work of conciliation in the wider field of divorce.

THE WORK OF THE COLLECTING OFFICER

41. As the work of this officer receives little publicity and may not be within the knowledge of the members of the Commission, we give a brief outline of the position.

(a) Prior to 1914, payments under maintenance orders were made direct to the complainant. The Affiliation Orders Act, 1914, provided for the appointment of a collecting officer, through whom payments under maintenance orders could be made, and this was followed by the Criminal Justice Administration Act, 1914, under which payments under all maintenance orders could be made through an officer of the court. In most courts the justices' clerk has acted in both capacities, and under Section 21 of the Justices of the Peace Act, 1949 (not yet in operation), the two are merged in his hands.

(b) Experience has shown this appointment to have great advantages, particularly to complainants. It avoids the inconvenience and often unpleasantness of the woman having to make personal application to the man for payment and enables the court to exercise considerable supervision over the enforcement of orders. If four weekly payments are in arrears the collecting officer must notify the woman, and at her request may take proceedings for recovery in his own name. He can assist in ensuring payment by reminders to a man in arrears, and on the other hand curb unreasonable attempts by the woman to take proceedings where there is a legitimate excuse for failure.

(c) This work has grown considerably, and now forms a considerable portion of the work of the justices' clerk's office. In the largest provincial city, Birmingham, the amount collected per annum is £230,000 (with, of course, a turnover of twice that amount) in respect of over 5,000 orders. The collecting officer receives some 93,000 letters and writes about 57,000. At the other extreme, even in the smallest country court a sum of over £1,000 will be collected in a year.

(d) The work includes much more than the receipt and payment of money; correspondence is considerable; and the collecting officer tends to become a liaison officer between the parties and other public authorities, such as the Ministry of Pensions, income tax authorities, the Assistance Board, children's officer and housing manager, all of whom often have more interest in prompt payment than the actual complainant. The money itself comes from other courts, both in England and Wales and the Commonwealth, from regimental paymasters, banks, and so on.

(e) The chief advantage of this system is that an accurate record is kept of the account, thus avoiding the many disputes as to the amount owing which were common before 1914. The collecting officer can do much to show that this is for the benefit of both parties and thus help to demonstrate the impartiality of the court. It is no exaggeration to say that this work makes the clerk's office the centre of innumerable domestic enquiries, and the spirit in which it is performed can do much to produce a more reasonable atmosphere between the parties, and often in fact assist in a reconciliation.

(f) We have commented elsewhere (paragraph 34) on the number of adjournments which sometimes occur when cases are transferred to other courts. This adds considerably to the work, for the collecting officer is under obligation to notify the other court of each payment made by the defendant and thus in effect duplicate the account in the two courts.

MISCELLANEOUS MATTERS

42. In the course of preparing this memorandum our attention has been drawn to a number of matters which relate to questions of administrative details rather than important principles, and we have therefore included these points in Appendix II hereto. Even if the Royal Commission does not consider it necessary to make any recom-

mendation with regard to these matters, they might perhaps be referred to a departmental committee for examination, or to the Rules Committee to be appointed under Section 15 of the Justices of the Peace Act, 1949.

CONCLUSION

43. If desired, members of the Council of the Society will be prepared to attend before the Royal Commission to give oral evidence in support of the matters mentioned above, or to assist the Commission in any other way.

44. A number of the subjects treated above could be amplified by statistics, but they are not available at the moment. The Council would be glad to assist in gathering information on any particular point, either generally throughout the country or from sample courts, but it has not been considered appropriate to attempt to do this without some indication of the wishes of the Commission. For example, the annual criminal statistics give the total number of orders made, but give no indication of the bulk of the work involved in cases which were dismissed or withdrawn or where there was a reconciliation. It would be possible to gather information as to the total number of suspended commitments, but to understand the effect of these would need a detailed analysis of the final result.

45. Magistrates have now had over fifty years' experience under their matrimonial jurisdiction, and it is perhaps within our province to end this memorandum with a few words which they can hardly say themselves.

46. The law as to desertion, cruelty, and adultery may be the same in the Divorce Court as in magistrates' courts, but the conditions under which it is administered are vastly different. Many of our members are not only justices' clerks, but also are, or have been, practising solicitors with experience in divorce work, and we note a great contrast. Divorce work may be "repulsive and disgusting" (see Lord Justice MacKinnon), but the Divorce Court is far removed from the actual events; the presence of the robes, and the assistance of counsel in guiding the issues on the right lines, give that court an advantage not possessed by the justices. The latter labour close to the event, the atmosphere is more charged with emotion, and passions more easily aroused. In the Divorce Court the "dust of the arena" has had time to subside, but in the magistrates' court it is still often a thick cloud.

47. Working under these conditions, we believe that magistrates have made a valuable attempt to maintain the best traditions of our judicial system, and have rendered useful service to their country in endeavouring to solve these difficult problems in something approaching an atmosphere of "calm judicial dignity". In doing so, and in spite of mistakes and weaknesses, we believe they have gained the confidence and respect of the humble folk who come to their courts seeking justice. It is not without significance that these people look on a magistrates' court as a place where they can obtain advice and help.

48. It is in this spirit that we respectfully venture to put forward the suggestion that the whole relationship of the two courts might be the subject of inquiry as to whether the magistrates' court, in the capacity of handmaid to the higher court, could not render even more useful service in dealing with this vast social problem. At the least, the justices' powers should be kept adequate to the task expected of them.

(Dated 17th December, 1951.)

APPENDIX I

EFFECT OF DIVORCE PROCEEDINGS UPON THE MATRIMONIAL JURISDICTION OF MAGISTRATES

(Memorandum submitted to the Lord Chancellor by the Justices' Clerks' Society in August, 1948, and revised to November, 1951.)

General terms of reference

1. At the meeting of the Council of the Society on the 21st May, 1948, attention was drawn to difficulties which arose in connection with the variation or discharge of matrimonial orders following Divorce Court proceedings and, after discussion, it was decided that the General

Purpose Committee should consider these difficulties and take such action as was deemed appropriate to assist members in dealing with such difficulties.

The premises

2. The classes of cases in which difficulties usually arise appear to be these:—

- (a) an application to vary or discharge a magistrates' order after a decree of divorce;
- (b) an application under the Guardianship of Infants Acts in respect of children of a marriage which has been dissolved.

The statute law

3. The relevant statutory provisions are:—

- (a) Summary Jurisdiction (Married Women) Act, 1895, Section 7 as amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925, Section 2 (1), and the Married Women (Maintenance) Act, 1949, Section 5.
- (b) Guardianship of Infants Act, 1886, Section 5 as extended by the Guardianship of Infants Act, 1925, Section 7.
- (c) Maintenance Orders Act, 1950, Sections 1 and 2.
- (d) Guardianship and Maintenance of Infants Act, 1925.

The decided cases

4. There are the following decided cases:—

(a) *Crampton v. Crampton* (1907) 71 J.P. 399: where proceedings are pending in the Divorce Division magistrates ought not to entertain any application between the same parties for a matrimonial order.

(b) In *Bragg v. Bragg* (1925) P. 20 the wife obtained a magistrates' maintenance order for desertion, and later a divorce on the grounds of adultery. The former husband having applied to the magistrates to have the order discharged failed and appealed. Held: dissolution of a marriage does not *ipso facto* discharge a magistrates' maintenance order nor compel the magistrates' court to discharge it. Every case comes within the discretion given to the court by Section 7 of the Act of 1895. "... it was a very convenient thing that ... a court which was close at hand to the parties should be able to give the wife assistance if she needed it or give the husband relief if he was entitled to it" (Duke, P.).

(c) In *Pharr v. Pharr* (1927) 43 T.L.R. 523 a magistrates' separation order was revoked by them on the grounds of the wife's adultery. Subsequently, on the husband's petition, a judge of assize decided that adultery had not been committed. Held: such a decision was a new fact on which the magistrates could revive the separation order.

(d) In *Vigon v. Vigon & Koster* (1929) 93 J.P. 112 there existed a magistrates' guardianship order in favour of the mother against whom the father subsequently obtained a decree nisi on the ground of her adultery. The father in his petition claimed custody of the child and the divorce judge held that he had jurisdiction to vary the magistrates' order but he invited the magistrates to vary his own order. This the magistrates declined to do. On appeal the court declined to decide the question of jurisdiction and dealt with the matter in another way.

(e) In *R. v. Middlesex Justices ex parte Bond* (1932) 96 J.P. 437 the father obtained a decree absolute upon an undefended divorce petition to which the mother appeared. Subsequently the mother applied to magistrates for a guardianship order. They advised her that, as she had appeared to the petition, she should apply to the Divorce Court. The mother later obtained a magistrates' guardianship order from a differently constituted bench. A rule nisi to the King's Bench Division for certiorari on the father's application was made absolute. A majority of the court was further of opinion that the jurisdiction of the Divorce Court over questions of custody and maintenance arising out of a matrimonial cause of which that court has become seized is an exclusive and over-riding jurisdiction displacing that of the magistrates under the Guardianship of Infants Acts. "The inconvenience of holding that

there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for if the justices may make an order, as in this case, there is nothing to prevent the husband going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might arise—between the two courts, producing an absolute scandal." (Avery, J.).

On appeal, however—(1933) 2 K.B. 1—the Court of Appeal declined to decide the further question whether the magistrates had concurrent jurisdiction with the Divorce Court as to the custody of children.

(f) In *Higgs v. Higgs* (1934) 98 J.P. 443 a wife having summoned her husband for wilful neglect, before her complaint was heard the husband commenced divorce proceedings. Held: the magistrates had no power to make an order, sole jurisdiction to do so being vested in the Divorce Court as soon as the husband's petition was filed.

(g) *Knott v. Knott* (1935) 99 J.P. 329 decided:—

(i) where an issue of adultery arises between the same spouses at the same time in both a magistrates' court and the Divorce Court that issue should be determined exclusively by the Divorce Court pending whose judgment the magistrates have no jurisdiction;

(ii) when a decree has been pronounced for a wife's adultery magistrates can discharge her maintenance order without further evidence than is required to show that the adultery was subsequent to the order;

(iii) magistrates may not refuse under Section 10 of the Act of 1895 to discharge an order on the ground of a wife's adultery because the concluding words of Section 7 of the Act are peremptory.

(h) In *Mezger v. Mezger* (1936) 160 J.P. 475 a wife having obtained a magistrates' maintenance order her husband subsequently had the marriage dissolved by a foreign court whose decree was effective in England. Held: the marriage having been terminated, the magistrates should have discharged their order which was completely at variance with the decision of the foreign court, that as being clearly distinguishable from *Bragg v. Bragg* *supra*.

(i) In *Klosser v. Klosser* (1945) 2 All E.R. 708 the husband commenced divorce proceedings in South Africa. Unaware of them the wife obtained a summons for a magistrates' maintenance order. She was served with the divorce proceedings prior to the hearing in the magistrates' court. The magistrates declined to make an order on the ground that they had no jurisdiction. Held: the principle in *Higgs v. Higgs* and *Knott v. Knott* (2) (i) *supra* did not indicate that magistrates could not exercise a discretion in determining the matter before them according to the convenience of the proceedings. "If the parties are residing in the jurisdiction, that has always been held to be sufficient to give justices jurisdiction to exercise the powers conferred upon them under these Acts, and, indeed, it is plainly indicated both in *Higgs v. Higgs* and in *Knott v. Knott*, that the procedure which this court recommended, where there is an overlap between a petition pending in the High Court and proceedings arising out of the same subject matter in the justices' court, is not obligatory in the sense that it depends upon any qualification in the Act itself but is rather a matter for the discretion of the justices to be exercised according to the manifest convenience and decency of the proceedings." (Merriman, P.).

(j) In *Kirk v. Kirk* (1947) 2 All E.R. 118 a wife obtained in England a magistrates' maintenance order against her husband, a domiciled Scot. Later she obtained a divorce in Scotland. The former husband then applied for revocation of the order. The order was discharged (on appeal) but the court explained that in no circumstances whatever could a maintenance order be kept alive when the parties had been divorced by a foreign court.

(k) *Kilford v. Kilford* (1947) 2 All E.R. 381. A wife in whose favour there is a magistrates' maintenance order, having obtained a decree absolute, must

object either to retain the magistrates' order or have it discharged and seek an order in the Divorce Court. She cannot have dual orders.

(d) In *James v. James* (1948) 1 All E.R. 214; 112 J.P. 156, a husband's divorce petition on the grounds of his wife's adultery was dismissed. When, later, the wife applied for a magistrates' maintenance order her husband alleged the same adultery. Held: the magistrates wrongly dismissed the summons after learning of the judge's opposite decision; but the question was especially left open whether a distinction ought to be drawn between a decision that the offence has not been committed and a decision that it has, for in the latter case it may be the absolute duty of the court to adjudicate upon the matter again, whereas in the former the unsuccessful party is estopped from bringing the evidence before the court at all.

(e) *Wood v. Wood* (1949) W.N. 59, 93 S.J. 200. The justices should normally exercise their discretion by discharging an order when the wife in whose favour it was granted is the unsuccessful party in divorce proceedings, but there may be circumstances in which the order would be justified in refusing to discharge as order.

(f) *Ross v. Ross* (1950) 1 All E.R. 654. The High Court will not make a maintenance order while a previous order made by justices is still in force. The wife must decide whether she will apply to the justices to discharge the order and then apply to the Divorce Court for an order.

(g) *Duchene v. Duchene* (1950) 2 All E.R. 784. A husband is estopped from asserting matters on an application for maintenance inconsistent with a previous decree for divorce and for reasons of public policy he is prohibited from asserting matters known to him which might reasonably be expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial.

Inferences

5. From the foregoing authorities it seems legitimate to extract these principles:—

(a) The magistrates' jurisdiction is not ousted by proceedings in the Divorce Court (*Klosser v. Klosser*).

(b) but magistrates must exercise their concurrent jurisdiction in their discretion according to the manifest convenience (*Bray v. Bray*) and decency (*dictum of Avory, J. in R. v. Middlesex Justices of the peace* (*Klosser v. Klosser*)).

(c) Wherefore, whilst proceedings are pending in the Divorce Court, magistrates ought to adjourn their summons pending the outcome of those proceedings (*Croston v. Croston*; *Higgs v. Higgs*; *Knot v. Knot* (4) (g) (i) *supra*)).

(d) However, once the proceedings in the Divorce Court have terminated (usually at the expiration of one month after decree absolute), and *a fortiori* where the applicant has not entered an appearance to those proceedings, and provided the question of custody was not decided by the Divorce Court, an application will lie to magistrates for a guardianship order.

(e) On the other hand, the outcome of divorce proceedings does not *per se* affect an existing magistrates' order (*Bray v. Bray*).

(f) but it may constitute a new fact on which a magistrates' order could be varied, discharged, or revived (*Pratt v. Pratt*; *Knot v. Knot* (4) (g) (ii) *supra*); *Mezger v. Mezger*; *Kirk v. Kirk*); and the justices should normally discharge an earlier order made in favour of the unsuccessful party in divorce proceedings (*Wood v. Wood*).

(g) and, in that connection, or upon a new complaint, a magistrates' court should consider itself bound by a decision of the Divorce Court that an alleged matrimonial offence has not been committed (*James v. James*).

(h) When considering the amount of maintenance following divorce proceedings the justices should not allow any evidence to be given which is inconsistent with the decree or allow evidence on matters known to the parties which might reasonably be expected to provide an effective answer to the petition.

Practice

6. Considerable difficulty arises in practice in applying the law to the varied circumstances that arise in magistrates' courts.

In particular, it is frequently contended that justices have no jurisdiction to decide questions of custody on applications under the Guardianship of Infants Act, 1925, when proceedings between the parties have previously been heard in the Divorce Court.

It is submitted that this view based upon certain *dicta* in *R. v. Middlesex Justices ex parte Bond* (*infra*) is not confirmed by other authorities.

Furthermore, difficulty arises where a husband seeks to discharge an existing maintenance order on the grounds of adultery basing his case upon an undefended divorce decree. It is by no means clear how far the wife is entitled to be heard if she denies the adultery on the application to discharge. If the application is opposed, are the justices required or even permitted to satisfy themselves that adultery has in fact been committed?

The following direction was given by the Senior Registrar on 23rd January, 1951:—

"It is considered that while it is right and proper when the issue of custody is actually pending in a divorce suit, that the justices should adjourn the guardianship summons on the lines laid down in *Higgs v. Higgs* and *Knot v. Knot*, there is no ground for restricting the concurrent jurisdiction of the magistrates' courts in a guardianship case when the issue of custody has not been raised in the divorce suit merely because it is open to a spouse to take the appropriate steps to enable him or her to raise the question of custody in the divorce suit. It is felt that the provision in Section 7 (3) of the Guardianship of Infants Act, 1925, affords a sufficient safeguard to any spouse who desires, however belatedly, to have the issue of custody decided in the High Court."

By virtue of the powers contained in Sections 1 and 2 of the Maintenance Orders Act, 1950, the justices need to consider the effect of any decree of a Scottish Court on any application made to them under the provisions of either of those sections.

These matters are respectfully brought to the notice of the Lord Chancellor as it would be of assistance to justices, their clerks and to the general administration of justice if some guidance could be provided.

If it is thought proper, the opportunity might be taken by the divorce judges in the course of an appropriate judgment to make a statement that would clarify the law.

It is respectfully suggested that the present state of the authorities is such that justices and their clerks are in need of an authoritative statement if mistakes are to be avoided, anomalies prevented and a consistent practice established.

APPENDIX II

MISCELLANEOUS SUGGESTIONS SUBMITTED FOR CONSIDERATION

1. Residence as affecting enforcement of orders

Sub-section (4) of Section 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, might be repealed. This provides that no order under the Act of 1895 shall be enforceable whilst the married woman resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made she continues to reside with her husband. This provision can work very hardly against a woman with a family in these days of housing shortage. See *Evans v. Evans* (1947) 2 All E.R. 656, and *Wheatley v. Wheatley* (1949) 2 All E.R. 428.

2. Children of wife's deceased husband, etc.

No specific order for maintenance can be made for such children against the wife's second husband, though it is proper to consider them in fixing her own maintenance (see *Harrison v. Harrison* (1951) 2 All E.R. 346), and this would therefore seem to apply to illegitimate children born before marriage. No order for custody is necessary as the wife has such custody. As with the passage of time the basis of the wife's maintenance may become obscured, it might be wiser to appropriate a definite sum to such children.

PAPER No. 35—FIRST MEMORANDUM SUBMITTED BY THE JUSTICES' CLERKS' SOCIETY
 PAPER No. 36—SECOND MEMORANDUM SUBMITTED BY THE JUSTICES' CLERKS' SOCIETY

3. Dismissal of summons for desertion

If a summons alleging desertion by the husband is dismissed, the position of the parties is often left very uncertain, as this does not involve a finding by the justices that the wife deserted the husband. It might be an advantage if the justices could record such a finding in appropriate cases.

4. Guardianship—infants aged over sixteen

By the proviso to sub-section (1) of Section 7 of the Guardianship of Infants Act, 1925, the justices may not ascertain any application other than an application for variation or discharge of an existing order in respect of a child aged over sixteen unless he or she is physically or mentally incapable of self-support. This provision might be extended so as to permit an order for an infant following a full-time course of education.

5. Payment of conduct money

The requirement that a wife must provide conduct money to enable a summons to be served on her sailor, soldier, or airman husband is often a hardship, and frequently means that it has to be advanced from the court poor box or borrowed from some charitable organisation. The necessity appears to be an anachronism now that service men are paid more adequate rates of pay, and it is suggested that Section 98A of the Naval Discipline Act, 1906, and Section 145 (3) of the Army Act, 1955, be suitably amended.

6. Appeals

(a) Notification of result

There is no machinery for formal notification to the court of summary jurisdiction of the result of an appeal from a matrimonial or guardianship order to the Divisional Court. This is especially inconvenient to the clerk to the justices as collecting officer where the Divisional Court substitutes a fresh order for that made by the justices. It is recommended that the Matrimonial Causes Rules, 1950, should provide for a notification by the divorce registrar to the lower court.

(b) Notes of evidence, etc.

The Matrimonial Causes Rules, S.I. 1950, No. 1940 paragraph 71, clearly specify the steps to be taken by an

appellant prior to an appeal as the result of the labours of the justices' clerk, but the actual notes of the clerk in such matters have to be gathered from obiter dicta in various decided cases. As the law library available to the clerk in a small country court is usually limited, his duties should be contained in the Summary Jurisdiction Rules.

7. Republic of Ireland

There would appear to be a need for reciprocal arrangements to be made with the Republic of Ireland either by the extension of the Maintenance Orders (Facilities for Enforcement) Act, 1920, or otherwise.

8. Custody to third party and subsequent maintenance

The power of the justices to give custody to a third party should be clarified with particular reference to those cases where a separated wife dies and any order for her children ceases on her death.

9. Transfers between courts for all purposes

We have referred in paragraphs 33-35 and 37 to the existing powers to transfer questions of enforcement or variation of maintenance orders. Under Section 21 (3) of the Justices of the Peace Act, 1949 (in force on 1st April, 1953), the justices can make an order payable through the collecting officer of some other court, and this is now done on occasion informally with the consent of such collecting officer. This does not and will not make the other court an "original" court. It is suggested that consideration be given to the desirability of giving a general power to transfer to any other convenient court for all purposes.

10. "Statement of allegations" by parties

When the justices have requested a probation officer to attempt reconciliation he may, if his efforts are unsuccessful, prepare a "statement of allegations" made by the parties, and this statement may be used by the court as a basis for questions to the witnesses. Section 4 of the Summary Procedure (Domestic Proceedings) Act, 1957, which contains these provisions, has proved of little use, and consideration might be given as to whether it serves any useful purpose.

PAPER No. 34

SECOND MEMORANDUM SUBMITTED BY THE JUSTICES' CLERKS' SOCIETY

Suspended commitments in default of payment under maintenance orders

1. In paragraph 32 of the Society's first memorandum (Paper No. 33) reference was made in general terms to the question of the use of suspended commitments as a method of enforcing maintenance orders, and leave was sought to submit this supplemental memorandum.

2. All married women and guardianship maintenance orders are now enforceable as if they were bastardy orders, by virtue of Section 9 of the Summary Jurisdiction (Married Women) Act, 1935, and Section 53 of the Children Act, 1948. At one time, the enforcement of a bastardy order was regarded as a quasi-criminal matter, and the remedy for non-payment as a punishment (see, for example the preamble to 18 Elizabeth, C. 3), but the law now approaches more closely to that applicable to the recovery of a civil debt. Although no onus rests on the complainant to prove the defendant's means or ability to pay, a defendant is simply protected, for imprisonment in default must be preceded by an inquiry as to his means in his presence, and the court must be satisfied that failure to pay is due either to wilful refusal or culpable neglect on his part.

3. The statute law relating to the suspension of a commitment order is as follows:—

Bastardy Laws Amendment Act, 1872.

Section 4. "... if such putative father ... be brought before two justices, and ... neglect or refuse to make payment of the sum due from him under such order, or since any commitment for disobedience to such order ... such two justices may ... commit such putative father to be committed ... for any term not exceeding three months unless such sum ... with the costs ... be sooner paid and satisfied."

Summary Jurisdiction Act, 1879.

Section 5. This Section gives a scale of imprisonment providing shorter terms of imprisonment where the amount involved is less than £20.

Section 21 (1). "A court of summary jurisdiction to whom application is made to ... issue a warrant for committing a person to prison for non-payment of a sum of money adjudged to be paid by ... an order ... may, if the court deem it expedient to do so, postpone the issue of such warrant until such time and on such conditions, if any, as to the court may seem just."

Section 54. "This Act shall apply to the levying of sums adjudged to be paid by an order ... which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums ..."

Criminal Justice Administration Act, 1914.

Section 3. "Where a term of imprisonment is imposed ... in respect of the non-payment of any sum of money that term shall, on payment of a part of such sum ... be reduced by such number of days as bears to the total number of days in the term less one day the proportion most nearly approximating to ... the sum in respect of which the imprisonment is imposed."

Money Payments (Justices Procedure) Act, 1935.

Section 3. "(1) Section four of the Bastardy Laws Amendment Act, 1872, ... shall have effect subject to and in accordance with the following provisions ..."

(a) on an application for the enforcement ... the justices shall make inquiry in the defendant's presence as to whether his failure to pay ... was due either to his wilful refusal or to his culpable neglect;

(b) If . . . the failure . . . was not due either to . . . wilful refusal or to . . . culpable neglect, a warrant of commitment to prison shall not be issued;

(2) On an application for the enforcement . . . of such an order . . . the justices may remit the payment of any sum due thereunder or of any part of any such sum.

(3) Where . . . no warrant of commitment . . . is issued, the application may be renewed . . .

Summary Procedure (Domestic Proceedings) Act, 1937.

Section 5 (1). "Where in any domestic proceedings . . . or . . . for the enforcement or variation of any such order, or in any proceedings in any matter of bastardy, a court of summary jurisdiction . . . has requested a probation officer to conduct an investigation into the means of the parties . . . the court may direct the probation officer to report the result of his investigation to the court . . ."

4. There are practically no decided cases giving any guidance on the interpretation of the above Sections in relation to the subject of this memorandum. Evidence of means is not necessary, *R. v. Richardson* (1909) 2 K.B.851, but this decision must now be read in the light of the Money Payments (Justices Procedure) Act, 1935, Section 8, *supra*.

5. The decision of the justices is put into effect by a document prescribed by the Bastardy (Forms) Order, 1915, described not as an order but as a warrant. The form in the Order, unlike forms of commitment for non-payment of fines, makes no provision in the body of the form itself for part payments, and they are merely shown in the marginal note. The form can be adapted as the Order provides for the use of "forms to the like effect".

6. The Summary Jurisdiction Rules, 1915, contain certain provisions which are relevant. No sum tendered in part-payment need be accepted unless it will secure a reduction of one day in the sentence (Rule 19). When payment is made to any person having custody of the defendant, the payment must be noted on the commitment (Rule 22). Defendant is not entitled to be discharged on the first day of his imprisonment except upon payment in full (Rule 24).

7. Cases of maintenance arrears vary greatly in character. The man may have absconded, and be brought before the justices owing several hundred pounds which are quite irrecoverable, or he may have defaulted while making an honest attempt to perform the impossible task of making one wage maintain two homes and two families. The woman may for several years have made a valiant effort to maintain her children respectably, and through advancing years and indifferent health be in need of a greater measure of support from her husband than when she was herself capable of work, or on the other hand she may be little more than a "gold-digger" who, so long as the Assistance Board provides her with subsistence, takes little interest in the enforcement of the order. Between these extremes many varieties of cases are met, and the task of equitably adjusting the available income is by no means easy.

8. On the hearing of these cases there are three courses normally open to the justices:—

(a) To adjourn the case, week by week, or month by month, subject to a condition that defendant pays the arrears (in addition to the current payment) at a rate fixed by the court.

(b) Where the justices are satisfied that there is either wilful refusal or culpable neglect, to commit the defendant to prison in default of payment forthwith.

(c) Where they are so satisfied, to commit the defendant but suspend the execution of the warrant on a condition similar to that mentioned at (a) above.

Little need be said here as to course (b). In these days no bench is likely to commit a defendant unless the circumstances amply justify such a course and no other method of treatment is justifiable.

As to (a) and (c), however, the position is not so simple, and different views are held as to the efficacy and desirability of these two methods. As the circumstances vary, it is probably true to say that differences in practice will be found within most courts. Many do not make a commitment, either forthwith or suspended, without having

first used the method of adjournment. On the other hand, an adjournment is certainly not a necessary preliminary to a commitment of either kind.

9. *Adjournments.* When a case is adjourned, a defendant is often told that (unless he wishes) he need not attend the further hearing provided that he fulfils the condition imposed. Those who support this course can claim for it the following advantages:—

(a) Defendant does not lose work by frequent attendance at court, and this is to the advantage of the complainant.

(b) If there is to be a commitment ultimately, it is kept in the hands of the justices until the last moment, and the decision is made in the presence of the defendant.

(c) None of the difficulties inherent in suspended commitments (and set out in detail below) can arise.

On the other hand, it is contended that:—

(i) Defendants gain experience of this treatment and tend to treat the adjournment as a formality. If a defendant defaults and does not appear, the proceedings are abortive and a new summons or warrant must be issued if his attendance is required.

(ii) If during an adjournment the defendant fails to keep the condition, the arrears will increase, and, should there ultimately be a commitment, the loss sustained by the complainant is greater. The adjournment can operate to the benefit of a dishonest defendant and to the disadvantage of the complainant.

(iii) In a large court, this means that the court list will often contain many cases which are there merely as a matter of routine.

(iv) If the defendant's financial position grows worse, he will not be slow to notify the court of this, but not so if his position improves. The court may, therefore, acquiesce in payments which could well be increased.

(v) In cases transferred from one court to another, the collecting officer of the first court is bound to notify the clerk of the second court of all payments made during the adjournment. This adds considerably to the clerical work involved, and often means that the work of the collecting officer is almost duplicated in the two courts.

(vi) The fact that substantial payments are often made on the occasion of a commitment shows that action more forceful than adjournment is sometimes needed.

10. *Suspended commitments.* The arguments for and against the suspension of a commitment tend to be the reverse of those set out under "Adjournment", but there are certain difficulties of which those who use this method are conscious. It is not the purpose of this memorandum to urge support for one course or the other, but rather to press for the clarification of the law so that, if the suspended commitment is to be retained as one of the instruments in the justices' hands, they shall be able to use it with no uncertainty as to their powers and the effect of their action.

11. In spite of Section 21 (1) of the Summary Jurisdiction Act, 1879, the suspended commitment appears to contravene the spirit, but not the letter, of the Money Payments (Justices Procedure) Act, 1935, Section 8 (1) (a), for, although there will have been an enquiry in the defendant's presence as to his means, such enquiry does not immediately precede the actual commitment.

12. The two Sections referred to in the last paragraph refer to the "issue" of a warrant of commitment. Is such a warrant "issued" when the decision is given in court or later when it is decided that such decision must be made operative? The word "issue" is used in the Summary Jurisdiction Acts in relation to both the "issue" of a warrant of arrest in preliminary proceedings and also the "issue" of a warrant of commitment after the proceedings in court.

13. If the warrant is "issued" at the sitting of the court, it is then a completed document and incapable of variation. The term of imprisonment will have been fixed in relation to the amount then owing, and there is no provision (except a marginal note on the warrant) for

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giving the defendant credit for part-payments (if any) or reducing the term of imprisonment because of them. In this case, the handing of the warrant to the police appears to be entirely an administrative matter.

14. If the warrant is not "issued" until the defendant makes default, the decision to take this step appears more judicial than administrative. The defendant's default may be serious or trifling. We believe it to be common practice to remind such a defendant of his default and of the consequences, but there is no obligation to do so. He may have been ill or unemployed, and the court may or may not know of this. The wife may be pressing for the commitment to be issued, or she may be anxious to give her husband a further chance. This usually means that the justices' clerk (or collecting officer) reports to the justices such information as he possesses, and the justices exercise a discretion (not in the defendant's presence) as to whether to issue the commitment or not.

15. There is no machinery for varying the decision by giving defendant credit for temporary periods of sickness or unemployment, unless he applies for and secures a reduction in the basic rate of payment, when the justices can remit any arrears. For this reason, many commitments are abandoned and the complainant takes fresh proceedings.

16. On making a suspended commitment, the court is only concerned with the arrears then owing and the condition as to payment relates to that amount only. It is difficult to avoid linking this with the basic current payment, and indeed it seems desirable for the information of the defendant that it should be so linked, and that he should thoroughly understand that temporarily he has to pay the normal amount plus an additional amount for arrears. For the purposes of the life of the commitment, the practice of the courts appears to vary. In some courts all payments made are appropriated towards the arrears, and in others only the additional amounts are so applied. For example, let us assume a normal weekly payment of £2, with arrears of £20 which are to be paid at 10s. per week. Under the first method, when the defendant has made eight weekly payments of £2 10s. each (total £20), the commitment is regarded as exhausted, though the defendant will still be £16 in arrears. Although resulting in abortive commitments, this method has the advantage that the defendant will have the opportunity of coming before the court again in respect of the reduced arrears if he does not continue the effort to reduce them. The other method is to regard the commitment as alive until defendant has paid the whole £20 at 10s. per week, i.e., a grand total of £160. This avoids further proceedings, but the longer the commitment hangs over the defendant's head, the greater is the risk that circumstances will arise which were not considered by the justices. This variation of practice can be confusing when a court which normally adopts one practice transfers a case to a court which uses the other method. It is believed that some courts have adopted the practice of treating all suspended commitments as "dead" if defendant has kept up the additional payment for a certain period of time which varies in the different courts.

17. In some quarters it is suggested that such a condition cannot interfere with the defendant's right to appropriate his payments to the old debt or the new one as he chooses. As between parties, where there are distinct debts, the debtor has the right to appropriate, and if he fails then the creditor has such right (*Clayton's Case* (1816) 1. Mer. Rep. 572, 12 Digest 483. *Knivard v. Webster* (1870) 10 Ch. D. 139), but in a current account there is a rebuttable presumption that the earliest sum is discharged first (see *Bradford Old Bank v. Jaisviffe* (1912) 2 K.B. 833). We doubt whether a debtor has any right to appropriate in face of the justices' power to impose a condition as to payment, but consider it proper to mention the point. Still more do we doubt whether any defendant would wish to claim such a right, and even if he did it would have little effect on the ultimate result, though it might enable a recalcitrant defendant to challenge the validity of a commitment after he had paid a total equal to the original arrears, such as £20 in the above example.

18. When the hearing of proceedings for arrears terminates in a commitment, the justices by virtue of Section 4 of the Bastardy Laws Amendment Act, 1872, then deal with the whole amount due, notwithstanding that because of adjournments this may be larger than the amount included in the original summons or warrant. In the case of a suspended commitment further arrears almost inevitably accrue between the hearing and the execution of the warrant. These cannot be included in the warrant, and there is no machinery for remitting them except in subsequent proceedings under Section 8 (2) of the Money Payments (Justices Procedure) Act, 1935. A defendant can therefore be released from prison still owing a substantial amount which there is little, if any, hope of recovering. It is believed that it is the practice of many courts for the collecting officer, with the consent of the complainant, to write off these amounts. We understand that the Law Officers of the Crown gave an opinion (referred to in *The Justice of the Peace* for 8th May 1948, at page 234) that similar arrears accruing under the Children Act, 1908, were irrecoverable. No arrears are to accrue while the defendant is in prison (Criminal Justice Administration Act, 1914, Section 32 (3)) unless the court otherwise directs. We suggest that consideration might be given to the clarification of the words "since any commitment for disobedience to such order" in Section 4 (*supra*) so as to ensure that imprisonment will discharge all sums owing to the date of release, unless (as in Section 32 (3) (*supra*)) the court otherwise directs.

19. We had hoped to supply the Royal Commission with statistics showing the relationship between the total number of cases dealt with in different courts and the number of suspended commitments, from which it might have been possible to deduce some opinion as to the value of such commitments. There is no common practice of the courts in keeping statistics of these matters, and the cases themselves vary so much that it seems impossible to give a true picture without a detailed analysis of a large number of cases earned through to the final conclusion. In one court, for example, out of 127 commitments suspended in 1950, 32 were actually issued. Of these, 11 were paid either in full or in part, and, strange as it may seem, in four of the cases the issue of the commitment actually led to a reconciliation between the parties. It is difficult to reduce such vagaries of human conduct to statistics. Some figures gathered from the larger courts are, however, attached in the Appendix hereto.

20. The matters we have referred to above are not of great importance in themselves, and are in fact usually overcome in practice without serious trouble, but constant vigilance is needed to avoid this. As the magistrates' courts deal in the main with unrepresented parties, it is important that the law administered there should be clear and easily understood by those parties. We, therefore, conclude this memorandum with two suggestions.

21. The solution to the problem of the suspended commitment probably lies in the speed with which arrears cases are brought before the justices. If the arrears are so small that they can reasonably be discharged by a small additional payment over a period of weeks or months, then the method of adjournment will probably suffice except where the default is really wilful. The collecting officer is now obliged to remind the complainant of the arrears periodically and to take proceedings in his own name at her request, and this provision should prevent the accumulation of substantial arrears. These reminders, and the additional summonses probably following thereon, will add considerably to the work of the collecting officer, and we doubt if it is sufficiently realised that this work is not merely a sideline but an important part of the work of the justices' clerks' office. Prompt collection of maintenance payments can save much public money, not only to the Assistance Board, but also to the police and prison services.

22. We could hardly hope that the Royal Commission would consider these matters of sufficient importance to make detailed recommendations thereon, but we would respectfully suggest that it might be possible that these problems with other minor matters referred to in our main memorandum might be referred to an appropriate body for detailed examination.

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APPENDIX

STATISTICS AS TO MATRIMONIAL WORK IN A SELECTED NUMBER OF LARGE COURTS

Note: M.W.—Orders under Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

G.—Orders under Guardianship of Infants Acts, 1886 to 1925.

Town or Division	Birmingham	Liverpool	Sheffield	Leeds	Nottingham	Newcastle-upon-Tyne	Manchester Co. P.S.D.	Rotherham P.S.D.
Population	1,112,340	802,500	517,000	505,000	306,500		237,800	120,000
Year	1951	1951	1951	1951	1951		1951	1951
Number of orders under which payments are actually being made	4,039	3,129	2,094	2,698	1,686		925	311
Amount collected per annum (net turnover)	£224,555	£138,616	£106,175	£128,766	£90,662		£50,104	£19,704
Summaries for new orders:								
(a) M.W.	—	1,373	590	879	482		281	96
(b) G.	—	361	194	—	94			20
Orders made:								
(a) M.W.	517	371	182	376	228	Figures	272	48
(b) G.	105	202	43	117	76	not		19
Proceedings for arrears (whether by summons or warrant)	2,069	1,271	487	1,383	626	yet	367	88
Commitals to prison forthwith	37	22	1	34	6	available	6	1
Commitals to prison suspended	984	311	214	159	260		198	65
Number of suspended commitals actually put into operation	169	56	135	24	92		18	24
Number where claim paid in part or in full after execution of commitment:								
(a) forthwith cases ...	37	12	Nil	7	31		2	—
(b) suspended cases ...			61	1			8	22

(Received 12th March, 1952.)

EXAMINATION OF WITNESSES

MR. JOHN P. WILSON, MR. ALBERT MARSHALL and MR. B. J. HARTWELL, LL.M., representing the Justices' Clerks' Society; called and examined.

2719. (Chairman): We have here from the Justices' Clerks' Society Mr. John P. Wilson, the President of the Society and Clerk to the Justices of the County Borough of Sunderland, Mr. Albert Marshall, member of the Council of the Society and Clerk to the Justices, Bath, and Mr. B. J. Hartwell, Honorary Secretary of the Society and Clerk to the Justices, Southport, Lancashire. Before I ask any questions is there anything you would like to add to your very helpful and excellent memorandum?—(Mr. Wilson): Very little. I should explain to you that this memorandum was prepared, after consultation with our branch societies and with a number of individual members of our Society, by a committee formed for the purpose, of which Mr. Marshall was the chairman. I should, perhaps, draw your attention to paragraph 5 of our memorandum where we summarise our various recommendations to this Commission. In particular I would refer to the first four recommendations, the first dealing with the need for consolidation, the second dealing with the difficulties arising out of the concurrent jurisdiction of the High Court and the magistrates' court, the third containing some suggestions for the extension of such concurrent jurisdiction, and the fourth dealing with matters affecting the custody of children. I think those are the four matters which we regard as being particularly important. That is all I wish to say at this stage.

2720. Thank you very much. For myself I have very few questions because others are much more familiar with the work than I am.

As regards paragraph 4, I have received the memorandum from the Home Office to which you refer. My first comment arises on paragraph 22 where, having made various suggestions for the extension of the concurrent jurisdiction of the High Court and the Justices, you say:—

"If the matters mentioned are regarded as having any merit, the Society would be glad to assist in exploring the suggestions in greater detail."

Now it may be that some of my colleagues will explore them now, but it may also be that we may call upon you at a later stage to express your views and to help us

on suggestions that come before us from you and from others. In paragraph 30 (a) you say:—

"In the Divorce Court the co-respondent must always be named and made a party where possible, and thus always has full knowledge of the proceedings. There is no corresponding provision in the justices' court, where the only requirement is that full details of the alleged adultery must be given to the defendant, and even this rests only on *ex parte* direct."

Then you refer to the cases and you say:—

"The Society would suggest that to avoid any risk of collusion the third party should either be given notice of or joined in the application and afforded an opportunity to give evidence and defend the accusation if desired."

And then you refer to Section 11 (3) of the Matrimonial Causes Act, 1937, and you point out that in undefended cases, especially in the absence of the third party, "it is difficult to see how the justices can be so satisfied". Another reason, which has been suggested by others, is that it would be more fair that any person who is accused of adultery should be given full opportunity of attending and denying the accusation if he or she so desires.—Yes, we would strongly support that as an additional reason.

2721. I want to turn to a memorandum by Mr. T. F. Davis, who is one of the stipendiary magistrates, and to see what your comments are on that. Your body represents exclusively clerks to lay justices sitting in magistrates' courts?—Yes.

2722. You do not include clerks serving the metropolitan magistrates?—We do not.

2723. But I would like to see what you say about Mr. Davis' comments. It will be convenient if you have the document before you. Will you glance at the paragraph beginning "In my experience on the bench"? There Mr. Davis says that he has had to deal with very few cases of alleged adultery and that he is not aware of

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cases in which hardship arises (putting it shortly). Then, in the paragraph beginning "It must be borne in mind" he says this:—

"It must be borne in mind that the accessibility of the magistrates' courts to persons of small means depends almost entirely on the simplicity of the procedure. Any rule requiring service of proceedings on the co-respondent or on the woman named would lead to endless difficulty, delay and expense."

Then he goes on to elaborate that there in the rest of the paragraph and the next two paragraphs. I should like you to give me your views upon it?—For my own part, I would respectfully disagree with the memorandum. In the first place I have in my experience known many instances where proceedings have been taken in a magistrates' court based purely on adultery. It may be that discretion could have been added but in fact in many cases adultery alone has been relied upon. I see no difficulty in practice in rules being provided—I agree they would have to be provided—whereby a third party should be notified of the proceedings and given an opportunity of appearing and taking part. It is a matter of some interest because the procedure for bringing in a third party is not unknown in magistrates' courts in other spheres. One thinks of it particularly in connection with Food and Drugs Act cases where the defendant can bring in as a third party the person whom he really blames for the offence complained of; that is a matter which is in need of clarification at the moment and I hope that the newly formed Rules Committee will be giving it some consideration at a fairly early date. It may be that in many instances proceedings based upon adultery are not defended but there is always the danger that the proceedings may be collusive. In fact the collusive case would be precisely the one that was not defended. I know by hearsay of one instance where very serious consequences could have arisen if the clerk had not taken some action in order to protect the good name of a perfectly innocent person with whom adultery was alleged to have been committed.

2724. Of course, you could only do something about it where the name was specified, and, I suppose, where it was possible to ascertain the address?—Yes. In my experience the person is known and the name and address are specified. We do not in the magistrates' court normally get proceedings based upon hearsay evidence or anything of that kind. The charges are mostly based upon an association with a named person.

2725. Mr. Davis thinks that substituted service, for instance by advertisement, if the address could not be ascertained by other means, would be too cumbersome; would you agree with that comment?—I think it would be very rarely necessary. My experience is that, nearly every time, the proceedings are brought as the result of a known association. I do not know if my colleagues will agree or disagree, we have not had an opportunity of discussing the matter among ourselves.

2726. If I may finish with you and then invite your colleagues to express views on any point where they disagree with you. Mr. Davis goes on:—

"It should not be overlooked that witness summons can be issued requiring the attendance of a co-respondent or of the woman named if the name and address are known to the complainant."

Then he goes on:—

"It is appreciated that there are limitations to the questions which may be asked (Matrimonial Causes Act, 1950, s. 32 (3)), but if there is no truth in the allegation of adultery it is not likely that the co-respondent or woman named would claim the protection of the Act."

What do you say as to the existing power?—The witness summons could only be issued in the behalf of one party or the other. It can hardly be issued by the court itself. On the assumption that the proceedings are collusive, which is part of the basis of our argument, then clearly the last thing the parties would do would be to issue a witness summons against the innocent person whose good name was being taken away in his absence.

2727. I follow that. Do your colleagues wish to say anything further or are they satisfied with that answer?—(Mr. Marshall): I am satisfied with Mr. Wilson's answer.

There would be no difficulty as providing simple rules, which would not be expensive to work, and I do not think that the comment about the witness summons has any point at all. (Mr. Hartwell): I agree, the matter should be kept simple. I should have thought that it was within the competence of the Rules Committee on which Lord Merriman serves to have devised some simple rules.

2728. Will you pass next to paragraph 18, headed "The non-cohabitation clause"? You say:—

"The average woman desiring matrimonial relief from the justices asks what the rules a "separation order" and has little or no idea of the subtle difference between that order and a maintenance order. The Society would suggest that consideration might now be given as to the proper use of the non-cohabitation clause."

The rest of that paragraph contains a closely reasoned statement as to why consideration should be given, but I do not find in it a definite suggestion as to what should be done about it. Have you any suggestion in your mind as to what is the proper use of the non-cohabitation clause?—(Mr. Marshall): I think I should find it very difficult to make a concrete suggestion. The way we look at it is that the clause should not be put in unless the wife has reason to fear physical violence. The wife may have a rather different viewpoint. We have to remember, too, that there is a vast difference between cohabitation and residence arising from the interpretation of our statutes. It is so easy to bring a maintenance order to an end by a *bona fide* offer to resume cohabitation, but once the non-cohabitation clause has been put in, the position is vastly different, although I do not think we quite know what that position is. I think that there ought to be some clear-cut statutory ruling as to when and when not to insert that clause and as to the conditions under which the clause could be set aside. As lawyers we know the distinction possibly, but the general public, who are bound by the orders, simply do not understand it.

2729. Will you turn to paragraph 42? You point out that your attention has been drawn to a number of matters which relate to questions of administrative detail rather than important principles, and which you deal with in Appendix II, and you say:—

"Even if the Royal Commission does not consider it necessary to make any recommendation with regard to these matters, they might perhaps be referred to a departmental committee for consideration, or to the Rules Committee to be appointed under Section 15 of the Justices of the Peace Act, 1949."

I myself have no questions upon those points, but that is a suggestion which will certainly be carefully considered.—(Mr. Wilson): Thank you.

2730. I should like to express the appreciation of the Commission for your offer in paragraph 44 to assist in gathering information on any particular point. We shall bear it carefully in mind and I think it very likely that we shall avail ourselves of it.—Thank you, we shall be pleased to do anything we can in that connection.

2731. (Mr. Lawrence): Following up the point about service upon the man or woman with whom adultery is alleged to have been committed, last week we had before us a metropolitan magistrate of many years' experience to whom I put certain questions upon this very point, and I gathered that he was opposed to any alteration of the existing procedure upon these grounds. He said, first of all, that within his long experience he knew of no case where any injustice had been done by not serving notice upon the adulterer and, secondly, and I think this was the chief ground for his view, that any attempt to give notice would be bound to destroy the advantages of speed and simplicity in the present procedure. I should be very glad to have your views on these grounds which are given for taking the opposite view to the one your Society takes?—Speed and simplicity are important, but speed is not the most essential element in the administration of justice. Sometimes speedy justice can be injustice. It is not our desire that anything that is introduced should be complicated, nor do we think that it need be complicated. In regard to the first point, I have some hearsay evidence in relation to a particular case which arose in London. I should like to tell you about it but I should much prefer that it was not mentioned in the Press.

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2732. (Chairman): The Press if requested would probably leave it out.—I am sure that will be enough. I will not vouch for the actual details because they were told to me. There will be no names used. The circumstances were these. A man and wife were on bad terms. The woman was in poor health and made a habit of visiting a doctor very regularly, to whom apparently she became rather attached. The doctor knew nothing of this and did not return that attachment in any way. The wife, a rather neurotic woman, in the course of one of the numerous domestic scenes told the husband that she had committed adultery with the doctor. The husband believed her and took proceedings in the magistrates' court for a separation order on the ground of adultery. He did not take divorce proceedings for reasons of his own into which we need not go. That was the position that faced the court, the doctor knowing nothing at all about the proceedings and, as events subsequently transpired, the whole thing being entirely a figment of the woman's imagination, something she had made up in order to annoy her husband. You can appreciate the serious consequences that might have arisen, if the matter had come before the court and possibly got some publicity, though untruthful the allegation was, particularly as the doctor would have had no right of audience nor indeed any knowledge of the case until it came to his ears through such ways as were open to him. The clerk to the justices concerned was very anxious about the position and took advice from the Director of Public Prosecutions. Eventually the matter was sorted out without the tragedy that might well have occurred. That is an extreme case but it is, with respect, an answer to the question that has been raised.

2733. (Mr. Lawrence): Do you think that in the practical working of a procedure whereby an adulterer would have to be cited to the proceedings there would be any difference in large urban areas as opposed to the rural areas? It was said that one of the major difficulties would be that you would hardly ever be able to find the alleged adulterer, who might make himself scarce or give false addresses and so forth, thus inevitably causing delay and that that situation would particularly arise in areas of congested population. Your Society, I gather, represents justices' clerks to lay benches all over the country, I suppose particularly outside those urban areas where stipendiaries sit, so I wanted to know whether you thought that there would be any difficulties in one class of area as against another?—I am glad you have raised that point. It enables me to correct a misapprehension. We represent clerks all over the country, except the clerks to the metropolitan magistrates' courts. For example, such urban areas as Birmingham, Liverpool, Manchester, Newcastle and the like. All these clerks, whether clerks to stipendiaries or not, are also clerks to lay justices and are all members of our Society. For my own part, I come from an urban area in the county of Durham where the population is closely congested and I should say that there would be no difficulties peculiar to congested areas because, in my experience, the charges of adultery are based upon a known association; they are not charges of adultery with some unknown man or something of that kind, but nearly always the result of a known friendship between the wife and the man with whom she is alleged to have committed adultery. It is rare for there to be in any way a casual association.

2734. That shows that you are speaking for every class of petty seasonal division?—Every class.

2735. In the event of the adulterer not being found, I suppose that power to dispense with service is a given case would meet the difficulty?—Yes. We think that it is common justice that a person who is known and named and who is going to be talked about and accused of being, and perhaps proved to be, an adulterer, should have an opportunity of being present and denying the charge.

2736. There is one other matter of procedure about which I should like your views. In cases where a wife, or a husband for that matter, is alleging persistent cruelty, I gather that in your courts it is not necessary, nor is it the practice, to require that even the barest heads of particulars of that cruelty should ever be put down on paper and notified to the person who has to answer the charge. Such a practice would, we were told, be impracticable in your courts because so many litigants are unrepresented and there would not be the facilities for

it to be done. First of all, would you agree that in the interests of fairness the man or woman ought to know, at least in outline, the details of the charges that are being brought against him or her?—If one could carry it through to a logical conclusion, that practice would be desirable. There are, however, as you have anticipated, certain difficulties. In the first place many of these women are not represented and quite a number of them are incapable of preparing particulars of that kind with any exactitude. It would probably fall on the justices' clerk to assist them in so doing; that would not be very desirable. Then, of course, if the idea of pleadings or particulars was once introduced, difficulties could arise because there would be complaints that the pleadings or particulars were incomplete. There might be a suggestion by a defendant that the applicant should not call evidence on a certain point because it had not been pleaded or particularised. The simplicity of our proceedings, which indeed we all want to retain, would be endangered in that way. Of course, there are High Court decisions that particulars of adultery should be given, and such particulars are fairly simple, but when persistent cruelty or desertion is the ground of complaint, the matter is nothing like so easy.

2737. I gather that that your Society would be against any change in the present procedure?—(Mr. Hartwell): I have known cases where the husband and wife have been represented and the solicitor to the husband has asked the wife's solicitor for particulars of the allegations of cruelty, which may, I think, have assisted him, and I have known other cases where the husband has afterwards alleged that certain evidence was now being adduced of which he had no particulars. I think the answer to the husband then is that he must justify an application for an adjournment on the ground that he has been taken by surprise.

2738. I suppose the matter would be rendered much easier when and if the Legal Aid Scheme is extended to magistrates' courts, in which there will then be a greater measure of representation?—Yes, indeed, and we are urging that the relevant sections of the Legal Aid and Advice Act shall be brought into operation at an early date.

2739. In paragraph 21, you say:—

"... we merely give a brief outline of our suggestions:—(a) Matrimonial cases in the justices' courts should be a matrimonial cause and in such cases..."

and then you go on to say what should happen. I do not quite understand that. In what sense would matrimonial cases in the justices' court differ from what they are now?—(Mr. Marshall): This suggestion is, of course, the barest outline, but what I think we had in mind was that once the matrimonial action, involving an issue which might later form the basis of a divorce action, started in the magistrates' court, there should be some method by which the case could be transferred from the magistrates' court to the High Court in much the same sense that a criminal for trial on a criminal charge is moved from the magistrates' court to the judge at assize. As it is, at the present time there is already a sort of link. The justices' clerk is called upon to prepare copies of the orders in the previous proceedings in the justices' court and copies of notes of the evidence, which are often very lengthy and which are used by counsel and often produced at the divorce hearing. We wanted the two courts to be in a sense linked together, when they are virtually dealing with the same issues.

2740. It would really be one cause or matter tried in two courts of concurrent jurisdiction?—Two courts but one of inferior jurisdiction. I do not want to suggest that we wish to elevate the justices' courts to the level of the High Court, but the same issues would be involved.

2741. One obvious result of your proposal would be that the justices would have the power to make an interim order at any time prior to the hearing of a petition. At the moment service of a divorce petition in proceedings in the High Court robs the justices of any further jurisdiction in that matrimonial dispute.—That is a point we would like to stress. We think that often there is hardship. The woman may not appreciate her position, she may have to apply for legal aid and there will be a considerable period of time before she can get maintenance in the Divorce Court; it would be much simpler and speedier

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if the magistrates could make an interim order to continue in force until the divorce petition is heard, of course entirely without prejudice to the final hearing.

2742. You promise in paragraph 22 to supply us, if necessary, with greater detail of that proposal. It would involve largely procedure and discretion rather than any substantive change in the law?—Yes.

2743. (Mr. Mass): Do I understand from paragraph 9 that you are suggesting that the magistrates' court should have power to annul a marriage?—(Mr. Wilson): No.

2744. I did not think that was so, but the very last words are:—

"The justices have no jurisdiction comparable to that of the Divorce Court to annul a marriage on the ground of non-consummation, but this ground can be raised before the justices as a defence to desertion."

That is merely a statement of fact, not a suggestion that the court should take further power?—No.

2745. Regarding paragraph 12, I want to make this suggestion to you for your comment. Assume that the rules gave the Divorce Court power to transfer cases to the justices for them to make a maintenance order or to enforce a maintenance order and thereafter the justices continued to have jurisdiction in that respect. Do you think that if there was such a rule and that the order of the Divorce Court could be made early on in the proceedings, it would help the justices with the difficulty which may arise when a petition for divorce has been filed?—It would assist of course. I do not think it would answer the matter completely. If I may refer you to paragraph 20, where we quote from the Denning Report:—

"There is a great delay in the applications coming on for hearing and in consequence a wife may be left by the law's delay without means of subsistence . . . a responsible and . . . described the position as 'almost scandalous' . . ."

We think that that quotation describes the position rather well.

2746. The procedure upon which the Denning Committee was commenting is old procedure now. The position has greatly improved and that comment would not be justified today.—May I put it this way? I have a case in my own court. The circumstances are these. Proceedings came before the justices in August and after the case had been going for a while we were told that the husband was asking a divorce. There being some doubt as to how far he had got with the divorce proceedings, the case was adjourned for further information to be obtained. At the adjourned hearing, the wife's solicitor said that he was now satisfied that there were to be divorce proceedings as a legal aid certificate had been granted to the husband as the petitioner. The matter was then adjourned before the justices *sine die*. It will stand adjourned and I have been told within the last week that the divorce case has not started yet. A legal aid certificate has been issued and to some extent the divorce case is pending but the whole thing is in the air. That state of affairs does occur and it seems to me that in a case of that type no harm would have been done if the justices could have made an interim order, at any rate, to cover the period that will elapse between the beginning of divorce proceedings and the matter coming before the Divorce Court.

2747. In that case, of course, if the petition has not been filed, there is nothing to prevent the justices exercising their jurisdiction?—Probably not, but if one is told that divorce proceedings are pending and that the legal aid certificate has been granted one hesitates.

2748. For a matter of days?—Yes.

2749. Concerning paragraph 29, a suggestion has been made to the Commission that when the legal advice centre comes into operation reconciliation officers—I use that expression without defining them as probation officers or as any private organisation—should be attached to the centres. When the justices are sitting as a court for applications, is the probation officer present? Is that the normal practice?—The practice varies. That is the practice of my own court. Each week, an afternoon is set aside when all the people who are applying for matrimonial summonses make their application to a woman magistrate. A probation officer is present and the deputy

clerk or myself. I find that about one-third of the applicants are referred, with their consent, to the probation officer with a view to reconciliation.

2750. Is the atmosphere such that the reference to the probation officer is in any way made compulsory?—No, Sir, it is not compulsory. You will not get any results in that way.

2751. I am just perturbed about the atmosphere. It may well be that with an experienced clerk to the magistrates and an experienced magistrate sitting, the right language is used to an applicant and conveys to the applicant that it would be well for him or her to see the probation officer and discuss his or her troubles, but I can imagine the atmosphere in an applications court being "Well, you must see the probation officer first before you can have your summons."—That is not the position. One can visualise that. I merely say that it does not happen.

2752. What are your views as to whether it should or should not happen?—It should not happen. Clearly if somebody comes to a magistrate and applies for a summons and there is a good case for a summons, then a summons should be issued, but it is proper in such cases for the magistrate to discuss the matter with the applicant by pointing out the effects of separation, pointing out the pros and cons of the situation and informing the applicant that the probation officer is available to discuss the matter with the other party. When a woman refuses the services of the probation officer, then it is our practice to leave the matter. We do not ask the probation officer to take up cases except with the consent of the complainant.

2753. Have you any views as to whether the reconciliation officer should be the probation officer, as an officer of the court, or whether it would be an advantage to refer the applicant for the summons to an outside office, either staffed by probation officers or staffed by a private organisation, so as to remove the negotiations for reconciliation from the shadow of the court?—My experience is limited to referring applicants to probation officers. This is successful in a large proportion of cases. In regard to the negotiations being within the shadow of the court, our probation officers are not in the court when they are conducting this business. They conduct it either at their own office which is quite a distance away or else they conduct it at the applicant's own home. In any event, I do not think that the shadow of the court is any great threat to successful negotiations because the applicant has come to the court for the court's protection.

2754. What I have in mind, perhaps I did not make it clear, is this. Reconciliation is very desirable and the best method should be applied in order to produce the best results. I am concerned as to what is the best method. Are probation officers, who are officers of the court and are dealing with crime, better than, as good as, or not as good as, an outside body?—Well, Sir, the position is this. Naturally probation officers vary in the same way as any other type of officer varies. For my own part, I am satisfied with the service one gets from probation officers in this matter. Being officers of the court they can at least be relied upon to act with discretion and fairness in a way perhaps an outside social worker has not been trained to do. There are advantages in having an officer of the court in dealing with this matter. The fact that they are also dealing with criminal matters does not adversely affect the position at all. It may be that they already know the family; quite frequently the family that produces the domestic quarrel is the family that produces the offender. That is not a factor which operates against their work in the slightest.

2755. In paragraphs 34 and 35 concerning transfers between courts, if an order is made in court A and the man moves to the area of court B, to which court does he pay the money?—He continues to pay court A.

2756. Now if he is to be sent to prison for non-payment which court sends him to prison?—That depends where the enquiry is made. The enquiry can be made in court A even though he has moved out of its jurisdiction or it can be made in court B. Whichever court makes the enquiry can send him to prison.

2757. I have in mind a very simple thing which I think is of the greatest importance. The clerks at the collecting offices get to know these husbands and wives quite

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well. If the husband is ill, they get to know about it; do you agree?—Yes, I do agree.

2758. Do you think that there would be any great advantage if the question as to whether or not he went to prison, in other words, the enforcement of the order, was always to be dealt with by the court to which he is paying the money?—Yes, I think I would agree with that, certainly.

2759. (Chairman): If necessary, there would be a transfer to that court?—Yes. (Mr. Marshall): So far as the illustration goes I entirely agree, but one must remember that the court which is going to send that man to prison, court B, will almost certainly not have before it any information as to the financial position of the wife and her children. With two people living in towns a hundred miles or so apart you cannot, as under the present rules, require oral evidence before one court without causing considerable hardship to one party or the other, but, so far as the illustration goes, undoubtedly the court for the area where the man lives can judge the situation as far as he is concerned far better.

2760. (Mr. Mace): Your suggestion in paragraph 37 (a) for allowing a statutory declaration would answer the point you put?—Yes.

2761. The question of sending a man to prison is so important that it should be decided by the court best able to judge his circumstances?—Yes.

2762. And that is not so today?—There must be an enquiry in his presence prior to the committal but that enquiry may be by a court which is far removed from his home and place of employment and he may come before the court and tell a long long story which the court has no chance to verify and often he cannot be cross-examined by the other party.

2763. And if the court were to admit the clerk's account of the man's circumstances obtained at first-hand by seeing the man, would that help?—Yes.

2764. That is most important?—Very important.

2765. (Chairman): Do you agree with the suggestion that the court to conduct the enquiry and make the committal order, if justified, should always be the court to which the man is paying the money?—(Mr. Marshall): I am not sure that I am at one with my colleagues on this. The situation is this, that the man cannot be sent to prison except after an enquiry; in other words he must be present. That may be at court A or it may be at court B at court A's option. If I understand rightly, Mr. Mace is suggesting that if the husband goes to live in the area of court B, court B should thereupon automatically become the collecting officer instead of court A. I do not know that I agree with him, the reason being that a wife who has become accustomed to dealing with court A would then have her business transferred, so to speak, to court B and she would then be put to the not inconsiderable expense of having the money transmitted to her from court B, whereas she probably went into court A and collected it.

2766. (Mr. Mace): The chief anxiety is to get these women their money, is it not?—Yes.

2767. That is the problem. A good payer causes no trouble whatsoever; it is the bad payer. Is it not the court at which the man attends which has the best chance of knowing whether he is on bad times or whether he is wilfully making default?—Yes.

2768. And the question of expense in transferring the money from one court to another falls on one of the parties today?—Yes.

2769. Today it is on the husband?—Not necessarily.

2770. Sometimes it is on the wife?—It may be, if the wife moves from the area of court A to the area of court C.

2771. So surely the difficulty of expense can be easily overcome by a rule which makes the husband pay the costs of transferring the money in any event?—Yes. I would not like this point to be lost sight of. Husbands are very mobile. I find that they may be in town B today and in town C in three weeks' time and in town D in another month; generally speaking, the wife, particularly if she has small children, is more static. I am not suggesting for one moment that court B in Mr. Mace's

illustration is not best able to judge the circumstances, though I think that there are cases where husbands can come from court B to court A to be heard, but, the enquiry having been heard in court B, I cannot see why court A should not go on with the collection unless at the request of the wife it should be made by court B.

2772. We will leave the point there. If there is any more help you can give us we will write to you. In paragraph 38 do you want a clear-cut ruling as to when to put the non-cohabitation clause into the separation order and when to take it out?—(Mr. Wilson): I think the proper answer is that. The non-cohabitation clause should be left in in cases of cruelty and adultery and nowhere else; there is nothing in the law that says this and I think it would be in accordance with modern thought if the law so provided.

2773. Does it need legislation? If the magistrates think fit to put the clause in, the law gives them power to do so. If the magistrates do not wish to put it in, there is nothing in the law which compels them to do so. How do you want the law changed?—I do not want personally to press the matter further. Recorded cases do show that there are cases where the presence of the clause has caused embarrassment.

2774. In Appendix II, you are asking for power to include in the magistrates' orders children born before the marriage whether of the union or not but resident with the parties?—Yes. I should like to make that clear because I do not think the memorandum is very clear. We are not suggesting that there should be a specific order for such children, but we think it would be a good practice, in making an order for the wife, to allocate a certain amount of the payment as being in respect of the expense she will be called upon to bear in relation to such children, so that, if anything happens to those children, that could be a ground for varying the order.

2775. (Chairman): You mean a payment to the wife on the footing that she will provide for the children out of it and, if she does not, the order can be altered by increasing the amount?—On application, yes.

2776. This is the suggestion in paragraph 2 of your Appendix II?—Yes, I think it is not very happily expressed. It can be read as meaning that we are asking for power to order a specific payment for the children. We are not asking for that, because the husband has no legal obligation for the maintenance of those children by reason of the present National Assistance Act, the poor law proceedings having been altered in that regard.

2777. (Mr. Mace): Why do not you ask for power for the justices to do that? Assume the facts were that the man was maintaining those children while living with his wife, would it not be better really if the justices had power to make orders in relation to children who were living with the parties and had some relation to them, either illegitimate children or children of a previous marriage?—I personally would like to agree with that, but to give such a power would be contrary to the present run of the law in this matter. Since the National Assistance Act of 1948 the man in those circumstances has no legal obligation to maintain any such children and I could not imagine any legislation on the basis of giving such a power being accepted by Parliament in view of the National Assistance provisions. We do, however, suggest that such children should be taken into account by the court in deciding the amount to be given for the wife, and we take it a little bit further by saying that in taking it into account the court should appropriate a definite amount. There should be one sum ordered to be paid, but a certain amount should be appropriated so that if there was a change of circumstances that amount could be varied accordingly.

2778. As I understand your suggestion in paragraph 1 of Appendix II, if a summons for desertion is brought before the magistrates by a wife and after a very long hearing it is dismissed, although in fact the parties are separated, the only fact that is at present established by that decision is that the husband did not desert the wife?—Yes.

2779. Therefore there are two alternative points left undecided, one that they separated by consent and the other that the wife deserted the husband?—I think that is so, yes.

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2780. And you suggest that if, at the end of that hearing, the magistrates come to the conclusion that the wife deserted the husband, they should record that finding?—Yes.

2781. And I presume that at that stage divorce proceedings are started by the husband against the wife?—Very frequently, yes. We think such a finding would be of assistance to the parties and to the Divorce Court.

2782. How would this be carried out in practice?—I think in practice one would do it by a short summary of reasons for the decision. It is customary at the end of the notes of a case of any substance for there to be a note of the reasons for a decision. In that case the reason would be because the wife had in fact deserted the husband.

2783. You suggest the issue of a document signed by the magistrates?—What happens very frequently is that we are asked to provide copy notes. Very frequently those notes are certified by the clerk—I assume that that is done because then they are taken more notice of in the Divorce Court—so what would happen would be that the complete note together with the note of that finding would be certified by the clerk; if necessary the matter could be entered into the court register and a certified copy of that provided.

2784. Are you not suggesting that there should be an order by the magistrates and then, if by rules of the Divorce Court any orders by magistrates become evidence of themselves, the finding of desertion would automatically become a fact which could be proved in the Divorce Court by the production of the magistrates' order?—I am afraid you cannot take it quite that far because there would be no order. The magistrates would be dealing with a complaint; if the complaint is then dismissed, I do not see that the magistrates can make any order. There is no procedure, of which we are aware, at the moment for any sort of cross-summons by the husband or anything of that nature. All the magistrates could do would be to make a finding of fact that the wife had deserted the husband. I do not think they could take it further.

2785. Turning to paragraph 6 (b) of Appendix II, it was suggested to us by a witness the other day that the procedure for appeals in matrimonial matters should be varied. Have you considered the suggestion, that the case should go to the quarter sessions as a re-trial in the same way as an appeal from the magistrates in criminal proceedings? That would allow an appeal on fact but if the unsuccessful party desired to appeal on a point of law, the case should go to the Divisional Court in the same way as a case stated? Perhaps you would also consider whether the appeal should be made to the Divisional Court or to the Divorce Court?—There is at the moment an appeal on law to the High Court. Upon that, there is no difficulty at all.

2786. May I stop you there? The point is this, that the appeal should go by way of case stated so that the parties should have the opportunity of drawing up a case?—The present procedure is this, that the justices provide the statement of their reasons for their decision. That is not quite a case stated but if it is properly prepared it should set out the arguments on each side, the cases to which reference was made and then set out, much as a case stated does, what the reasons are. The practice is in that regard of course a judge-made practice. In regard to the question of appeals on fact, we think that is a matter of great difficulty for this reason. Mr. Mease has referred to an appeal on fact from a criminal case. The essence of a criminal case or a bastardy case is that the facts are complete, the whole thing is in the past. A matrimonial case, however, is a fluid, fluctuating and continuing thing and by the time the matter comes before the court of appeal the facts may well have altered; we visualise that factor as presenting a very great difficulty, most particularly in cases of constructive desertion and the like where the position can alter from week to week. One might find that the position between the parties which justified a decision by the magistrates was quite different by the time the case came to be reheard before a court of appeal. Therefore, we think the analogy of an appeal on fact in respect of a criminal case is not a true comparison. The further difficulty is of course connected with the nature

of the court of appeal. It is not perhaps for us to say much about that, but we do feel that matrimonial matters can be dealt with, as they are, by a court consisting of two or three magistrates of both sexes, that such a tribunal is usually well able to judge facts and that going to a recorder or to quarter sessions would not necessarily be an advantage.

2787. In a memorandum by the London Magistrates' Clerks' Association, it is suggested that it is most undesirable that, on the one hand, the husband should have no prospect in his lifetime of being relieved of the burden of a maintenance order, and, on the other hand, that a wife should be encouraged always to remain her husband's dependant. They say:—

"We therefore consider that the court should be given discretionary power to limit the duration of an order having regard to the length of time the parties have been married, their circumstances and their ages and the ages of any dependent children. There should also be an amendment of the law to make it clear that the power to revoke a maintenance order provided by the Criminal Justice Administration Act, 1914, Section 30 (3) includes power to revoke such an order at any time upon the court being satisfied. . ."

I think I have read sufficient to give you the suggestion they are making. May we have your comment?—They would have to be personal comments because this is a matter which the Society has not considered. I think what the Association is against is what one might describe as a "pension for life" to somebody who has done little to earn it. I think that is what it boils down to. One sympathises with that type of case but I think it would be very difficult to visualise any limitation working satisfactorily in practice. As people get older their dependence upon the order tends to increase. If one could delay the operation of the order, that might be of more use in practice, but I cannot quite see a scheme of that kind operating successfully. I would like you to hear what my colleagues have to say.—(Mr. Marshall) I think the number of orders that can be regarded as conferring a pension for life are really comparatively few. I think that of the orders that are made in magistrates' courts there are very few still functioning fully, say, ten years after the order was made. In those cases where the orders are still functioning after that period, it is almost certainly on the lines Mr. Wilson has suggested, that is, where the parties are getting on in life and the wife has no other means of subsistence, because she cannot go out to work. I think the idea that these maintenance orders are just a pension can only be exaggerated.—(Mr. Hartwell) I do not agree with the suggestion at all.

2788. In paragraph 15 of your second memorandum, are you suggesting that there should be some machinery whereby, if a man is sick and gets payments under the National Health Insurance Scheme, the order should be benefited if he paid in a portion of those payments? Is that how your suggestion would be put into practice?—That might be a way of doing it. I ought to say that I do not favour suspended commitments. This is an example of the kind of thing that happens. An order was made recently in a city court that a man was to be sent to prison for a certain period unless he paid at a certain rate per week. I, being the court collecting officer at the receiving end, did not receive any money and with the authority of the wife asked that the commitment be put into operation. I was then told that the proboscis of that court is not thereupon immediately to send a man to prison but to ask that he be interviewed by the probation officer. The probation officer then made enquiries and found that the man was receiving a course of injections for some ailment or other. I then said, "What do you propose to do about the commitment order? I want an answer one way or the other." I was told that one of the magistrates who had made the commitment order had been consulted and he thought that in the circumstances it would be inappropriate to use the commitment order at this stage. Those are the kind of difficulties in which one can become involved with suspended commitments. I am not saying I am against such orders in all circumstances. I recognise that they may have some use but I am not sure that one can by rule provide for all the kinds of contingencies that can arise in these cases between the time of making the suspended commitment order and the time when it should come into operation.

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2789. I think your memorandum sets out very fully the pros and cons with regard to suspended criminal orders. It is when the husband is ill that there is a difficulty. There is power in the court to remit arrears but wives do not like arrears remitted, particularly if they think their husband can pay them later on. If arrears arise because of genuine sickness or unemployment, do you think that the man should make up those arrears out of future earnings or should he be relieved by law of this liability provided he paid in a portion of his allowance in respect of sickness or unemployment?—My answer is this, that when it is found that a man is ill and is receiving national insurance, we ask that the man should pay over the portion he is receiving in respect of his wife and children; then the practice in my magistrates' court is for that sum during that period to be treated as having met the requirement under the order. My own experience is that wives are usually very ready to allow the arrears to be remitted and are often agreeable to allowing large sums of arrears to be wiped out altogether, the more so if there is justifiable reason for non-payment such as prolonged ill-health.

2790. Would you support the view that any reconciliation officer who is doing work to bring the parties together should have an absolute privilege in relation to the communications he or she receives?—(Mr. Wilson): That sounds attractive but one must think of the question against the whole background of privilege. As I understand it, the privilege is not the privilege of the probation officer any more than it is the privilege of the solicitor; it is the privilege of the party, and as I understand the reported law at the moment, the party is fully covered in that anything that is said between party and probation officer is a privilege at the behest of that party. That I find works quite satisfactorily.

2791. When the National Association of Probation Officers gave evidence, I put to them the question, do not you find that as a general rule the clerks send the applicants to you and they said, no, that they had instances where clerks were not interested to send the parties to probation officers. Would you like to comment on that?—Only to say that I think it is exceptional. I suppose one can find instances of everything, but I find that most clerks, even those the extent of whose business does not warrant an applications court—and one must remember that one cannot have that sort of procedure everywhere, it is only introduced when there is a sufficient volume of work—are very ready indeed to get the assistance of the probation officer in all appropriate cases. I am sure that is the general experience of all probation officers of my Society.

2792. (Mr. Maddocks): Would you turn to paragraph 25? I am interested in your suggestion that the question of custody should be an entirely separate issue, but what would you suggest should be done where an issue between husband and wife has been decided and then the husband, on being asked whether he has anything to say on the question of custody, replies "No, my wife must have the children; she is a very good mother; I cannot have them because I cannot possibly look after them"? Is there any other enquiry which ought to be made?—Not very much more, in the ordinary case. It is the practice in my court, no doubt in others, for the justices to enquire whether the mother will be staying at home or going out to work now there is a separation. That often arises, but having satisfied themselves upon that matter, they proceed to make the order. What I think is a good thing is that the justices do apply their minds to the matter and make a specific order of custody, and do not merely make it automatically.

2793. Supposing some suspicion arises in the course of the proceedings that the woman the husband wants to have the children is not a very good mother, who is then to have the custody if the mother is not to have it?—(Mr. Hartwell): The power to make an order for custody is discretionary; the justices are not obliged to make it.

2794. But, as a practical matter, somebody has to look after the children? One has either to make an order for custody on that day or to adjourn it to another day. The husband says, "I cannot have the children," the court does not think the wife suitable; who is to have the children?—(Mr. Wilson): You cannot alter the fact that the children are the children of the parties and one makes the best job one can of the rather unfortunate circumstances before one. As a matter of practice, when

ever doubts arise the magistrates sometimes request me to inform the local branch of the N.S.P.C.C. of the circumstances so that the Society at least can keep in touch with the proceedings.

2795. That may be common form, but as a practical matter somebody has to have the children?—That is so.

2796. In paragraph 25 (b) you say:—

"A similar suggestion was made in the Report of the Deering Committee (paragraph 34), but we differ from that Committee in that we feel that the decision as to a decree or order between the parties should follow and not precede the decision as to custody."

Does that mean that when you have an application by a woman for an order on the ground of persistent cruelty of her husband and she is also asking for the custody of her children, the custody issue should be decided first?—I do not think that particular paragraph is very well expressed. I think what is intended is this, that the justices should first of all consider the allegations of persistent cruelty, that they should come to their conclusion on that, deciding, if you like, that the persistent cruelty has been proved, and that then, before they proceed to make their decision public, they should consider the issue of the custody of the children and make a decision on that matter, instead of announcing their decision to make the separation order and then considering what to do with regard to the children.

2797. (Dr. Robertson): One further point in regard to the custody of children, are your courts making increasing use of children's officers now?—For my own part, no, not in the matrimonial courts. We do not see much of children's officers there.

2798. Then in regard to the work of the collecting officer, you mention in paragraph 41 (d) England and Wales and the Commonwealth, but there is no reference to Scotland. Does that indicate that you are having difficulty in receiving money from that country?—Many of us have, because this is a fairly new procedure; until the passing of the Maintenance Orders Act of 1950 it was impossible even to get an order there, let alone to get any money. The procedure there is quite different from ours and, on the whole, speaking from experience of a court in the North-East of England where we have had some of these cases, we have been paid rather better than we anticipated.

2799. Can you suggest any remedy for this state of affairs?—No.

2800. (Mr. Allen): In paragraph 36, dealing with attachment of wages, of course it is important to ensure that the wife does receive her money. Would you like to make any statement about the attachment of wages? In particular ought one to attach any portion given in respect of the wife of payments under the National Insurance Scheme? Do you think that would help?—As you know, attachment of wages has been canvassed on several occasions, I think most recently in the Women's Disabilities Bill, which was before Parliament this session. It does appear to us that this is a matter requiring a great deal of care and thought. Attachment of wages does not operate in this country. We believe it operates in Scotland. We have no knowledge as to how it works there and it would be interesting to find out. From the point of view of operating it in England and Wales we make three points. There is the matter of principle, which other witnesses have mentioned, that is, that it would involve communicating to an employer the private affairs of the employee. The next problem is this, that it would involve an employer deducting a specified amount each week from a man's wages and sending that to the court. Now he would have to deduct that amount regardless of the amount which the man earned during that particular week. You might have a man earning an average of £6 a week with an order against him of £3 a week; normally all would be well, but if a week came when the man only earned £3 10s., nevertheless the employer, by law, would be bound to deduct that £3. This is taking an extreme case. You would get other cases approaching that extreme where the husband would probably say "I am going to throw up this employment." We do deal with a large number of stupid people, people who are very capable of cutting off their nose to spite their face and who would throw up a job rather than see some of their wages going direct to the

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wife. Then there is the further problem of the casual employee, the man perhaps on the docks, who is known by those who engage him as a man against whom an order exists and who, if he is engaged, will cause the employer the trouble of deducting and paying over. That man, I think, may lose the employment that would otherwise be available to him. Then another difficulty, and I think it is a real one, is that if attachment of wages is going to operate, it will operate not merely in respect of the large employers of labour but every employer of labour, and one would expect that there would be the odd case of the employer who deducted the amount payable and who either failed to reimburse it at all or failed to reimburse it at the proper time. All these things are very real difficulties standing in the way of attachment of wages. On the question as to whether payment of unemployment benefit could be made direct to the wife, in practice we find that causes no difficulty. Where a man is drawing unemployment benefit, practically always the pays into court the amount which he draws for his wife and child. If he fails to do so he may be prosecuted quite apart from any effect it may have upon his benefit. While there may be the odd case I think it is exceptional for a man to default in that connection.

2801. Could you tell us if it is your experience that unhappy homes, broken homes, are the cause of juvenile delinquency?—I would say they are a contributing factor towards juvenile delinquency and one which one sees time after time in juvenile courts. I am sure my colleagues will bear that out.

2802. (Chairman): The question, as I gather, bracketed unhappy homes and broken homes?—Yes.

2803. (Dr. Bain): Mr. Wilson, you said that you did not have experience of the use of children's officers in matrimonial courts but I wonder if you would think that they would be appropriate people to supervise children after an order for custody had been made?—They might be in individual cases; of course they have general duties and responsibilities towards all children, as I understand it, at the moment. One would hesitate to recommend an alteration in the law whereby when one has given somebody the custody one should also put that person under some supervision. It is a matter which would want a lot of thought. Certainly I do not think there is any need for a general practice of that kind.

2804. I meant cases where the court was worried about the children?—The children's officer may well be a suitable person to help. I instructed the N.S.P.C.C. Inspector, thinking of the grosser case perhaps of cruelty, but in other cases the children's officer would be a very useful person I am sure.

2805. (Mr. Beloe): In paragraph 25 (b) I was not quite clear what you meant by saying:—

"We are of opinion that all courts should have the power to require such an appointment in matrimonial cases."

Is a guardian ad litem required on behalf of the children's property only or the children's interests?—The children's interests. What we ask there is that any court before deciding the question of the custody should have the right to call for an independent report. We are not suggesting that this is required every time but we are asking that the court should have the right to do so in the appropriate cases. We point out by way of comparison that where an infant has property, or where there are adoption proceedings, there is a guardian ad litem appointed and we think something of a like kind would be appropriate in the difficult cases of custody.

2806. What I had in mind was this, it is not entirely analogous, but when a child comes before the juvenile court there is a definite system laid down by the Children and Young Persons Act, 1933, by which one can find out almost anything one wants to know about that child. Is not the question of a child's future so important that there ought to be some such system to which one could turn in respect of the custody of the children?—We feel that the power should be there. We do not seek to use it every time but we think that it should be there.

2807. When you say "independent report" do you mean from a schoolmaster or schoolmistress, for instance?—The first person we have in mind is the probation officer because he is available in the court, he often knows the parties beforehand and he has heard the case. We find very often that he would be a suitable person. This is done unofficially quite frequently now.

2808. I know it is. It did strike me that the person who has known the children for several years might be very helpful?—Yes, the schoolmaster would know the children but may not know enough about the home background; sometimes he does, sometimes he does not.

2809. He will know a good deal about the effect of the home background on the children?—Only sometimes. It depends on the schoolmaster.

2810. But do you ever seek the advice of the schoolmaster in these cases?—I have no experience of having done so.

2811. So you do not really know?—No, I am judging from the reports one gets in the juvenile court emanating from the schoolmasters; sometimes they are very helpful, sometimes they are not. (Mr. Hartwell): The question arises, we find, most acutely in guardianship cases where there is an issue as to who is to have the custody and two homes are offered; then it is very helpful to have someone whom one can ask to go, particularly in an official capacity, to look at both homes and bring back a report.

2812. If we are going to make use of the probation officer a great deal more than is now done, the probation service will have to be enlarged, will it not?—(Mr. Wilson): Not so greatly. This practice is carried out now in many courts. What we seek is that the court should have the right and power to do it. I do not visualise that this particular suggestion would involve any extension of the probation service. I am dealing now purely with this question of the custody of children.

2813. In paragraph 10, where you refer, in passing, to the question of the court's power to give consent to the marriage of an infant, have you any statistics which show whether such marriages have been a success?—I know of no such statistics. (Mr. Hartwell): No, I know of none.

2814. Regarding paragraph 4 of Appendix II, the suggestion that the provision for making an order for children over sixteen might be extended seemed to me, if I may say so, extraordinarily important for some children. Is it your experience that many children of broken homes are unable to go on with their education because the inability to maintain them ceases at sixteen?—(Mr. Wilson): I have not personally experienced that. Under the existing law in respect of a matrimonial case there is the power to extend the order to children up to twenty-one; the fact that some provision has not been made under the Guardianship of Infants Act seems to be just a gap in the law and we seek to bring the Act into line.

2815. (Chairman): I think this particular paragraph is referring only to guardianship and not to making an order for payment of money. (Mr. Beloe): I am sorry, I misread it. Perhaps what I have said may nevertheless be of some importance. (Chairman): I think it may very well be, but that particular paragraph is dealing with guardianship as I read it, and suggests the extension of the provision to permit an order for guardianship for a child following a full-time course of education after sixteen. However, you have put your question and it is answered.—(Mr. Marshall): I think the real point of this paragraph is that the justices cannot make an order once the child is sixteen.

2816. An order for what?—Custody, maintenance and access. But the Chancery Division and I think the county court can make an order; the justices cannot; you may have cases where there are several children in one family, two under sixteen and one over sixteen still going to school and the magistrates' court cannot deal with the one over sixteen.

2817. This paragraph is meant to have general reference to guardianship, custody and maintenance, is it?—I think that is the real answer.

2818. (Mr. Selous): And you seek really to ensure that no child shall be deprived of the opportunity of going on to the full extent of its education?—Yes.

2819. (Lady Bagg): Continuing with custody, do you not think that there may be certain advantages in having an informal report about the children from the probation officer? Do you think that if the requirement were embodied in some rule or law, the procedure might become as formal as it is in the juvenile court? The report would have to be read aloud and anything disadvantageous would have to be shown to the parties, thus creating rather an unpleasant atmosphere. Do you not think that there is a good deal to be gained by the present elasticity?—(Mr. Wilson): That is an attractive proposition but unfortunately it is rather dangerous because, if the justices are going to base their decision upon the report of a probation officer, then I think material portions of it should be given in the presence of the parties concerned. I would not like to advocate that the justices' decision should be based upon something which is not really evidence and is not known to the parties concerned. All we are seeking to do is to give the court the power to do what it often does now informally, of saying to the parties, "We want to send the probation officer to see the two homes, he will let us have a report about the conditions which will enable us to decide where this child should go". (Mr. Harwell): May I add, in supplement to that, that sometimes a rule serves as a useful reminder to the court of a power it might otherwise overlook?

2820. You said to my Lord Chairman previously that a man may not be committed to prison unless he was present in court. I wanted to ask you about that in connection with the suspended commitment. Am I not right in thinking that very often, perhaps generally, the order is put into execution by the clerk to the justices, possibly after an informal reference to the court but not necessarily?—(Mr. Harwell): It is a responsibility I would never personally take. The way I have done it is to obtain the authority of the wife as to whether she waives the commitment order to be executed; and if she says "yes" I think the commitment should go forward.

2821. Then who takes the responsibility for deciding upon whatever extenuating circumstances there may be? Is that a matter between the husband and the clerk, the fact that he has been ill or has had less wages?—Those things are not so difficult in practice as they appear. Generally we know the situation of a particular person. We would never dream of letting a commitment be executed without having first found out why the payment was not being made. Certainly if it was discovered that there were good reasons we would tell the wife if she proved unable to have the commitment order issued and we would do what we could, I suppose, to deter her from any vindictiveness.

2822. I was wondering if you thought that it mattered that the case did not go back to the court and I think it was you, Mr. Hartwell, who said that you did not like suspended commitment orders?—Yes, I did say that. I cannot see that it is appropriate to go back to the court. The court has said that the man shall go to prison unless he pays. I would say this, too, that where a long period has elapsed after a suspended commitment order has been made, the usual practice is to begin all over again with a fresh complaint of arrears. That is the only fair thing to do in the circumstances.

2823. Do you think that the probation officer is probably not only the best but perhaps the only agent for reconciliation once a man or woman has actually come to the court with his or her difficulties? It might be very difficult if the husband or wife came to the court in an angry mood and were then told to go away and see some reconciliation agency in some other place, possibly not even being supplied with details as to whether they had to pay the agency or as what the circumstances of the interview would be. Would you think that a great deal is lost, in fact perhaps the whole chance of reconciliation, if there is not somebody on the spot at the court to deal with the applicant immediately; otherwise he or she merely comes back again hoping for the summons instantly?—(Mr. Wilson): Upon that, most of us have more experience of

the probation officer than of any other agency and, speaking for myself, and I believe for my colleagues, we are very satisfied with the services that we get in that regard. Some probation officers are particularly gifted at this work, others are not so successful, but in the main we find that their standard of success is extremely high in this reconciliation work and we have no complaint and no desire to alter the position.

2824. I am only putting it to you, is it not essential to have a person, say the probation officer, there on the spot?—I think that any procedure whereby one refers the applicant to somebody a week next Tuesday or something like that would be fatal. It must be somebody probably on the spot or available fairly soon.

2825. In paragraph 31 (b) you say that the collecting officer is bound to take proceedings at the complainant's request. Do you find that sometimes the woman will not take proceedings because she is very well satisfied with what she is getting from the Assistance Board? Would you like to see the collecting officer himself able to take proceedings?—No. Again speaking for myself, and I think for my colleagues, I do not like taking proceedings on behalf of anybody. The wife can ask us to take proceedings and for my part I much prefer the proceedings to be in her name rather than in mine. One does come across cases where the woman is receiving payment from the Assistance Board which is quite satisfactory to her and she then is not very interested in the non-payment of maintenance by her husband. In those circumstances the Assistance Board should go to her and interest her in the matter. I think they are entitled to ask for her to take an interest as they are maintaining her. I do not want to start proceedings on my own simply to enforce somebody else's orders. (Mr. Marshall): I should like to add that I entirely agree with Mr. Wilson. As collecting officer, one tries very honestly to demonstrate that the court and its officials are impartial and that the collection is done on behalf of both parties. We keep a record for the woman and we keep another record for the man; and if we start taking proceedings for the woman we have obviously gone over to her side of the fence. In my court, on the instructions of the justices, if the woman wants me to take proceedings, I send a reminder to the man before doing so, pointing out that I shall have no option but to take proceedings if he does not pay. It is my duty to try to make it abundantly clear that I am only going over to the wife's side of the fence when pushed there.

2826. (Chairman): You find Section 4 (2) of the Act very useful?—It is very useful as long as one makes it clear that one is being fair to both parties.

2827. (Lady Bagg): Except that the husband can build up considerable arrears in such a case?—(Mr. Harwell): I think that, whether or not the wife takes an interest in the amount, it is the practice for the collecting officer to do so. I do myself, I review every case periodically and find out why payment is not being made.

2828. With regard to paragraph 1 of Appendix II, would it satisfy you if the wording of Section 1 (4) of the Act provided that no order shall be enforceable while the married woman "cohabits" with her husband?—(Mr. Wilson): I think that might be a satisfactory solution.

2829. In these days of shortage of housing do you agree that it would be possible for a husband not to be looked after by the wife, but to live on in one room in the house?—That does happen, and we know that application of the cases referred to, *Evans v. Evans* and *Whitely v. Whately*, can be a real hardship.

2830. If the wife just resided in the house, she could still have her maintenance, you would hope?—Yes, we wish that.

2831. (Chairman): Have you seen the case recently decided in the Divisional Court, *Harwin v. Harwin*, which deals with this matter? The Lord Chief Justice kindly sent me copies of the judgment today.—Does that carry the matter further? (Chairman): I think you will find it very interesting.

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MR. JOHN P. WILSON, MR. ALBERT MARSHALL AND MR. B. J. HARTWELL, LL.M.

[Continued]

2832. Arising out of one of Lady Bragg's questions, is the suspended committal order made by the magistrates in the same form as the order I used to make as a judge in Bankruptcy, namely, the order is made for committal, but it is to lie in the office and not to issue if and so long as the man does certain things? Is that the form?—That is the effect. It is not drawn as formally as that but in the register we have a statement to that effect.

2833. The magistrate makes a committal order, but you have a note which in effect suspends it so long as certain things are done?—That is so. (Mr. Maddocks): The note is typed on the side of the order, "suspended so long as 10s. 6d. a week is paid".

2834. (Mr. Brown): In connection with custody of children, in reading paragraph 25 I understood that you were suggesting that the issues relating to the children should be decided first, before the case of the parents was considered at all. Do I understand you now to modify that and to say that you would try the case of the parents, not give the decision, settle the question of the custody of the children, and then give the decision on the parents' case?—That is so. May I make that more clear? Usually the issue between the parents forms the basis of the proceedings and unless a case is made out of custody, desertion or whatever it is, we are not concerned with any question of custody at all.

2835. Is that your main reason for not putting the issue completely before the court and dealing with the innocent people first before you come to those who are partly guilty?—There are other reasons. (Chairman): Arising out of that, I can see a difficulty in finally making up one's mind about the children before one has decided whether there is to be a separation or not. That is perhaps what you had in mind. However important the interests of the children may be, you have first to find out what the position is before you deal with them.

2836. (Mr. Flecker): I should be grateful if you would expand a little paragraph 8 of Appendix II, dealing with the case where a spouse who has custody suddenly dies and the question arises as to what then happens to the children.—(Mr. Marshall): I have a case in mind at the moment where there were three children. When the mother died, I think one was just about eighteen and the other two were still under sixteen and at school. The eighteen-year-old became mother of the family. Now the wife's maintenance order dies with her. Surely it should be possible for that elder girl, who becomes mother of the family, to have a maintenance order against the father for the two children who are left in her care. A decent and honest father would pay without an order, but the awkward one would not.

2837. Suppose the father wants to come back into the picture; has he the right to do so?—I think the position is that he has the right to assume the custody again, but if he is the awkward father, he does not do so. If he is the decent father, he might very well want to do so and would do so.

2838. Supposing he would like to have his children back but is the type of person who ought not to have them, would the matter automatically come to the court?—There are complications in the Guardianship of Infants Act. Unless the mother has appointed a guardian by will—and she very rarely does that—he would have the right to take charge of the children.

2839. Could a third party, such as, shall we say, a local authority, go to the court and represent that he was an unsuitable person if there were reasons to think that he was?—They could do that under the Children and Young Persons Act.

2840. (Mr. Seloe): But would you not agree that under that Act a local authority has to have a pretty strong case before it can step in against the father?—Quite, but if the mother had died and two children of school age were left without any maintenance from their father and without any care, surely that would be a pretty strong case for a local authority to step in.

2841. I understood Mr. Flecker to be trying to prevent the father stepping in when the father was unsuitable.—Yes.

2842. It is a far cry, is it not, from the court deciding whether a child should go to its father or mother to the local authority successfully applying to the court against the father having custody?—Quite, but we should start off on this basis, that at some time in the previous history this father had either deserted the mother or had been cruel to her or neglected to maintain her. There would be a black mark against the father from the word "go".

2843. But if you look at the Children and Young Persons Act you will find it rather difficult to show that that type of case fulfils the conditions laid down in that Act?—Yes.

2844. (Mr. Flecker): I wondered whether in paragraph 30 (d) you were merely calling attention to what appears to my untutored mind a somewhat Gilbertian situation or whether hardship did arise?—I have never struck the situation in practice, but there is an anomaly which rests on this, that the Matrimonial Causes Act, 1937, authorises the justices to make the orders which can be made under the Licensing Act, 1902, but not the orders which can be made under the Summary Jurisdiction Act of 1895.

2845. (Chairman): That you think is a flaw in the 1937 Act which should be remedied?—I think it would be better if the 1895 Act were mentioned.

2846. (Mr. Flecker): You say in paragraph 31 (a):—

"If the man's address is in the possession of any public authority, we submit that there ought not to be any regulation preventing such address being disclosed. . . ."

Is the reason that the address is not disclosed because the public authorities concerned are standing on their rights or because legislation is required to permit them to do so?—I think it rests on departmental regulations. It does not rest on any statute law. It is merely the department which has made a domestic rule of its own.

2847. Probably because to give the address involves a good deal of trouble?—That may be.

2848. (Lord Keith): I want to ask you about the statistics in the Appendix to your second memorandum. I am not familiar with these statistics and I want to know what they suggest. Take the number of orders under which payments are actually being made, do these figures represent what one might call broken homes?—(Mr. Wilson): They represent live orders in respect of which payments are being made, cases where maintenance or separation orders have been made by the courts and, as far as we know, the parties are still apart and the husbands are paying through the court.

2849. One could say that they do represent approximately the number of broken homes?—The number of broken homes in respect of which there is an operative order. We would not say that it was the total number of broken homes in that particular town. Homes may well be broken and payment made in another way so that the number of broken homes may be greater than the figures shown here.

2850. I have made a calculation which I will just ask you to take from me and which shows that in the various towns you have mentioned there are 14,800 orders in a population of 3,596,000. Is it right to take the population of England and Wales at 50,000,000?—Yes.

2851. Taking the proportion for the towns you have given here and applying that throughout the whole country, one would have something like at least 205,000 broken homes throughout England and Wales. I am not suggesting that that is an accurate figure, I am merely searching for information.—That is an arithmetical calculation and you must bear in mind that you may get a bigger proportion of orders in the big urban areas than you would in the rural parts of the country, so that the total would have to be toned down a little to allow for that.

2852. But there are some very large industrial areas which are not represented in your figures?—Yes, very many.

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[Continued]

2853. (Chairman): As we understand the matter, in the case of magistrates' orders the imprisonment wipes out any arrears of payments which are due at the time of the imprisonment, is that right?—Not quite. It wipes out the payments due in respect of which the imprisonment was ordered. No payment becomes due during a period of imprisonment but the man is liable for the payments, which become due between the time when imprisonment is imposed and imprisonment actually operates. Very often the payments in respect of that period are quite irrecoverable but in theory they are due from the man.

2854. It has been suggested that it would be better if imprisonment did not have the effect of wiping out any payments. It might be that the man would be more

likely to make the payments and less likely to choose to go to prison if he did not, by going to prison, get out of a certain amount of payments. What do you say to that suggestion?—I think no, my Lord; generally speaking, I think people who go to prison for wife maintenance arrears usually go there through sheer stupidity because they have set their face against paying and have decided to go to prison.

2855. Put it another way, can you see any good reason why prison should wipe out any payments a man has been ordered to make and has not made?—Only this, it does give him a chance of a change of heart so that when he comes out he can come out with a clean sheet.

Chairman: Thank you very much for your helpful memorandum and your evidence.

(The witness withdrew.)

(Adjourned to Tuesday, 17th June, 1952, at 10.30 a.m.)

THIRTEENTH DAY

Tuesday, 17th June, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRIKTON, M.C. (Chairman)

Mr. D. MACE
 Mr. H. H. MADDOCKS, M.C.
 The Honourable Mr. JUSTICE PEARCE
 Dr. VIOLET ROBERTSON, C.B.E., LL.D.
 Sheriff J. WALKER, Q.C., M.A.
 Mr. THOMAS YOUNG, O.B.E.

Miss M. W. DENNISON, C.B.E. (Secretary)
 Mr. A. T. F. OGILVIE (Assistant Secretary)
 Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 35

MEMORANDUM SUBMITTED BY THE HEADMASTERS' CONFERENCE

INTRODUCTION

1. The Headmasters' Conference, which submits this memorandum, is an association of the headmasters of some 200 secondary schools for boys. The majority of these schools are independent, some are dissent grant schools, a few are aided schools. About half its members are headmasters of boarding schools. The schools of these headmasters who are members of the Headmasters' Conference are generally designated by the term "public schools", but it should be realised that the common meaning given to this term is a somewhat narrower one. This memorandum may be taken as expressing the views of headmasters most of whom have to deal with boys whose parents are ready and able to pay fees for their children's education. While we should hold that the comments and proposals we make are of general application, we recognise that some of us have little contact in our professional duties with children who come from very poor homes. We are aware that there are social problems arising from the divorce and separation of married persons who live in overcrowded dwellings or on very small incomes, with which we do not feel particularly competent to deal. We need only say that we believe that the problems with which we deal in this memorandum are likely to be intensified when the families of divorced persons have to face greater material difficulties in life.

2. We do not consider that it is our duty to state our views on the religious and ethical questions involved in a consideration of the question of marriage and divorce. The great majority of the schools, whose headmasters are represented on the Conference, have strong Christian traditions; some are very closely identified with various religious denominations. We have not thought it necessary or advisable to draw up any "profession of faith" of our members on the subject of marriage. Our concern, as expressed in this memorandum, is with the welfare of children whose parents are separated, whether by divorce, or judicial separation.

3. We have not felt it necessary to obtain figures of the number of children of divorced parents at the schools of which we are headmasters. The size of the problem, and its gravity, are apparent without these. Nor have we compiled any statistics, such as, for example, the proportion of children whose school career seems to show evidence of moral or mental instability and who come from "broken homes", or the proportion of the children of divorced parents whose moral or mental development gives cause for concern.

THE EFFECT OF DIVORCE ON THE CHILDREN

4. Regarded simply from the point of view of the children, and apart from all other considerations, we feel that the present position is extremely serious, and that its gravity is insufficiently appreciated. We have now, in this country, reached the position that some one in twelve

marriages end in the Divorce Court. There are no means, as far as we know, of computing how many children are affected by this. No doubt the proportion of children of couples whose marriage is dissolved is smaller than that of all marriages. But it is true to say that some, where approaching one in twelve—certainly, we suppose, as many as one in twenty—of the children of this country are, in future, going to live some part of their lives, while still children, without a normal home life living with their two parents. The effects of this phenomenon, which on its present scale is one quite new to our people, must be profound, and are likely to have a grave influence on our general moral and social well-being. Any one who has to do with children is aware of the tensions created by the break-up of their parents' marriages. We face a future in which a substantial proportion of the inhabitants of the country will have suffered this experience, and, in some cases at any rate, will have been rendered less fitted themselves for normal married life when they grow up.

5. We are aware that there are homes where the breakdown of normal relationships between the parents is complete and obvious. The children in such homes may live continually in a state of tension so acute that it would be relieved if the parents agree to separate. Indeed, any tension in a home must interfere with a child's stability. But when there is a breach between parents which results in a divorce, normal home relations are irremediably lost. Broadly speaking, and stating the principle in simple terms, we consider that a real home, even if it is not a good one, is better for a child than none. Seen from the point of view of the welfare of the children, therefore, and disregarding all other aspects of the question, we consider proposals to widen the grounds for divorce to be very dangerous. We should think it wholly wrong to decide on any extension of the grounds for divorce without the most careful consideration of the effects of this step on the children whose homes are destroyed when their parents are separated.

THE WELFARE OF THE CHILDREN OF DIVORCED PARENTS

6. Divorce in this country, other than very occasionally by Act of Parliament, is of less than a 100 years' standing. During that time very little thought has been given to the problem of the welfare of the children of divorced persons. In the Divorce Court, as stated in the Final Report of the Committee on Procedure in Matrimonial Causes, "the welfare of the children is subordinated to the interests of their parents". The very great increase in recent years in the number of divorces has found the country quite unprepared to deal with this problem. We believe that radical reforms of the procedure in the Divorce Division will be needed to secure the proper consideration of the welfare of the children of divorced parents.

7. While it is true that any divorce, when there is a child or children of the marriage, creates a problem with regard to these children, it may be granted that in some cases the problem to all intents and purposes solves itself. One spouse may wish to have custody of the children and be well fitted for the responsibility. The other may not wish in any way to interfere. But in the great majority of cases some problem arises. Both parents, though now divorced, may feel some responsibility towards the children, those inescapable survivors of a married life which no longer exists: they may both feel, whatever the cause of the divorce, a strong sense of possessiveness towards the children. One parent may wish to divert him or herself of a financial responsibility, which he or she has no right to ignore. To our mind, the most serious trouble arises, and frequently arises, when the parents are competitive in their demands on the child's loyalty. Whatever their motives, such competition must set up very strong tensions in the child's mind. Worst of all is the strain imposed on the child when it is left with some power to choose between such competing influences.

8. We find ourselves generally in agreement with the views expressed in Part II, Sections 30-34 on Children and Divorce in the Final Report of the Committee on Procedure in Matrimonial Causes. As is stated in this Report, "by statute the Court has to regard the welfare of the children as the first and paramount consideration". We feel that the very greatest care should be taken about the custody of children after a divorce, and that the arrangements for this should be regarded just as seriously as the divorce itself. We do not believe that say hard and fast rule can be laid down about the right of regular access by a parent who is not granted the custody of the child. But we feel that this right is often allowed to a parent without due attention being paid to the best interests of the children. Points such as those to which we have referred should always be given careful consideration before the question of access is decided.

9. In an undefended suit, it is rare for any consideration to be given to the question of custody, which is almost always given to the petitioner. When an application for custody is opposed, the decision as to the child's future is really, in practice, left to the parents, and parents who are at loggerheads and have come to the point of separation are not necessarily the best judges of this. We do not recommend that the court should necessarily have to consider the question of custody in every undefended suit where the application for custody is opposed. We think it more important that the arrangements made in such cases should be reviewed subsequently when this appears desirable. It is not widely appreciated that such reconsideration is possible, and in a number of cases carried out, under Section 26 (1) of the Matrimonial Causes Act, 1950, which provides:—

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

When the court makes provision of this kind we recommend that the procedure which we shall suggest for defended cases should be used.

10. When the application for custody is opposed, the question of the custody of the children is looked into more thoroughly. The usual practice is for the application to be heard in chambers by the summons judge. In our view it would be better if it were heard by the judge who has heard the divorce case. If it has been a contested case he will have had the opportunity to see the parents, and to form some impression of their suitability to be granted the custody of the children. If the case has not been defended, the judge will have seen the party who obtains the decree, and have had an opportunity of questioning that party about his or her plans for the welfare of the children of the marriage. We recognise, however, that, in the present circumstances where there is so serious a shortage of experienced divorce judges, there is something to be said for the present arrangements. Nothing would be

gained if the pressure of work in the Divorce Court led to these questions of custody, often very difficult and complicated, being settled without proper consideration.

11. We do not agree with the recommendation of the Final Report of the Committee on Procedure in Matrimonial Causes that the question of custody should normally be settled on the same day as the trial of the divorce petition. We believe that in any case this is likely to be impracticable. We also doubt the wisdom of the proposal. The question of custody raises quite a different set of circumstances for consideration, and it would seem to us better dealt with after some short lapse of time.

12. We consider it to be of the utmost importance that, when the question of custody is considered, the personal evidence of interested persons should be available to the court. We do not consider it to be satisfactory that such evidence should be given on affidavit. It is essential that the court should be given the opportunity to examine the witnesses on whose evidence it may largely rely on reaching a decision.

13. It can hardly be supposed that the court will always come to the right decision when the question of custody has to be settled. As in the case of undefended suits and those in which an application for custody is not opposed, we feel it important that the parties should be made aware that there is an opportunity for the decision to be reviewed.

14. The Final Report of the Committee on Procedure in Matrimonial Causes recommends that use should be made of a court welfare officer to assist the court in deciding questions of custody. We are wholly in agreement with the principles underlying the recommendations of the Committee on this point. While strongly supporting, however, the practice of making use of court welfare officers or probation officers in this way, we feel that there may be some danger that parents will feel that their employment in deciding questions of custody carries with it some stigma. This would be all the more unfortunate if the officers, as we shall suggest, should have the duty of continuing to interest themselves in the welfare of the children after the decision about custody has been made. It is essential that their employment should come to be regarded as a normal part of the procedure in a divorce case when the custody of the children has to be considered, and should be accepted by the parents as such. We hope, therefore, that the Commission will consider the feasibility of a special appointment of officers to assist the court in this matter. We believe that it should be quite possible to find enough men and women, who have had experience in dealing with children, for this duty. We do not suggest that they should only be taken from those in the teaching profession, but we should like to point out that in the ranks of retired schoolmasters and schoolmistresses there must be many who would be very well fitted for it.

15. We recognise that to make use of the services of court welfare officers as the normal practice in cases where custody has to be decided would mean a great change in the present arrangements of the divorce courts, and the appointment of officers specifically appointed to assist these courts in their duty towards the children of divorced parents would be a new departure in English legal procedure. We consider the present situation quite serious enough to warrant such changes. In the rest of this paper, when referring to court welfare officers, we have in mind only the work which we should suggest they should do in furthering the interests of the children. We hope, however, that the Commission will not lose sight of the fact that it may be preferable to appoint special officers for this purpose, who might be given some title such as children's assessors. We think it might be wise for some experiment to be made in their employment.

16. We have suggested that the fact that the decision of the court about the custody of the children may be reviewed should be more widely appreciated. We recognise that there is a danger that the possibility of such a review might tend to make the condition of the children even more unstable, while one of the main objects of the court should be to make it as stable as possible. We feel that the court welfare officers or children's assessors should be of service here. We recommend that parents should have to consult the officer before any application is made for such a review. It should be open to the officer to inform the court whether he considers a review desirable, and if he thinks that the application is a frivolous one. We do not

PAPER No. 35—MEMORANDUM SUBMITTED BY THE HEADMASTERS' CONFERENCE
MR. ROBERT BURLEY, C.M.G., M.A., D.C.L., F.S.A.

17 June, 1952]

MR. C. C. TURNER, C.M.G., M.C., M.A., and MR. H. W. HOUSE, D.S.O., M.C., M.A.

suggest that he should have the power himself to initiate a revision of the arrangements laid down by the court, but he could inform the court if he felt that such a revision should be considered.

17. It is often some person who is not one of the parents who is in the best position to know whether such a review is desirable. He or she, very possibly the headmaster or headmistress of the school at which the child is being educated, may be more aware than either parent that the arrangements made are proving unsatisfactory. We have considered whether such a person should have the right to make an application to the courts. We feel that this position would be undesirable. It would add one more element of instability to the situation. We think, however, that the school authority should be entitled to approach the court welfare officer or the children's assessor in confidence, and that the latter should have the right to apply for a review of the arrangements if he or she felt it to be necessary.

18. We consider it important that the authorities of the school at which the child is being educated should be consulted whenever any question of the child's education is being considered. It should be the duty of the court welfare officer to keep in touch with the school whenever he or she is required to give advice to the court on educational questions, and whenever any important decision affecting the child's education or immediate future was being taken by either parent.

SEX EDUCATION

19. We imagine that it will be expected of us that we should state our views on the subject of sex education as a means of reducing the number of unsuccessful marriages. We add, therefore, a short statement of our views on this question.

EXAMINATION OF WITNESSES

Mr. Robert Burley, C.M.G., M.A., D.C.L., F.S.A., Mr. C. C. Turner, C.M.G., M.C., M.A., and Mr. H. W. House, D.S.O., M.C., M.A., representing the Headmasters' Conference; called and examined.

2856. (Chairman): We have before us as representatives of the Headmasters' Conference Mr. Robert Burley, Headmaster of Blois, Mr. Turner, Headmaster of Charterhouse, and Mr. House, Master of Wellington College. Is there anything you wish to add to the memorandum which you so kindly prepared?—(Mr. Burley): No, my Lord, I think we will let it stand.

(Chairman): I propose to ask Mr. Justice Pearce to clear up one or two points as to the present practice in the Divorce Court, and certain other matters. Then I will come to some of the scholastic experts on the Commission. I shall not myself open the ball on this occasion.

2857. (Mr. Justice Pearce): In paragraph 16 of your memorandum you recommend "that parents should have to consult the [court welfare] officer before any application is made for such a review". Now I wonder if you would think that that recommendation ought to be amended to a small extent, for this reason. About a year ago I started putting into every custody order a requirement that, before coming back on any matter, the parents must consult the welfare officer. A few months after that, it was represented to me that possibly I had no right to make such a requirement since the parents had a right to come back to the court in any event. It was suggested that the requirement, if inserted, would be resented by parents, who would feel that they were being denied the right to approach a judge without the intervention of a welfare officer. Having thought it over, I altered my form of order to the effect that, before making any application, the parties should consult the welfare officer. Now that does entail a slightly different approach, though in the end, it does not differ greatly from that underlying your recommendation. Would you be content with a recommendation that parents should be directed to consult the welfare officer before coming back to the court?—Yes, I think we would be quite happy about that. It would cover our main point all right.

2858. It really covers your point, and it amounts to the same thing, because a judge who has said that the parties should consult the welfare officer will undoubtedly

(i) The term, "sex education", is generally very loosely used, and it is necessary to consider more precisely what is meant by it. It is obviously desirable to give children at or before the age of puberty some information about the biological facts of sex. We do not believe it possible to lay down a hard and fast rule whether this is best given by the parents or the school. In any case, this has nothing to do with any instruction which has marriage specifically in view.

(ii) It should be realised that children do not stay at school after the age of sixteen, and that the great majority leave at the age of fifteen. It is pointless to give instruction to children about marriage years before they are likely to marry. Whether they should be given further sex instruction before leaving school is quite another matter. In our view, the need for such instruction will depend on the character of the individual child and his or her circumstances in life. There is a real danger that such instruction may give the impression that satisfactory relationships in marriage depend on merely physical and material considerations. This danger is intensified if instruction is given to children en bloc and not individually, so that due regard is not paid to their differing personalities.

(iii) It is a grave error to think that sex education can be separated from the general religious, spiritual and moral education given to children. Marriages fail because of a lack of sympathy, unselfishness, intelligence and, above all, of loyalty on the part of the husband or wife. The essential duty of a school is to endeavour to foster these qualities in its pupils. Sex education is no substitute for this.

(Dated 1st March, 1952.)

see that they do so before he goes very far with the case; but it does not exclude them from the tribunal to which they have a right to go. Then in paragraph 17 you say that "the school authority should be entitled to approach the court welfare officer". I think that the position now is that you are entitled to approach the court welfare officer, and it is quite certain that if you did so he would approach the judge in charge of that particular case. But there a difficulty might arise as to what the judge should do, and you probably hold the view that it would be convenient if he could instruct the Official Solicitor, say, to present the matter from the child's point of view. I agree that at the present moment there is a weakness there. I do not think it arises in the way you suggest, namely, from the inability of the school authority to approach the welfare officer. It arises out of the question of what action the judge may take when he hears that the headmaster thinks that all is not well. If the judge's action stirs up the parents, then he is starting a battle—which is the very opposite of what he wants to do. It would seem the logical implication of your suggestion that the judge should have power to have the child separately represented by some suitable person. Would you agree?—We would certainly accept that. I think that there is one point of importance and that is how very little people know about the present provisions. The whole position of court welfare officers in this matter is very obscure, I think, to the general public, including headmasters and headmistresses.

2859. The employment of a court welfare officer is, of course, a very recent development. But the difficulty is this, is it not? If the court publicises the fact that headmasters can approach welfare officers, do you think that that would be an encouragement to unwise headmasters to stir up something which is better left as it is?—If they are sufficiently unwise it might, but taken generally I do not think there would be much danger in that. After all, they have a great responsibility for the children and they would not wish to get into all the trouble involved unless they really felt it necessary.

17 June, 1952]

Mr. ROBERT BIRLEY, C.M.G., M.A., D.C.L., F.S.A.,
Mr. C. C. TURNER, C.M.G., M.C., if people, and Mr. H. W. HOUSE, D.S.O., M.C., M.A.

[Continued]

2860. I suppose the best solution would be for it to be placed on record that the proper way for a headmaster to deal with his worries about a custody case is for him to approach the welfare officer. That could be communicated to the Headmasters' Conference?—Of course one must remember to go beyond the Headmasters' Conference, which represents only a limited number of schools.

2861. What I had in mind was this—if you broadcast the fact that people who are not parties to the dispute can interfere with children's custody orders, you may stir up people whose advice really is not very desirable?—Yes, I quite see that. We were rather concerned last arrangements of this sort might lead to a new element of instability—and to obtain some sort of stability seems to us to be of the greatest importance—but if people like headmasters and headmistresses have this legal right then I suppose they ought to know about it. Is it rather unsatisfactory if this right is only exercised by a few headmasters and headmistresses who happen to know about it?

2862. In paragraph 14 you suggest that the court welfare officer should keep in touch with the school. To what extent were you envisaging that, because it is, of course, placing quite a large burden on the welfare officer if he is going to have to write from time to time to schools?—What we suggest is that the welfare officer should do so whenever he or she is required to give advice to the court on educational questions and on any important decision affecting the child's education or immediate future. That we think very important indeed. But I think it would be a mistake to lay down that the school must be consulted at stated intervals.

2863. Do you not find that in practice the schoolmaster always gets roped in when there is a dispute between the parents about custody?—I think this is very important. We feel that he does not, except by the parents. He gets roped in by one or other of those very often.

2864. What I meant was that he gets involved in the dispute, despite the fact that he may wish to be impartial, because each party tries to make him partial.—That is really what it comes to.

2865. Then you suggest that it might be possible to utilize the services of retired schoolmasters and mistresses in dealing with custody cases. That might be very helpful. But how would it work, because at present the courts work through the probation service? Do you not think that if further assistance is to be provided, it should be done through the probation service?—That is an important question, and we did go into it. I do not know how far it might be felt that the use of the probation service might create certain difficulties. The fact that a probation officer was engaged in a custody case might be felt to put a certain stigma on the parties and some people might think that the probation officers tended to interfere too much with the children and so on. The appointment of a court welfare officer has not, as you say, been going very long, and it is probably too early to say how far the scheme has been successful. That is why we did suggest the possibility of having officers whose specific duty would be to deal with this problem. Some of us feel that it is such a large problem by now that a solution on these lines is the only answer.

2866. Although the officer appointed is called the welfare officer, he is in fact drawn from the probation service. This has various advantages in that he can get knowledge from all sorts of places with which the probation service has contact. If you were to introduce a team of schoolmasters to act in this capacity, that would not have the advantages of the probation service?—It would not have certain advantages, I should agree. But I think that schoolmasters have certain other advantages, perhaps in particular experience and so on. And if there is going to be any extension of this service and more people have thus to be engaged, perhaps it would be worth experimenting by appointing a few people other than directly from the probation service.

2867. As assistants, for instance?—Yes.

2868. One might, of course, leave the matter in the hands of the welfare officers where it is now and arrange for them to get help from the schoolmasters?—Yes.

2869. If that suggestion were to be followed up, would the Headmasters' Conference be the appropriate body with whom to discuss it?—We would be very glad if it was discussed with us, but I think it should also be discussed with other bodies, such as the Incorporated Association of Headmasters, which deals with the secondary schools as a whole. And, of course, it is not by any means a problem only for secondary schools. There are the other teaching associations. There is also the Association of Head Mistresses.

2870. Yes, I was not forgetting them. In paragraph 10, you say that in your view it would be better if an application for custody were heard by the judge who has heard the divorce case. That has in fact been the practice for some little time past, unless there are some special circumstances. For instance, in a case where a speedy hearing is needed at a time when the judge who dealt with the divorce case is away on circuit, if both parties agree to such a course, then the custody application is transferred to another judge. But you may take it that the usual practice now is that the custody application goes to the judge who heard the divorce case and remains in his hands, so that if further squabbles develop later the parties always go back to him. Of that you obviously approve?—Yes, we do.

2871. You say that you do not agree with the recommendation in the Denning Report that the question of custody should be settled on the same day as the trial of the divorce petition. Is practice what is done is this. The trial judge adjourns the case to himself in chambers and tells the parties to discuss it and come back when they are ready. Would that seem to you a sensible method?—Yes.

2872. And incidentally my own practice—and I believe that of many of my colleagues—is to add, "—and you must talk it over with the welfare officer before you come back to me". Do you think that that is probably the best way of dealing with the situation?—Yes.

2873. (Mr. Flecker): In the first paragraph of your memorandum, you point out that the Headmasters' Conference is largely, though not entirely, concerned with boys whose parents are ready and able to pay fees for their education, and I think that you will be the only body who could be so described who will give evidence to the Commission. The Association of Head Mistresses seems on rather a different basis, I fancy. I would like to know whether it is your experience that any significant number of boys are withdrawn from public schools or are denied a university education because, as a result of a divorce, the father, as presumably the person with the money, refuses to support them any longer. Does that actually happen?—Perhaps you would ask my two colleagues as well on this and get our combined experience. A lot depends on what you mean by "significant". It certainly happens, there is no doubt that it happens, but not very often. When it does, it is something which very much attracts one's attention; one probably has a great deal of trouble about it. It is not a sizeable problem but it is a problem all right. (Mr. Turner): I would agree with that. I think that it occasionally happens, but it is not one of the problems that seems to us the most difficult in this whole connection. (Mr. House): I think I would agree. I think perhaps that the case where it does arise rather stands out in one's mind, because it is very often that of a boy who would definitely benefit from a university education, and that education is threatened because of the position described. But the situation arises only in isolated cases.

2874. If there is any injustice I think that the Commission ought to pay some attention to it, even if the number of cases is small. The question is whether it is a reasonable thing for us to consider, whether we should in our recommendations suggest that where the money is available, and where the circumstances are suitable, then a parent should not be able to divest himself of educational responsibility, in the fullest sense of that term, for his child.—(Mr. Birley): The situation you describe might be taken as one example of the kind of difficulty which arises from divorce. But parents cannot automatically divest themselves of responsibility for their children. The example cited is perhaps a rather extreme instance of evasion of that responsibility, and certainly we should

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[Continued]

agree it is monstrous that a child who can benefit from university education is denied it, when one or other of the parents could quite well afford it.

2875. Have you in mind concrete cases where this situation has actually arisen?—Yes, I have one or two. Sometimes—usually, as a matter of fact—you can get the thing settled in the end by putting a lot of pressure on the parent concerned.

2876. (Lord Keith): What I have difficulty in understanding is this. Why, because parents have been divorced, should the father, who, we will assume, has the money, take his son away from school?—I did not actually refer to boys being taken away from school. I was referring to their being sent on to a university. I am sorry if I misunderstood the question. I thought that it was dealing with further education.

2877. (Mr. Flecker): The question was twofold—first, as to whether you had had boys withdrawn from secondary education, and secondly, as to whether you had known of boys who were denied university education afterwards?—I do not think that I can remember a case myself where a boy has been removed from school for this reason.

2878. (Lord Keith): Might I ask the next question—why should the father deprive him of a university education if the father is in a position to give him that education?—I am not quite sure of the implication of the word "why". There are all kinds of reasons from the father's point of view. He may want to wash his hands of his responsibilities altogether. We are used enough to something of that kind, a failure to accept responsibility for the children in one way or another. If the question means what right has the father, I should say he has none.

2879. I did not mean what right, I mean why, as a matter of parental interest or affection for the child?—He may not have the proper affection and interest.

2880. (Chairman): May I try to supply an answer myself, which is a very rash on my part, from my experience as a Chancery judge. Sometimes if the custody is given to the mother the father resents it and after the divorce is up to do just as little as he possibly can for the boy. (Mr. Justice Pearce): I absolutely agree.—That is exactly where the trouble arises.

2881. (Mr. Flecker): A statement has been made in one memorandum which we have received that where the mother has deliberately kept the boy from contact with the father, who is paying towards the boy's upkeep, the boy often shows irresponsibility and instability. Do you think that the middle clause—"who is paying towards the boy's upkeep"—is relevant or would you say that a boy neither knows nor cares who pays?—Speaking for myself I should say this. I would not accept the statement quoted. It seems to me greatly over-simplified. As a rule, boys are not particularly concerned who is paying for their education except in a general way. But one of the difficulties that arises in these cases where you get children of divorced parents is that questions of this sort, with which they ought not to have to bother themselves too much, are brought before them. As part of the competition for the boy's affection he is very often told who is paying for his education. Although I would not agree with the statement you mention, I think that it does indicate one example of the kind of problem that arises.

2882. Then in paragraph 7 you say:—

"Worst of all is the strain imposed on the child when it is left with some power to choose between such competing influences."

Judging from the context, I took that to refer to the question—with whom will he spend the holidays and so on?—That is almost always the practical difficulty.

2883. But various witnesses have suggested to us that the children should themselves be allowed to decide questions of that kind, and, where older children are concerned, that they should have the right to choose the parent they want to go and live with and in whose custody they wish to be. Would you regard that as wise or unwise?—I should regard it as unwise. I think that it really leaves out too many factors in the case altogether. The child is very often not going to be in a position to make a reasonable choice. Frequently he is subject to

those competing influences to which we have referred. Above all, we have seen so many cases where the child would be in a constant state of uncertainty and in the position of having to weigh up the most difficult personal and moral questions in making his decision. I think that it is unfair on the child to expect this of him.

2884. Then in paragraph 8 you say:—

"We do not believe that any hard and fast rule can be laid down about the right of regular access. . . ."

I think that most of the witnesses who have spoken before us on this subject would agree with that. But is it your impression from experience of such cases that access is often given to a parent because it seems so hard on him to deny it? And would you maintain that that should not come into the picture at all, but that merely what is good for the child should be considered?—This is a very difficult matter, a dangerous matter on which to generalise. It is difficult to say that never, in any circumstances, should the feelings of the parent seeking access be allowed to weigh in considering the case. But it seems to me that it should be most exceptional that that should be treated as the determining factor. We feel that there is at present a tendency almost to take it for granted that parents should be allowed access unless there are very strong arguments against. There is a great deal to be said, I imagine, in every case on both sides. One has to consider, for example, the position if the parent who is given custody dies. All sorts of questions have to be taken into account, but we certainly do not feel that access should be allowed practically as a parental right.

2885. And there is an impression that that is the situation at present—that the child's interests do not come first—as they should do?—We feel that that is generally so. We feel that this question is probably even more intricate and difficult than the question of divorce. It has not had the right attention paid to it.

2886. The Denning Report, which you quote with approval, recommends that where there are children under sixteen years of age, every petition, whether it contains a claim to custody or not, should give information about the plans for the children's education and proposed homes. That was implemented in the Rules for a short time but the requirement has now apparently been dropped. Would you say that information of that sort was essential in order to achieve the objects your memorandum has in mind?—Yes, certainly we should. (Mr. Justice Pearce): Would it be possible for Mr. Justice Pearce to tell us whether that requirement has been dropped? (Mr. Justice Pearce): Yes, it has. Of course, any judge who is dealing with the question of the children knows where they are being educated and finds out all about the case, so that the rule did not really produce any effect. Mr. Lawrence knows more than I do about the history of it. (Mr. Lawrence): I think it was found that that rule, like so many well-intentioned rules, did not achieve its object. In many cases it provided the court with the maximum of information which a competent and conscientious court always has found out for itself, and for the rest, details of education, proposed education and proposed homes and so forth, were very often filed in in the absence of any precise information on those points at all. They were in precise information questions which it was quite impossible, at the time of filing the petition, to answer. The experience in all registries was that the rule, though well-intentioned, was not achieving its object and it was dropped.

2887. (Mr. Flecker): May we go back to paragraph 5, where you say, as many other witnesses have said in different words, that a real home, even if it is not a good one, is better for a child than none? But when we have a statement by one witness that where a boy is freely in touch with his father with the mother's agreement, the boy does not appear to suffer much. Do you consider the latter to be a serious underestimation and that in fact in every case the child does appear to suffer—as far as one can tell in these imponderable things?—In the very great majority of cases there is no doubt as to that.

2888. Then it has been stated that it is a mistake to send a boy to a boarding school from a home where there are tensions and quarrels, because children of secondary school age are bound to be fully aware of those facts. They are prepared to face them if left at home to face them, but if they are sent away to boarding school their

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[Continued]

arrangements agreed between the parents about custody may be part of a bargain, and we feel that in every case the court ought to concern itself with custody.

2916. So that one would hope that some form of rules could be devised which would see that the judge was provided with the kind of information that would be useful to him?—Yes, I think that would be necessary.

2917. Information about the children?—Yes.

2918. Do you feel that it would be wise if the court had a continuing supervision of the children after custody was decided?—Up to a point, yes. We have rather suggested that it should, though it should obviously be exercised with discretion. One of the things one does hope for is that as far as possible the child will get a new stability. I think it would be unfortunate if it were thought the whole time that the whole arrangement might be blown up. One must preserve a balance which, while allowing for a review in the light of changing circumstances (where, for example, an arrangement does not work) does ensure that the child is allowed to settle down again.

2919. Could I put to you one possible reason why it might be a good plan for the schoolmaster or schoolmistress to be brought in over the question of custody? Would you agree that the schoolmaster or schoolmistress—because they see all kinds of boys and girls, boys and girls with very happy homes as well as boys and girls with very unhappy homes—may possibly come to a more balanced judgment about the children than people who are all the time seeing children in difficult and unhappy circumstances?—I think there may be something in that. Are you referring now particularly to the serving schoolmaster or schoolmistress who is consulted?

2920. Serving?—Yes, I think so, and I think you can go further than that. The success of such an arrangement is going to depend very largely on individuals. Some schoolmasters and mistresses would be very good at giving reports and would really help, and others would not. That is inevitable as human nature goes, but there is no doubt that good headmasters and headmistresses, and other masters and mistresses one knows, would be able to produce the most useful suggestions to the court and could give the court a picture of the whole situation. I am not now thinking only of the public schools, and obviously one cannot mention names, but immediately there come to my mind headmistresses of secondary modern schools, for example, who would prove invaluable if they could be asked to give reports in such cases.

2921. I wonder if you would feel able to answer this question? It is on the question of whether there should be divorce after a considerable period of separation. I want to put a case to you, and to ask you whether or not you feel that such a case would justify divorce on that ground. Supposing you have a father who has been deserted by the mother and left with the children, but cannot look after the children himself, and cannot afford a housekeeper. Do you feel that in such a case divorce would be a better thing than an illegal union which would probably result if the father had to take a housekeeper unpaid? (Chairman): Might I just point out that, of course, the father could get a divorce under the existing law for desertion? (Mr. Bile): After three years. (Chairman): Does the question relate to whether it would be a good thing to give some further power of divorce, I am not quite sure that I follow? (Mr. Bile): I am sorry, my Lord. That was what was in my mind. (Chairman): Divorce after a shorter period?—(Mr. Bile): Yes—I feel that in, if I may say so with all respect, an almost typical example of the sort of question which it is so difficult to answer without perhaps giving quite a false impression.

2922. (Mr. Bile): I do not think I want to ask you any more than, I quite understand. (Chairman): I do think it is very difficult for the three gentlemen who have come here as representing the Headmasters' Conference, and who said at the beginning that their concern is with the welfare of children whose parents are separated, if we ask them for opinions—which can in any event only be the individual opinions of Mr. Bile, Mr. House or Mr. Turner—as to extension of grounds for divorce. I am not quite sure that it is fair. (Mr. Bile): I accept your correction, my Lord, but I thought that as they are

experts on children then possibly they might have some views on such a case as this. (Chairman): If Mr. Bile is willing to answer the question, well and good. (Mr. Bile): I do not want to press him on that—I should be prepared to say that, my Lord, that I think it would be quite possible to bring a single case like that where the argument would be very strong indeed for divorce. But I should not consider that—and I am really thinking of it from the point of view of the children—I should not consider that as a convincing argument because, I think, one would have to consider what the effects of a law, which allowed perhaps the perfect solution in that case, would be upon the children of the country as a whole, and that is much more difficult. That is where the real danger exists of a particular example of that sort.

2923. (Chairman): The questions already asked have left me with only one question and one comment. The question arises on paragraph 4 under the heading—"The effect of divorce on the children". There you draw attention to the very large number of divorces that there are today, and you say:—

"The effects of this phenomenon, which on its present scale is one quite new to our people, must be profound, and are likely to have a grievous influence on the general moral and social well-being. Anyone who has to do with children is aware of the tensions created by the break-up of their parents' marriages."

Could you expand that a little? From your experience, in what way do these tensions manifest themselves to the schoolmaster? What sort of things do you observe?—I think, first of all, in a general instability which can very often be traced to that sort of insecurity. It is extremely difficult to define it exactly.

2924. I appreciate that—I think that there is no doubt that divorce does lead to a general lowering of moral standards; I am sure everyone must know of marriages which have failed on what is basically a moral question, something which we touch on in our last paragraph.

2925. I realise that it is a very difficult matter to put into more precise words. The comment that I wanted to make arises on paragraphs 10 and 12. There you are dealing with the proceedings in the Divorce Court. I thought it was perhaps worthwhile pointing out that the practice in the Chancery Division in dealing with wards of court, who are very frequently, though not invariably, the children of divorced parents, is that the judge who has once heard the matter retains it unless there is some very strong reason to the contrary. Further, when any questions of custody are under contest it is always the custom to see the parties in person instead of relying on affidavit evidence.—We had that in mind actually.

2926. You have no doubt had some experience of children who have become wards of court?—Yes, we have.

2927. (Lord Keith): I would like to touch on one matter which I think you have already mentioned. I think you agree, Mr. Bile, that the Headmasters' Conference deals with rather a specialised sample of children?—Yes, as we stated in our first paragraph.

2928. What I was wondering was this. How far can one equate the problem which arises among children of this sample with what is the very much larger problem of children in poorer homes, because I think we may take it that a very large percentage of the divorce cases in the country are divorces in the lower income group of people? For one thing, do you think that the tensions in a child's mind in a home such as the homes that the children in your schools come from might be somewhat different from the tensions in the mind of a child who is living in very close contact with his parents, who can never really get away from their quarrelling and ill-will, living perhaps in a couple of rooms or three rooms with them? Do you think that the effects might be very different in each of these two cases?—I am not sure that I think the word "different" is quite right, that is to say, I think the problems are essentially the same in all cases.

2929. You think they are the same?—I should agree, of course, that the problems would be likely to be very greatly intensified in the case of the poorer homes.

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Mr. ROBERT BILLEY, C.M.G., M.A., D.C.L., F.S.A.
 Mr. C. C. TURNER, C.M.G., M.C., M.A., and Mr. H. W. HOUSE, D.S.O., M.C., M.A.

[Continued]

2930. And again, when one comes to questions of custody, would you agree that although there are undoubtedly difficulties in the question of who is to get the custody of children who come from the better homes, it may be rather a different problem from that to be considered in the case of children who come from the poorer homes, where the mother is always out at work, where perhaps the mother may herself have to go out and work?—I cannot quite see where the problem is a different one. I think each problem is a personal problem, and should be considered as such. That is one of our points, and we feel that such questions as the parents going out to work and so on should certainly be taken into account.

2931. Might I put to you a concrete illustration—a case that I have actually come across in my experience?—Two children were at boarding school. One might say, in fact, that they spent the larger part of their lives at boarding school. There was no question of taking them away from the school, they never saw their parents except during the holidays, and so far as the holidays were concerned the question of custody—one could almost call it nothing but access—was solved by allowing each parent to have the children for half the holiday period. Now that is one way is a very simple solution. But, of course, it is not a solution that could ever apply in the case of poor parents whose children did not spend the bulk of their lives, or their school lives, at a boarding school. That is the sort of thing I have in my mind. It may be that the problems of custody in these two situations are really quite different, not only in degree, but perhaps in essence.—There we should agree wholeheartedly. We think that these examples strengthen our case, because they imply that these cases must be taken separately, that no hard and fast rule is going to apply. I am sure that is so.

2932. I think you have really answered my difficulty. It comes to this—that one has really got to take each case by itself on its own circumstances?—Yes.

2933. I should like to ask you, merely for information, where you got the figure, mentioned in paragraph 4, that one marriage in twelve ends in the Divorce Court?—That was supplied to us by Mr. William Lacey. And he, I think, obtained it from the Divorce Registry and other statistical sources.

2934. (Sir Frederick Burrows): Mr. Billey, can you tell me where you got the statistics to support the statement in paragraph 4 that the number of children of couples whose marriage is dissolved is smaller than that of all marriages?—I am afraid that did not arise from any statistical survey. It seemed to us that because the marriage very often came to an end very quickly it followed that one could assume that the size of the family was likely to be smaller. I hope you will not think us too precipitate on that but we thought that there was a tendency for the families in that case to be smaller. We were perhaps leaning over backwards in order not to exaggerate our case.

2935. In paragraph 5 you point out that a home where the parents live together is better than where they are apart, I am not saying exactly what you say here, but that is what it means, and in paragraph 7 you say:—

"To our mind, the most serious trouble arises, and frequently arises, when the parents are competitive in their demands on the child's loyalty."

Would that not arise just as much where they are living together in a home with acute conditions where the mother cajoles and the father brags, as where they are divorced and the undivided loyalty of the child is given to one parent, who has the custody? How do you reconcile those two statements, Mr. Billey?—I would say this, that it certainly seems to be the case that you may get competition for affection in a home which is going wrong, though it does not always work that way by any means. But in paragraph 7 what we were referring to was the kind of questions that arise after separation has taken place, and we say that the most serious one is this competition for the child's affection. We do not mean to say by that that it does not exist in any other case. The two statements are not, I think, incompatible.

2936. The two statements are compatible, you think?—When you have a bad home it is a bad home and we were not suggesting it is a good one where there is a conflict going on. We are not suggesting that unfortunate tendencies do not develop in it. Of course they do, otherwise it would not be bad.

2937. (Mrs. Bruce): I should like to take up a point on paragraph 5, where you say, "... we consider proposals to widen the grounds for divorce to be very dangerous". Did you consider that the grounds for divorce should be narrowed? It has been suggested by another witness that there should be two kinds of divorce application, one where there are children up to the age of sixteen, and another where the children are beyond the age of sixteen. Had you considered anything on those lines?—I am sorry, but could I get this clear? Would it mean that with children the grounds for divorce would have to be more restricted if they were under sixteen?

2938. I am asking you if you have considered that?—We have not considered that particular possibility, no.

2939. You would not have any information to give us there?—I could only give what I am afraid would be an absolutely snap answer, because I have not heard that particular suggestion put forward before.

2940. You do say—"... we consider proposals to widen the grounds for divorce to be very dangerous". I wondered if you had been considering proposals to narrow the grounds of divorce?—There are two questions. First, there is the possibility of having one set of grounds of divorce where there are children, and another set where there are no children. I have not considered that proposal. Secondly, there is the question whether the grounds of divorce should be narrowed. I am afraid that brings us into territory on which we feel it would be difficult to answer questions. We did not think that it was our business as a Conference to go into the question of what should be the grounds for divorce. We felt it was our duty to do two things—first, to bring to the attention of the Commission the importance of the problem of children, and secondly, to make some suggestions as to the procedure which should be adopted with regard to children in divorce cases.

2941. I would like to take up a point with reference to paragraph 14. Has the possibility of using the services of children's officers in custody cases been considered by your Conference at all?—I think there would be a difficulty as far as many of the schools, not all of them, but many of the schools in the Conference are concerned, and that is that we are boarding schools, and the children's officers, of course, have a particularly local knowledge. For that reason, some of us have really had very little experience of children's officers. By itself, I do not think that the children's service would be entirely satisfactory for this purpose. It would not quite fill the bill for boarding schools, but as far as schools where the children come from the immediate locality are concerned I should say that the possibility of utilising its services ought to be considered.

2942. (Mr. Young): I should like to ask two questions. First, how many boys are there in each of your schools, and secondly, how many of these boys are unhappy because of home circumstances?—Speaking for myself, I can give the number of boys at Eton—it is 1,161—but I do not think I could give the number of boys who are unhappy owing to home circumstances. I cannot claim to know personally all 1,161 boys. Some of them may be unhappy without my knowing it. Without very careful enquiries I do not think I could decide how far it is home circumstances which cause the unhappiness of those who are unhappy.

2943. You see the importance of it. I am following out the same difficulty as Mr. Brown had in regard to paragraph 3 of your memorandum. It would be useful to the Commission if we could get some idea of the number of boys, or the percentage of boys, at your particular schools who are unhappy either because of conditions at home (where the parents are together), or because of parents who have been divorced. Do you think it is possible to get these figures?—Personally I do not

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think that it is possible. It seems to me that you are dealing with intangibles and the measurement would really mean very little. (Chairman): Might I also suggest that perhaps you might only disturb the boys' minds if you were to try to ascertain whether they were unhappy for either of these reasons? I feel there is a little difficulty about that.

2944. (Mr. Young): I was not thinking, my Lord Chairman, of an enquiry on those lines. But, Mr. Briley, you are giving evidence about this problem which, I take it, is based upon your experience in your school?—Yes.

2945. And we should like to have some idea of how you arrived at the statement?—I think we arrived at it through our experience. The three of us representing the Conference have been schoolmasters for some time. We deal with others who have been schoolmasters for some time and we talk about these matters. We ourselves have to meet boys in this position and advise them, and so on. And in that way, one does get an impression that it is a serious problem, but we have not statistics on the matter. I really do not think that such statistics are obtainable, or at least if they were, that they would be of any value.

2946. (Chairman): I suppose you might be able to give figures of the number of boys whom you have actually observed under these conditions. Would that help Mr. Young at all? (Mr. Young): I want to distinguish between opinion and fact, my Lord Chairman. (Chairman): It was with that in view that I suggested you might possibly get statistics of the number of boys who have actually been observed with these traits, but I may be wrong in thinking that is possible.—Happiness is no doubt a factor but it does not mean to say it is necessarily measurable; the same is true of unhappiness. You are bringing statistics into an area where they cannot usefully apply. I cannot imagine myself wondering whether a particular boy came within the required category or not. I just do not think it can be done usefully.

2947. (Sheriff Walker): Where the court has given custody of a boy to the mother, who is it who gets the school reports on progress of education?—The mother.

2948. And no steps are taken to furnish the father. . . . Not necessarily, there is usually some arrangement about that, it varies a good deal. It is usually a little problem on its own to arrive at a satisfactory arrangement.

2949. If the father did not get by some means or other reports on education he would obviously not be in a position to decide whether the boy should go up to a university?—Yes, I think that is certainly so.

2950. In answer to Mr. Beloe, I think you said that you thought that the court should always take cognisance of agreements about the custody and maintenance of the children?—Yes.

2951. Is it not preferable that it should be left to the parents to decide about the custody and maintenance if they can, and thus allow both parents to keep in touch with the children?—I do not say that the court should necessarily not accept the arrangement that is made, but I think that the court should have an opportunity to look into the matter and should not accept it automatically.

2952. What power should the court have of reviewing or altering an agreement that the parents have come to?—Personally, I feel that the court should have the ultimate power to alter such an arrangement and should adopt a procedure which would make it possible for it to find out when things were going wrong.

2953. It might be very dangerous, might it not, if the court over-ruled an agreement that had been come to by the parties and perhaps gave custody to a parent who did not want it?—I wonder if the court is likely to do that?

2954. There might be a chance. I was wondering what power you think the court should have of cutting and carving an arrangement that had been come to by the parents?—I am not really quite sure of the present position. Is it a fact that the court has not the power now to make an investigation into an agreed settlement about the children?

2955. (Mr. Justice Pearce): The court has at present power to do anything if one parent asks for custody, and that is not contested. Before giving that parent custody,

most judges would probably ask, "What arrangements have you made about access?" But there would be no further investigation then at all, that is to say, neither the judge nor any officer of the court would have seen the parent with the children. Nor would the court have had any information, other than that obtained when the petitioner appeared before it, which would enable it to say that he or she was not really fit to have custody of the children. That sort of thing is not investigated at all, though the court has the power to do so. If, however, the court were required to say in every undefended application, "I shall not give you custody of the child until the court welfare officer has seen you", that would mean an enormous increase in work.—I quite see the practical point.

2956. (Sheriff Walker): I am not sure that the position is exactly the same in Scotland. I rather think that there in many cases a divorce is undefended mainly because the parties have agreed on how custody should be arranged. If every agreement about custody had to be investigated by the court then perhaps the case might be defended on merit?—I do not think that it is for me to say, but I should have thought by what you have just said that that possibility is a relevant consideration.

2957. (Mr. Jones Roberts): I was interested to find, Mr. Briley, that you make no reference in your memorandum to juvenile delinquency. Some bodies, notably the Magistrates' Association, have told us that in their view the broken home is a major factor contributing to juvenile delinquency. Am I right in thinking that as far as your schools are concerned juvenile delinquency is not a problem?—What happens at a boarding school is that matters which might bring a boy before the juvenile court are liable to be dealt with inside the school. That case does not appear in any official statistics as "juvenile delinquency" in the recognised sense. It was not particularly our business, therefore, to talk about juvenile delinquency, but if you are referring to juvenile delinquency generally, I should agree entirely that a broken home is likely to have a harmful effect on the moral standards of the child.

2958. I thought perhaps the correct inference was this, that where you find juvenile delinquency you may find the broken home behind it as a factor, but that the broken home need not necessarily lead to juvenile delinquency unless other social factors are involved?—Yes, I do not think it is automatic, certainly, and, of course, other social factors are of very great importance. But given the unfortunate social factors, I can well understand that a broken home is liable, shall we say, to topple the child over the edge.

2959. As far as your experience is concerned, you are able to deal with it without recourse to the courts?—Yes, but that is our good fortune as it were. It is not dependent on whether the delinquents came from broken homes or not. It is merely that children, whether they are at boarding schools or not, who are able to stay on at school until eighteen are more fortunate in that respect than other children.

2960. The real point I want to make is this. Does the broken home of itself lead to juvenile delinquency, or is it simply a factor?—I have no particular right to answer, but I should have thought myself that it is an important factor.

2961. (Mr. Lawrence): I am not a schoolmaster, and I have followed the evidence with considerable interest. May I ask you whether this is right? Every school has its proportion of "bad boys", is that so?—Naturally.

2962. Is it the common belief amongst members of your Conference that that proportion of "bad boys" is, by and large, co-extensive with the boys who come from broken homes?—No, we could not possibly say that.

2963. I said, "by and large"?—I think that a considerable proportion do, but the two things are certainly not co-extensive. One gets boys, who are not satisfactory, who come from perfectly good homes.

2964. I was not suggesting an exact coincidence, and I qualified it by the phrase "by and large". However, can we agree that a large proportion of the "bad boys" are boys who come from broken homes?—I think that it would be wrong for me to accept that as such, it would probably give a false impression. I think that the broken home is an unsettling factor for a boy, and I say it is a thing which is likely to lower his moral standards—it is

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PAPER No. 36—MEMORANDUM SUBMITTED BY THE ASSOCIATION OF HEAD MISTRESSES

[Continued]

inevitable it should—but I think that it is probably going further than we should to say that a large proportion of boys who are not satisfactory come from broken homes.

2965. I was asking you this question, following those which have been put to you by Mr. Brown and by Mr. Young, because we should all like to have facts rather than opinion, and although we cannot have statistics I was trying to get at what I thought was the common experience of responsible masters of leading schools—I think we have to consider something more than merely whether the boys behave badly, and that sort of thing. There is the question of personal happiness, and what sort of citizens they are going to be afterwards—the whole question of social adjustment, for instance, whether they are likely to turn out to be good husbands. I think that it would probably be unfortunate and misleading, even if we could get the statistics, to view the two factors—delinquency in relation to the broken home—in isolation from other considerations.

2966. Perhaps I am prejudicing the whole enquiry by using the epithet "bad boys". If I said "unsatisfactory boys", would you more nearly have agreed with what I was putting to you?—Yes, I think so. Shall we use the phrase, "difficult boys"?

2967. I agree. I apologise for the wrong choice of the word. That is really what I mean—"difficult boys". Would it be, if I may come back to my first question, largely true to say that it is the general belief that the difficult boys in a school are the boys who come from broken homes?—I think that put in that way the statement goes too far. We all know enough examples of difficult boys who do come from perfectly good homes. I must guard myself by saying that, but I should still say that a large proportion of the difficult boys do come from broken homes, and that one has a feeling that such a boy has a very serious handicap. He is much more likely to be difficult if his home is a broken one.

2968. That is, after all, the basis of the conclusion which you reach in paragraph 5 of your memorandum. The sentence there that I have marked is that which reads:—

"Seen from the point of view of the welfare of the children, therefore, and disregarding all other aspects of the question, we consider proposals to widen the grounds for divorce to be very dangerous."

Do you mind if I analyse that sentence a little bit to see what it really means? By "all other aspects of the question", I take it that you mean the individual happiness of the parents, the rights and wrongs as between themselves and so forth. What are the other aspects?—There is obviously the religious aspect, which they are disregarding altogether. There are the general principles, you might say the broader social aspects, which might also be considered. We really wanted to underline the fact that here we were looking at the question solely from the point of view of the welfare of the children.

(The witness withdrew.)

PAPER No. 36

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF HEAD MISTRESSES

(NOTE.—The Association of Assistant Mistresses has indicated that it wishes to associate itself with this memorandum.)

1. On many aspects of the subjects under consideration by the Royal Commission on Marriage and Divorce the Association of Head Mistresses is not competent to pronounce. As head mistresses, however, we are deeply concerned for the welfare of children and have had occasion only too often to observe the effect of unhappy home life upon children, whether the adverse conditions are caused by (a) the divorce, (b) the separation of parents, or (c) their inability to maintain an atmosphere of harmony and secrecy, in which children can enjoy a happy home life. It is our experience that broken homes affect children chiefly in two ways; they are frequently the cause of (i) maladjustment, (ii) juvenile delinquency.

2. Maladjustment. The Joint Committee of the Four Secondary Associations has collected evidence from which it appears that in the 283 grammar schools under review 62.7 per cent. of about 500 cases of maladjustment, severe

2969. And from that point of view in isolation you consider proposals to widen the grounds of divorce to be very dangerous?—Yes.

2970. Because you consider that any widening of the grounds for divorce would lead to a greater number of divorced parents?—Yes.

2971. And therefore to a greater number of children coming from broken homes?—Yes.

2972. Implicit in this viewpoint in this consideration, is it not? That, again looking at it solely from the point of view of the children, it would be better still if the number of divorced parents and broken homes were restricted?—Yes, I think it would.

2973. Let us face it if we have got to face it, because I want your help about that.—Yes.

2974. That, of course, is on the assumption that the extension of facilities for divorce increases the number of divorced persons?—Yes.

2975. If it does not, of course, the argument breaks down. But if the first assumption is correct and if the object is to restrict the number of broken homes in the interests of the children, then it follows that you should restrict facilities for divorce?—Yes, I think that may possibly be over-simplifying the question a little, but broadly that is so.

2976. I agree that I may, for the purpose of pointing to the conclusion, be over-simplifying it. But I want to bring your attention to what I thought was implicit in the statement already quoted, namely, that not only would you consider that proposals to widen the grounds for divorce could be very dangerous, but that looking at the question in the light of the interests of the children, and in isolation from every other aspect, you would consider proposals to restrict the grounds of divorce to be salutary.—Yes, that is so.

2977. If looking at the question from the point of view of the children we are led to that conclusion, then we must face it?—Yes.

2978. (Chairman): May I put the first question which Mr. Lawrence put to you in a slightly different form? Supposing you take the children in a school who have come from broken homes as one division, and children in the same school who have not come from broken homes as another division. Would you say that the proportion of difficult boys was higher in one block than in the other?—Yes, it would be higher in the former, in the first block.

Chairman: Thank you all very much for your memorandum and for your help here this morning.

(The witness withdrew.)

of more accurate statistics than we can supply, but it is clear that the great increase in divorce and separation cases has coincided with a marked increase of juvenile delinquency; our knowledge of individual cases and of the comments made by magistrates and others concerned with juvenile courts leads us to the conclusion that there is a close connection between the two.

4. We believe, therefore, that it is most important for us, who have the interests of children at heart, to lay evidence before the Royal Commission on Marriage and Divorce, especially as its terms of reference direct it "to have in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children". We therefore put forward the following suggestions.

Changes in the law concerning divorce and other matrimonial causes

5. *Dissolution of marriage.* We do not think that there should be any extension of the grounds for the dissolution of marriage but are of the opinion that more positive steps should be taken in attempting to reduce the number of separations and divorces and to increase the number of happy homes; more skilled help and advice should be available to young people to enable them to prepare for marriage and its responsibilities.

6. *Minimum age for marriage.* We recommend that the minimum age for marriage be raised from sixteen to at least seventeen. This change would be a natural corollary of the raising of the school leaving age and is in line with the increasing realization that a boy or girl of sixteen has not the emotional, intellectual and physical maturity necessary for such grave responsibilities and lacks sufficient general experience of life.

The function of the home and Church

7. We believe that it should be the function of the home and of the Church to give some of the more detailed training upon the subject of marriage and parenthood, and we should like here to pay tribute to the guidance given by many of the clergy, but many parents are either unequal or indifferent to this task, and too few of the younger generation are attached to any church. Thus the school today bears a very special responsibility since it may be the only influence which can help growing boys and girls to prepare themselves for the responsibility of marriage, although good youth clubs and, at a later stage, marriage guidance councils, are often effective allies in this training.

The function of the school

8. To a certain extent the school can help young people to gain the right background for marriage. It can provide a healthy, happy, serene atmosphere, which forms the best basis for happy human relationships. It can prepare children for later adult responsibilities by making implicit in school life such things as the importance of keeping promises, however inconvenient; the necessity for self-control in ways both large and small; the development of habits of tolerance with one another, of an attitude of "give and take"; the importance of duties rather than of rights and of the necessity to complete a task; it can also make clear to its older pupils the principles upon which all human relationships are founded, and relate these to marriage and family life, encouraging them to think of the importance of their contribution as citizens in making good homes in the future. Courses in child welfare have proved interesting and useful to older girls. Sometimes a talk by an outside speaker on problems of marriage and parenthood is helpful, parent-teacher associations can also help by the frank and impersonal discussion of parents' responsibilities and children's difficulties in the home.

The post-school problem

9. School, however, cannot grapple with the heart of the matter; there is a serious gap to be bridged between leaving school and entry upon marriage, especially for those pupils who do not remain at school beyond the statutory leaving age. Constructive advice is badly needed for young people on the eve of marriage and in the early years of married life. We should therefore like to endorse the recommendations of the Final Report of the Committee on Procedure in Matrimonial Causes (the Denning Report), page 32, paragraph 87, I. 1, which states that

"There should be a Marriage Welfare Service to afford help and guidance both in preparation for marriage and also in difficulties after marriage. It should be sponsored by the State but should not be a State Institution. It should evolve gradually from the existing services and societies. It should not be combined with judicial procedures for divorce but should function quite separately from it". We hope that a service of this kind would be able to advise very helpfully on the delicate spiritual problems of human relationships involved in marriage, home-making and parenthood at all stages.

10. We wish to recommend that it be the special function of the welfare officers of a marriage welfare service to emphasize to those about to marry the sanctity of a contract taken "for better or for worse" and the very grave harm done to children of the marriage by the insecurity which comes from division in the home. It might well be that the form of marriage in registry offices should be revised, to emphasise the solemnity of the occasion and to express clearly the fundamental principle that marriage is the personal union, "for better or for worse", of one man with one woman, exclusive of all others on either side, "so long as both shall live".

11. We hope that ways may be devised to bring home to the spouses their duties and responsibilities when difficulties arise after marriage between husband and wife. Every effort at reconciliation should be made, for their own sake as well as for that of any children of the marriage. Children should have as far as possible the right conditions for growing up, and the security of a happy home life in this connection is of the greatest importance.

12. We cannot but deplore that in the year ending March 31st, 1951, the amount of public money given to help divorce proceedings was £204,800 while that given to the four main Marriage Guidance Councils was £13,000. We would urge that much more generous financial help be given to these agencies, that their number may be increased and their work extended.

13. If divorce is inevitable (and we realise that sometimes it is the only possible solution, not only for the parents but also for the child's welfare), we recommend the implementation of another section of the Denning Report, page 33, paragraph 87, II. 1. "Court Welfare Officers should inquire and report as to the welfare of children of parents who resort to the Divorce Court and should represent the interests of those children before the Court". We would urge that the interests of the children should never be overlooked or left to chance.

Powers of courts of inferior jurisdiction in matters affecting relations between husband and wife

14. We should deprecate in the strongest terms the extension to the courts of inferior jurisdiction of the power to deal with divorce cases. We feel that divorce is a matter for the expert guidance and wisdom of High Court and assize judges. Further, the delay inevitable in taking divorce to the High Court and to assize courts may give time for difficulties to be overcome by some less drastic means. We recommend that there should be a differentiation within the courts of inferior jurisdiction between criminal and matrimonial cases and that arrangements be extended for officers specially trained in matrimonial work to act as conciliation officers.

The law relating to the property rights of husband and wife

15. We should like to suggest that the law be amended in such a way that injustices are diminished both for men and women.

16. After a dissolution of marriage has taken place we recommend (a) that any savings which have accrued during the marriage should be reasonably distributed between the spouses, according to the particular circumstances of each case, (b) that arrangements be made to ensure a better property status for the woman. We consider that it is not only right that the wife should have a claim on the husband's income, but that she should also have the opportunity to live, as far as possible, in the same style as her husband.

17. We recommend the strengthening of the law to enable the court to trace a man who owes alimony and we also recommend that throughout divorce proceedings adequate provision for alimony be made.

(Received 15th January, 1952.)

17 June, 1952] Miss M. J. BISHOP, M.A., Miss A. CATNACH, C.B.E., B.A., and Miss N. W. WOOLDRIDGE

EXAMINATION OF WITNESSES

(MISS M. J. BISHOP, M.A., and MISS A. CATNACH, C.B.E., B.A., representing the Association of Head Mistresses; MISS N. W. WOOLDRIDGE, representing the Association of Assistant Mistresses; called and examined).

2879. (Chairman): Miss Bishop, you are Headmistress of the Godolphin and Laymer School, Hammersmith, and you are also the President of the Association of Head Mistresses?—(After Bishop): I was President when this memorandum was written.

2880. We have also before us Miss Catnach, formerly of Putney County School, and Miss N. W. Wooldridge, a representative of the Association of Assistant Mistresses. Do you wish to add anything to this memorandum on any of comment or explanation before we ask questions on it?—No, thank you.

2881. Would you tell us something about the constitution and work of the Association, because you modestly do not go into that in your memorandum?—Our Association represents every kind of grammar school and secondary school, though the large majority of members are headmistresses of grammar schools. It includes independent, direct grant-aided, and maintained schools.

2882. Then you say in paragraph 2:—

"The Joint Committee of the Four Secondary Associations has collected evidence..."

Would you describe the Joint Committee?—It comprises the four Secondary Associations—the Headmasters, the Head Mistresses, the Assistant Masters and the Assistant Mistresses.

2883. In paragraph 1 you say that, in your experience, broken homes affect children chiefly in two ways: they are frequently the cause of maladjustment and juvenile delinquency. Then in paragraph 2 you give certain figures collected by the Joint Committee:—

"... from which it appears that in the 283 grammar schools under review 62.7 per cent. of about 500 cases of maladjustment, severe enough to be referred to child guidance clinics, can be attributed to 'difficult home relationships, ranging from subtle tensions and jealousies to clear-cut difficulties such as broken homes, a second marriage, death of one or both parents, or adoption.'"

Which does your Association think does most harm, what you describe as subtle tensions and jealousies in the home, or a broken home the result of which is that the child is either living with one parent only or is divided between the two parents?—I think the second.

2884. In paragraph 3, which deals with juvenile delinquency, you say that the Commission will have other sources of more accurate statistics than you can supply, but you go on to say:—

"... it is clear that the great increase in divorce and separation cases has coincided with a marked increase of juvenile delinquency; our knowledge of individual cases and of the comments made by magistrates and others concerned with juvenile courts leads us to the conclusion that there is a close connection between the two."

Would you care to elaborate that at all as to your knowledge of individual cases—not, of course, giving any names—but indicating the general trend of what you have observed personally?—We would say that in the grammar schools there is definitely an increase of juvenile delinquency, some of which is dealt with within the school and thus never gets to the court. We have no exact statistics, but from our knowledge we are quite sure that in many cases delinquency is due to the broken home.

2885. In paragraph 16 of your memorandum you state:—

"After a dissolution of marriage has taken place we recommend (a) that any savings which have accrued during the marriage should be reasonably distributed between the spouses, according to the particular circumstances of each case;—

Then you continue:—

"(b) that arrangements be made to ensure a better property status for the women. We consider that it is not only right that the wife should have a claim on the husband's income, but that she should also have the opportunity to live, as far as possible, in the same style as her husband."

You are contemplating that after a dissolution of marriage has taken place, the wife should not only get some part of the income, but should be as well off as the husband?—Yes, or at any rate, more nearly as well off than she often is at present.

2886. Suppose the wife were richer than the husband. What would you say in that case?—I think that the same law should operate.

2887. Assume that the wife gets a divorce against the husband but is better off than he. Would you suggest that there should be any division in that case, or are you thinking of a case where the petitioner is worse off than the respondent?—We were thinking more of the second, but I think we would like to apply it to both cases.

2888. (Mrs. Jones-Roberts): Miss Bishop, you do keep in touch with old pupils, and you have quite a wide knowledge of what happens to your girls after they leave school?—That is so, yes.

2889. Do you find that when your girls are planning their careers a good many of them look forward to working after marriage? I take it that the average girl does look forward to marriage. Does she also contemplate going on working after marriage?—That is true of increasing numbers of girls, I think.

2890. And do you think that when they are planning their careers they keep in mind the idea that they will go on working? In the past, so often a girl only looked forward to work until she got married, but now she may be looking much further ahead?—I do not know that, at the stage when they decide upon their careers, they really think what is going to happen after marriage. They look forward to marriage, and then, when they are about to get married, very many of them nowadays decide that they want to go on working. But I would not say that the prospect of continuing to work after marriage influences their choice of careers.

2891. Have you any knowledge—from your Old Pupils' Association, for example—how this works out in practice? Do you find that difficulties arise, or does it in fact work out very happily even although both spouses continue to work?—I should say that on the whole it works out quite happily and that difficulties may arise only when children begin to arrive. The wife then may be attempting to do too much outside work to increase the income—which may be very necessary—and as is able to give less attention to the children than is really desirable.

2892. So that the real disadvantage would be not so much for the children as perhaps for the mother herself, who might be tending to overwork?—Yes, and may indeed be overworked and unable to give that sense of serenity to the home, which is perhaps the most important gift a mother can give.

2893. When you are advising girls on their careers, do you try to envisage some type of work which they can more easily carry on after marriage? Many jobs are in themselves difficult to carry on, but on the other hand one can think of many jobs which a woman can combine with married life without too much difficulty.—I would say that our first concern is to find a job which is suitable for a particular girl at that particular time, and bearing in mind the way in which she is likely to develop in the future.

2894. You do not really consider it from the standpoint of marriage as such, but from that of the girl's future? We consider what particular kind of work would give her her best fulfilment.

2895. Have you found that part-time work is on the increase among women and that it does not bring about the disadvantages that you have mentioned?—Yes, I think it is on the increase, but perhaps not sufficiently on the increase.

2896. You would like to see it extended?—Yes.

2897. And you think that that would not have an unfavorable effect on the home surroundings? There would still be some space for leisure, and so on, which

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you consider so important?—It would be very much better than the full-time employment which many women are struggling to carry on.

2994. Have you found amongst your old pupils that the broken marriage is making itself apparent in any considerable numbers?—It is increasing.

2999. But not to such an extent that you have to take serious cognizance of it? We are told by some witnesses that it is waning, but the Headmasters' Conference have suggested that as many as one in twenty of the children may come from broken homes.—We cannot give any statistics, but even if we had them, they would not be a fair representation of what is happening in the country at large, because, I think, the incidence of divorce amongst our girls is very much less than it would be amongst girls who have attended secondary modern schools, for instance. We are speaking largely for the grammar schools.

3000. And does your Association cover the whole country?—It covers the whole country.

3001. Rural areas as well as the towns?—Yes.

3002. Have you any statistics or experience which would show that the incidence of the broken marriage is very much less in rural areas?—We have no statistics to prove it, but I am sure that it is less in rural areas.

3003. And you might find a school in a rural area where there is not a single child from a broken home?—I do not think that we could assume that, but our opinion is that the incidence is less in rural areas.

3004. (Dr. Robertson): May we take it that you all have experience of the distress caused to children by the granting of access to the parent not having the custody?—Yes, we have.

3005. And you are perhaps tempted to take the law into your own hands sometimes if you feel that the law has not given sufficient protection?—I do not think that any of us would dream of doing that.

3006. It is a very great problem?—Yes, one which very often puts the head of a school in a very difficult position.

3007. In paragraph 14, you indicate that you feel very definitely that jurisdiction in divorce cases should not be extended to the inferior courts but should be left to the High Court?—We do.

3008. And then with regard to the minimum age for marriage you recommend, in paragraph 6, that that should be raised to at least seventeen. Did some of your members feel rather in favour of eighteen?—Yes, but seventeen seemed to be the only realistic figure.

3009. You may be aware that there has been some discussion as to who are best fitted to act as welfare officers to the courts. Have you had any experience of the children's officers or school welfare officers?—I think that the children's officers would be of tremendous use where children are attending day schools. As each officer serves a particular locality, they would be much less use, surely, where children attend boarding schools and come from all over the country. We hope that officers of that type, but officers with specialised training in this kind of work, can be made available to look after the children, perhaps even before the mother has come to the court, in the hope that it might prevent the divorce or separation. They should certainly be available to assist after the separation or divorce has taken place. We have very many instances of the sufferings of children who may have been given to the wrong parent, and no one seems to be responsible for their welfare. I have in my own school at the moment two girls from homes where there is a divorce. In one case no one looked after that girl for more than eighteen months and if it had not been for our intervention, there would have been no one to take an interest in her outside school hours at all. It seems to me a terrible thing that such a situation can arise.

3010. You feel that such an officer might be used at the very outset?—Yes, one would hope so.

3011. (Mrs. Allen): Do you consider that it would be advisable to have a follow-up period after custody has been granted?—Yes.

3012. I think you indicated earlier that you feel that the broken home or unhappy home is one of the causes of juvenile delinquency. What about the home which could be considered a good home, but where both parents are going out to work? Would you say that that situation has increased delinquency?—Not to the same extent, it happens in the odd case much more than generally. It might be true where a child specially needs the care and sympathy and understanding of the mother; and because that child is unable to get that care and attention the moment she needs it, she becomes more and more introverted and thus develops difficulties and complexes.

3013. Did I understand you right when you said that you considered that broken marriages were more likely among girls from the secondary modern rather than the grammar school?—I think that the former would have more cases.

3014. More cases?—Probably. I do not know whether Miss Catnach agrees with that. (Miss Catnach): I would say, my Lord, that, after all, we in grammar schools get the more intelligent girls, and therefore the girls with a greater feeling of responsibility, the girls who are more easily influenced in school, and have better traditions of conduct. And we do have smaller numbers. We know our girls better, and therefore we can do things that the secondary modern school, with its vast numbers of undifferentiated girls, cannot do. That view is based simply on these grounds, and not on any other, because as far as my school was concerned, we drew pupils from entirely the same social strata as the secondary modern school. It was only that our pupils were more intelligent, and perhaps came from homes with a better sense of purpose and with more desire to do well by their children.

3015. (Chairman): You are dealing, as I understand it, with the number of girls who afterwards become divorced?—Yes.

3016. (Mrs. Allen): That is the point I wanted to elucidate rather than to ascertain the actual number of girls from your schools in that position. But you think that wider social factors are the determinant rather than type of school?—Yes.

3017. You indicated earlier that, in advising girls about careers, you would not take into account the possibility that the girl might continue work after marriage. You went on to say that it would be better if only part-time work was undertaken after marriage. But, would you agree that in future there may be less opportunity for people to take part-time work? Do you feel that it is better for married women to concentrate on the home rather than to take any work at all, even in times of economic difficulty?—(Miss Bishop): I think it would be dangerous to generalise on that question, because if you rule out all scope for the employment of married women, that may lead to difficulties of another kind.

(At this stage the Commission adjourned for a short time.)

3018. (Mrs. Allen): Miss Bishop, in your Association's memorandum, you place emphasis upon the need for pre-marriage training. Would you give me your opinion as to the part the schools can play in this? Do you think that the extension of facilities for training in housewifery and domestic science would help?—Yes. The schools are already doing a great deal through biology teaching, in which sex instruction is given, and a good many schools give lessons in parenthood. Moreover I am sure that if marriage welfare officers, of the kind we suggest, were established, then the schools would be very happy to co-operate with them in every possible way.

3019. By providing classes in housewifery?—Housewifery is taught in many schools at present.

3020. Do you think it would be helpful if it were further extended?—I think it would be helpful. It would be difficult to give a great deal more time to it in the present curricula of the grammar schools. But a good many grammar schools do have special courses for their sixth forms, and possibly more of that type of instruction could be put into that course than at present.

3021. In paragraph 16 of your memorandum, you recommend that, on divorce, a wife's settlement should be such as to give her a standard of living equal to that of the

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husband. Would you apply that to separation as well as divorce?—Yes, I would, but I do not know enough about the financial arrangements in cases of separation. I would, however, hope that the same rules would obtain there.

3022. (Dr. Baid): In regard to custody of children, we have had it represented to us that it might be less disturbing for the child if access were not granted to the other parent—the parent who did not have the custody of the child. For the child, the effect would be just as though that parent had died. Have your Association considered that?—I think that it would be a very dangerous generalisation. Sometimes the hardest thing that the child has to bear is the separation from the parent who has not got the custody.

3023. You think that even if it proved rather disturbing, in general it would be better for the child to see both its parents?—That is a matter where I hope it would be possible for the advice of the welfare officer to be used.

3024. And each case decided on its merits?—Yes, I think it is such an individual matter that you require an expert to deal with each one.

3025. (Mrs. Bruce): In regard to paragraph 16, where you deal with the question of savings, you say earlier that even if the wife were richer than the husband there should still be a division of the assets. Have you considered the position where a wife had gone to work in order to supplement the income of the family, and out of her own earnings had been able to set aside a certain amount, and then the marriage was dissolved? In that case would you suggest that the wife's savings, from her own earnings, should be divided between the parties?—Logically, we must say "Yes". But I think honestly, that it is the other situation that had occurred to us as being the more frequent.

3026. In paragraph 5 you suggest that steps should be taken to reduce the number of divorces. Had you considered whether the grounds of divorce should be narrowed?—No, I do not think we had considered whether the present grounds should be narrowed. We had considered merely that it was inadvisable to extend the grounds.

3027. You have no observations to offer as to whether you think the grounds should be narrowed?—No. As a personal observation, I would say that I would hope that, if marriage welfare officers are appointed, then the grounds for divorce could gradually be narrowed. The advice and help given should prevent many cases coming to the Divorce Court which at present arrive there.

3028. (Lord Keith): Would you look, please, at paragraph 2 of your memorandum, which is headed, "Maladjustment"? I should like to know exactly what these figures indicate; they seem a little confusing. Do I understand that out of 283 grammar schools you found 500 cases of maladjustment?—Yes. May I ask Miss Cateach to answer these questions. She is our authority on this matter.

3029. Have I put the question right?—(Miss Cateach): Except that there would be more cases of maladjustment. The 500 cases were cases severe enough to be referred to child guidance clinics. We felt they were the only ones on which we could base any conclusions.

3030. What would be the average number of pupils in these 283 schools?—The figures are based on answers to a questionnaire that was sent out, and while there were a few schools with as many as 900, that was not the average. Normally the number of pupils would be between 350 and 550.

3031. I have made a calculation on the basis of 500. Would that be a fair average figure?—I think the average would be under 500, more like 400.

3032. 500 is an easy figure to work on and we will make an adjustment later if necessary. On that basis the total number of pupils in the 283 grammar schools is 141,500. Then out of 141,500 pupils, there were 500 cases severe enough to go to child guidance clinics?—Yes.

3033. And that represents roughly 0.35 per cent.?—Yes.

3034. In other words one case in 350. But it is only 63 per cent. of that one case in 350 that is due to the various causes that you have set out in paragraph 2 of your memorandum?—Yes.

3035. So that the number of pupils affected by these causes is a relatively small number in the total number of pupils at the schools. You would agree with that?—I would agree with that, although that is not the way I would put it myself. It is true that in the grammar schools the problem of maladjustment is small, but the point is that where we do have maladjustment, by far the largest cause is home difficulties.

3036. I quite appreciate that. I am merely trying to find out the extent of the problem so far as your particular schools are concerned. But the various causes from which the 63 per cent. of cases of maladjustment arise range from "subtle tensions and jealousies to clear-cut difficulties such as broken homes, a second marriage, death of one or both parents or adoption". We are working on very small figures, but of those various causes I take it that broken homes would perhaps account for the greater proportion?—Yes, I think that is fair.

3037. But even so, is it the case that so far as your schools are concerned, the number of pupils affected is a relatively small proportion?—Yes. Before we leave that, I ought to say that the number of child guidance clinics is so inadequate that many children, who might be referred to them never get there, so that these figures have to be taken with some reserve.

3038. Will you turn to paragraph 16 of your memorandum? May I put a general question? Has this matter been very fully thought out?—(Miss Bishop): No.

3039. I did not think that it could have been. Let me first of all ask this. Married people very often bring property with them into the marriage. Again, married people very often inherit property during marriage. I do not know whether you are including these two sources of property in either head (a) or head (b)?—What we were really thinking about was the property common to the two of them, and I do not think I am really competent to express any opinion in answer to your question.

3040. Am I right in putting it this way, property which either of them had earned by his own efforts during the marriage?—Yes.

3041. Now when you come to your recommendation (b)—arrangements to ensure a better property status for the woman—are you again confining that to the earnings of each spouse during a marriage?—The kind of case we were thinking about is where the husband may have had during the marriage a fairly substantial salary or income. After divorce, the wife is granted a certain allowance. That frequently results in her living in comparative poverty, as compared with the husband, who continues to live on the same standard as they both enjoyed during marriage. That seems to us unjust.

3042. Am I right in expressing your view as this, that the courts in England—I am not concerned for the moment with Scotland—that the courts in England should give a much larger proportion of the husband's income in the shape of maintenance to his wife?—Yes, that is what I am saying.

3043. You realise that the husband very often has considerable calls on his income in the shape of business liabilities, business development and matters of that kind?—Yes. I think we were considering it very much from the point of view of the child. In many cases, the custody of the child, especially if a girl, is given to the mother, and the child, having lived during the marriage in comparative ease and comfort on the father's income, is suddenly faced with a situation in which the mother has to earn in order to supplement what is granted to her by the court. And even where the mother does go out to work their standard of living is often so much below what the child had previously enjoyed, that that sets up a further series of difficulties for the child.

3044. I thought you were looking at this entirely from the point of view of the wife, but you are now bringing the children into it?—Throughout our memorandum our concern is always with the effects of the broken home on the child.

3045. I realise that. I thought perhaps that the question of property rights was in a separate category and that here you were really advocating a measure of sex equality.—Only in so far as we think that on this particular question, that might benefit the child.

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3046. Does that mean that if the mother did not have the responsibility of looking after the children after divorce, then this section of your memorandum would not apply at all?—I should rather not say that, though in fact that is what you have led me to say.

3047. I really was not trying to lead you to that at all. You yourself introduced the question of the children into the matter. I did not think that the interests of the children came into the question until you brought them in.—I think it is fair to say that in preparing the memorandum our first concern was the interests of the children. Therefore it is true to say that our recommendation as to equality of property rights was based on the consideration that it would, in many cases, also be of benefit to the children. On the other hand, I do not think I would wish it to be said that we would not stand for equality for the wife, even if there were no children.

3048. (Mr. Flecker): Some of the schools represented in the Association of Head Mistresses are fee-paying schools?—Yes.

3049. Do you find frequently that, owing to divorce proceedings, the father shuffles off his responsibility for the children's fees, with the result that a girl is either withdrawn before she has finished her normal school career, or is denied a university career, because the father does not come up to scratch?—Both these things happen, unfortunately.

3050. Fairly frequently?—Out of the number of divorce cases, yes, fairly frequently. I have no statistics to prove that, but I know that girls are sometimes transferred from boarding schools to day schools because the father does not come up to scratch to payment of fees. I have several such cases in my own school.

3051. You think that that is an unfortunate thing?—Most unfortunate, because it means a break in the girl's education. It means a whole new adjustment in the educational sphere, as well as adjustment to the changed circumstances in the home.

3052. Earlier witnesses expressed the view that when the mother is given custody of the children the father in some cases behaves badly towards the children, and tries to evade any further responsibility for them. Would you say that probably the explanation is that the father is disgusted with the whole affair and wants to get away from it as far as possible?—That may be so, but I would not feel competent to say.

3053. Several witnesses have suggested to us that when the question of custody arises, the child should be allowed some choice as to which parent should have the custody. Do you think that wise or unwise?—I think, in very many cases, unwise. I think that it is putting an extra burden on the child and I know of cases where it has given rise to real suffering. The child has loyalty to both parents and it is a very hard thing for a child under sixteen to make that decision.

3054. You would regard it as quite exceptional for a child to be allowed the choice?—Yes, I should.

3055. It has been suggested also that insufficient use is made of retired teachers to help in the care of children of divorced parties, whether as assistants to the probation service or the children's service. Do you think that retired teachers would be suitable for that sort of employment in certain cases?—Perhaps in certain cases, but I would have thought that younger people would be better.

3056. You think that by the time one has done one's work as a teacher one is pretty well worn out?—I think that very often it is easier for the child if the welfare officer is someone younger, not necessarily very young, but a little younger than one is when one reaches retiring age.

3057. Might I ask one question in regard to the figures you were discussing with Lord Keith? I was a little surprised that only 62.7 per cent. of the severe maladjustment cases could be attributed to difficult home relationships. I should have thought that the figure would have been nearer 90 per cent. What are the various causes which account for the remainder?—(Miss Catnach): Educational difficulties accounted for the next highest percentage. There the child was in the wrong kind of school, could not manage the work, the work was too difficult or too easy, or something of that sort.

Then, physical handicap is the third largest group. A child who is born with some physical handicap may get all kinds of complexes which lead to maladjustment.

3058. (Mr. Brown): I should like to put this question to you. Suppose a child's parents separated when she was eleven years of age, and remained apart for the next seven years, and that during that time the child never saw her father. Do you think that if the marriage were then legally terminated it would cause any extra psychological disturbance to the child?—(Miss Bishop): If she did see the parent?

3059. If she had not seen the father from the age of eleven onwards, do you think it would cause any extra psychological difficulty if that marriage were then legally terminated?—No, I do not. Probably there might be individual cases where it would, but I should think generally that it would not, after that lapse of time.

3060. Do you think that would be the common opinion among teachers?—I think so.

3061. (Mr. Baloe): Do you think there would be value to the children in being able to have another parent—a step-parent—in circumstances such as those outlined by Mr. Brown?—Again surely it would depend on what the child felt about the step-parent. If the child can accept the step-parent, and in many cases of course children can, then nothing but good comes of it, but where there is antagonism then nothing but bad.

3062. When Lord Keith was asking you questions about the statistics given in your memorandum, it occurred to me, and I wonder whether you agree, that one does not send a girl to a child guidance clinic until she is in a pretty bad way?—I think that our figures on this subject are misleading, because so many of the cases of slight maladjustment—which may nevertheless be a very painful thing—are dealt with by the school, partly because of the small number of child guidance clinics available, and sometimes because the school feels that it can perhaps better deal with the difficulties. It knows the child, it knows the parent and it knows the background. Only a small proportion of the children who suffer actually appear in the child guidance clinic.

3063. I have not been quite clear from the answers that you have given whether you wish to distinguish between the court welfare officers and the marriage welfare service. You mention one in paragraph 10 and the other in paragraph 13.—We hoped that there would be, if not a new, then an extended marriage welfare service, which would include all the work which we think should be dealt with.

3064. Had you in mind that that would be provided by or aided by the State?—Certainly aided by, but not controlled by, the State; something which would grow out of such agencies as already exist.

3065. You are not thinking of the court welfare officer as belonging to this service, or are you?—I am probably in regions I am not very clear about. I really do not much mind what name is given. I just want to be sure (a) that the children have far more care given to them in divorce cases, and (b) I want far more guidance given to the parents before they have come to the point of separation. I know that so often parents come to see the head of a school to discuss their difficulties, but the head of a school is not always capable of giving the help the parent needs. If there were established this service, to which all these people in difficulties could go in the initial stages, surely many of the final difficulties might be avoided.

3066. I was trying to ascertain whether you thought that voluntary marriage guidance councils situated in the big towns, were the most suitable agencies to give such advice, and whether perhaps you would need, in addition, somebody attached to the court to carry out enquiries in relation to the children of a broken marriage. You do not mean that both functions should be carried out by the same officer?—No. I think it would probably be necessary to have two separate officers.

3067. From your experience of parents would you think that the person who is going to advise them in their difficulties—that is, before the marriage is broken—should be somebody attached to the court, like a probation officer, or would you think that the agency to give such advice should be a voluntary society? Or perhaps you think both would be helpful?—I think preferably someone attached to a voluntary society.

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3066. Is it your experience that parents would seek advice more readily from such a person?—Yes, definitely.

3069. In paragraph 6, you discuss the minimum age for marriage. Have you any statistics which show whether or not those who married very young made a success of their marriages or not?—I am afraid very often not.

3070. That is from your observation rather than from statistical evidence?—Yes, I have no statistics at all, but very definite observation.

3071. Is it your experience that the courts are anxious to seek the advice of headmistresses and assistant mistresses in regard to which parent should have the custody of the children and to what the education of the children should be?—I should say that the schools are far too seldom consulted.

3072. You feel that teachers would be willing to come forward and help the courts even though the result might be in some cases to offend one or other of the parents?—I think so; I would hope so.

3073. (Mr. Lawrence): Miss Catnach, I hesitate to return to the statistical information in paragraph 2 of your memorandum, but I should be very grateful if you would tell me whether I am interpreting it in the way in which you wish to present it to the Commission. One starts with the number of grammar schools under review. The next step is that out of those schools 500 cases of maladjustment were severe enough to be referred for assistance to a clinic. Lord Keith has pointed out that that is a small proportion of the total number of pupils at all those schools. But am I right in thinking that the really significant point of this paragraph is this, that of those 500 cases, however many or however few there may be in relation to the total number of pupils, no less than 63 per cent., or more than half, were directly attributable to domestic difficulties between mother and father?—(Miss Catnach): That is the significant fact.

3074. And of those domestic difficulties the largest category of all was the category of the broken home?—Yes. I think it would be fair to say that the broken home accounted for the largest number of those cases.

3075. (Chairman): Might I just intervene? I do not want Mr. Lawrence to be under a misapprehension but I think that "death of one or both parents" could not possibly be described as "difficulties between the parents". There are a number of categories under the heading of "difficult home relationships". Miss Catnach, I think, a little rashly assented to Mr. Lawrence's suggestion that 63 per cent. of the cases of maladjustment were due to difficulties between parents.—Could I give some further indication of the various causes giving rise to these difficulties? The maladjusted children under review were 530 in number. Of those 530, 125 came from broken homes.

3076. (Mr. Lawrence): I had not forgotten that some of the domestic difficulties were caused by the death of one or both parents, for I had in mind the next sentence in your memorandum—"Some of these causes of maladjustment admittedly lie outside human control, as, for example, the illness or death of parents", but those are in the minority?—Yes.

3077. If what I have put to you is substantially right, does it come to this, that in so far as one can ease the domestic difficulty between mother and father, then to that extent one has made a very great inroad upon the problem of juvenile maladjustment?—Yes, that is so.

3078. (Mr. Justice Pearce): May I return to the problem which arises where a father is no longer willing to continue to pay for the child's education at school or to send her to a university? That situation generally arises owing to the fact that, on divorce, the father's income has to be divided between two homes. There is not so much money to go round and if he marries again

it is at that point that the real trouble starts. Would you agree with that?—(Mr. Bishop): Yes, I would.

3079. Not only has he to provide for his first wife, but he has of course another wife and may have children by his second marriage, whose educational needs must also be considered?—Yes.

3080. I would suggest to you that that situation is far more common than one where the father merely wishes to shuffle out of his responsibilities because he is annoyed with his wife. Do you agree to that?—I think that is probably true, though I do think that there are very definite cases where the father shuffles out of his responsibility even although he has not married again.

3081. Where a family has been separated and there is a divorce, if the child has not seen one parent, the child loses little or nothing. But have you found that when the mother remarries again, the girl then finds that she is no longer the centre of interest in the home? Her mother's attention and interest tend to be focused on her new husband and that is frequently resented by the child?—Very frequently resented.

3082. Of course, it may be that I have formed that impression because that is the type of case which more frequently comes before the court. A judge does not see the happy relationships where there is no trouble; he sees only the cases where difficulties have arisen. But you see all kinds, the happy and the unhappy. Would you say that a high proportion are cases where the child's outlook is disrupted by the re-marriage of one of the parents rather than by the actual break-up of the first home?—Quite a high proportion. Even where both the mother and the step-father try to help the child to adjust herself to the new relationship, it is hard for the daughter so to adjust herself. It does create real conflict and difficulty, and too often not enough consideration is given to the point of view of the child.

3083. (Chairman): Do you think that the trouble to which you refer is more likely to arise where there is a second husband and the child's father is still living rather than where the child's father is dead and the mother then re-marries?—I do.

3084. (Lord Keith): Miss Catnach, I think you were on the verge of giving us some information which I thought might be very useful to us. I am keen to get facts as far as I can. You began by giving a division of the 530 cases of maladjustment. The first one was 125 broken homes?—(Mr. Catnach): Yes.

3085. We did not get the other categories and I think it would be very helpful if you could let us have the figures. There were 125 broken homes, and then after that?—This analysis was not prepared with a view to its being submitted as part of our evidence. You will take that into account. The figures are: "difficult home relationships"—78; "bad social conditions"—63; "educational difficulties"—47; "one or both parents dead"—29; "the effects of the war" (that is, I suppose, the father being away from the home)—28; "adopted children or step-parents"—48; "unequal preference shown by the parents to one child or another"—19; "illness of parents"—14; "the fact that both parents were working or the only parent, if only one"—10; "that the parents were too strict"—12; "physical handicaps"—15. The last category is rather a hotchpotch. It comprises: "over spoiling"—7; "heredity"—7; "serious illness in early life"—7; "illegitimacy"—7; "ambitious and over anxious parents"—7; "abnormal sex development"—3; "religious pressure or religious differences"—3; "indolent assault"—2; "refugee child"—1.

3086. And that adds up to 530?—I hope so. (Lord Keith): I am very much obliged.

(Chairman): Thank you very much for your very helpful memorandum and evidence. We are much obliged to you.

(The witnesses withdrew.)

PAPER No. 37

MEMORANDUM SUBMITTED BY MR. CLAUD MULLINS

(NOTE.—In this memorandum I have not dealt in any detail with matters that are likely to be included in the evidence of the Magistrates' Association, of which I am a member.)

EXPERIENCE

1. (a) I was a metropolitan magistrate from 1931 to 1947 and during that time I took a special interest in the social side of court work, particularly in the matrimonial cases. I calculate that I must have dealt with nearly 5,000 matrimonial cases during my 15½ years' work. I established a domestic court over two years before they became compulsory on the passing of the Summary Proceedings (Domestic Proceedings) Act of 1937. I had a large share in the movement which led to the passing of this Act.

(b) I am the author, amongst other books, of *Why Crime?* dealing with the main causes of crime. In this book I point out the importance of parental affection and stability for children, and the consequences of breaking and broken homes.

(c) I was the first Chairman, and am now one of the Vice Presidents, of the London Marriage Guidance Council and have taken great interest in its work.

DIVORCE PRIMARILY A SOCIAL PROBLEM

2. The English law of divorce has, in my opinion, erred mainly because of its assumption that divorce is primarily a legal matter. On that assumption the Matrimonial Causes Act of 1857, and all succeeding legislation, was based. But in my view the conception that divorce is primarily a legal matter is socially dangerous. It necessitates a concentration on questions of proof of matrimonial offences, thus ignoring the more essential questions whether it is really necessary in the interests of the parties and of their children that application should be made for separation or divorce; also whether reconciliation is possible. In this legal conception of divorce the children of a marriage merely become problems that are subsidiary to that of proving a matrimonial offence. But I regard the children of a marriage that is breaking or broken as a central problem needing attention.

3. This Act of 1857, the first Act authorizing full divorce by national courts, was based on this false assumption. It was also based on a false conception of Biblical authority. The then Archbishop of Canterbury (Dr. Sumner) stated in the House of Lords that "he did not hesitate to support the main object of the Bill" and he and eight bishops, including Dr. Tait (Bishop of London and later Archbishop of Canterbury), voted for the Bill. This policy was presumably based on the exception for "fornication" in St. Matthew, chapter V, verse 32. But modern theological opinion is doubtful whether this verse is binding on the Christian conscience, or whether the word translated "fornication" necessarily means adultery.

4. Theological witnesses will help the Royal Commission on this subject, but even for laymen it is of prime importance. For the belief that this Bill carried out the Christian commands prevented the ecclesiastical authorities from applying their minds and knowledge to a search for a policy that would best reflect Christian teaching.

5. The consequences of this factor were (a) that this Act of 1857 placed upon the national courts the primary duty of granting decrees of divorce *a vinculo* solely according to the proved conduct of the husband and wife and (b) that the welfare of the children of the marriage became only a matter to be dealt with after such decrees had been granted. The result today is that ordinarily the judges decide their cases solely according to their view of the conduct of husbands and wives and that the welfare of their children is dealt with later, usually by the registers of the courts.

6. I submit that this priority of husband and wife over the welfare of their children is socially wrong and contrary to the spirit of Christian teaching. It is noteworthy that in the Final Report of the Committee on Procedure in Matrimonial Causes (the Denning Committee) it was

stated that "the welfare of the children is subordinated to the interests of their parents" (para. 30). The solution proposed by this Committee (paras. 33 and 34), and since put into force in experimental fashion (of having a probation officer available to assist the Divorce Court in family matters) seems to me likely to prove inadequate. The welfare of children should, I believe, be considered first before application is made to the courts for legal remedies.

NEED FOR TWO SEPARATE PROCEDURES IN DIVORCE

7. For these reasons I submit that the divorce law of the future should regard divorce primarily as a family matter and that the welfare of the children should be regarded as at least equally important as considerations about the conduct of husband and wife.

8. I would suggest, therefore, that the law should provide two separate procedures in divorce cases, one for cases where the parties have no children under sixteen and another for cases where either such children exist or the wife is pregnant at the time of the hearing.

9. In cases where the parties have no children under sixteen and the wife is not pregnant, applications for extending the grounds for divorce should, I submit, receive sympathetic consideration. In this memorandum I do not deal further with these cases.

CONCILIATION IN CASES INVOLVING CHILDREN

10. I strongly advocate the adoption of the principle that parties having children under the age of sixteen, or where the wife is pregnant, should by law be offered conciliation before their divorce cases are considered by the courts, and before there can be any application for legal aid. It may not be wise to order this compulsorily, but opportunities should be given and facilities provided. Where parties refuse to undergo conciliation, a period of delay might be enforced, subject to urgent cases being freed from such delay, as is the case with marriages that have not lasted three years. (Section 2 (1) and (2) of the Matrimonial Causes Act, 1950.)

11. As three out of the four grounds on which magistrates can make orders of separation or maintenance can also be grounds for divorce, I submit that the experience of magistrates in their domestic courts has some relevance to the problem of conciliation in divorce cases. My experience before the war of 1939-1945 was that at least one third of the cases in my domestic court were settled before the hearing, through the agency of probation officers acting as conciliators. This proportion was lower during and after the war and I am unable to say whether it has been raised since 1947, when I retired. As in many of the cases so settled grounds for divorce existed, I have reason to believe that a considerable proportion of cases presented for divorce could be amicably settled by some form of conciliation process.

12. As I wrote in *Why Crime?* :—

"In conciliation procedure the last question that is considered is whether the case can be legally proved. Before that question is considered, the conciliator sees first that the party concerned fully understands the consequences of the proposed step; alternative courses are clearly explained. Without using undue pressure, the conciliator endeavours to see whether the parties can be satisfied without having to bring their troubles before a court of law. With conciliation procedure in existence, a court knows that the very fact that the hearing of a case is necessary is an indication that the parties are determined, or that one side in the dispute is determined, to force matters to legal decision. . . . But where there is no conciliation procedure, a court never knows whether its decision will bring more harm than good to the party who wins the case." (p. 74.)

13. This is the present position. Judges are compelled by law to grant decrees of divorce without knowing whether the parties have fully understood the consequences, or whether decrees of divorce must inevitably inflict harm on the parties or on their children. It is not surprising that some of them have expressed a strong distaste for divorce jurisdiction. A registrar of the Probate, Divorce and Admiralty Division once said to me: "In dealing with questions of alimony and custody after decrees have been granted, I often get the impression that only the law is holding the parties apart."

14. Many decrees of divorce are granted in cases in which orders of magistrates' courts had been granted at an earlier stage. In such cases the High Court usually allows the order of magistrates' courts about amounts to be paid and custody of children to remain. Then the parties frequently apply to magistrates' courts, after the granting of decrees of divorce, to modify or cancel the earlier orders. Dealing with such applications, I was often struck by the ignorance of the parties about the effects of divorce. I had before me men who believed that, when divorced, they had no further obligations to the children of their marriage and also women who took it for granted that after divorce the same amounts would be paid by their husbands, regardless of the latter's remarriage and fresh parental responsibilities. In my opinion the law should provide that, as part of a conciliation procedure, the consequences of divorce should be explained to the parties before they apply to the courts.

METHODS OF CONCILIATION

15. A conciliation procedure for cases involving children could be provided in two ways.

(a) Those who come within the financial limits of magistrates' domestic courts could be invited to appear before these courts. Magistrates in general (but not stipendiaries when sitting alone) form an excellent tribunal for dealing with matrimonial matters. They understand the lives of those who appear before them and most of them have experience of work in domestic courts. It would be easy to extend the jurisdiction of domestic courts to include informal hearings, which should not be reported in the newspapers. At such hearings (i) the parties should be encouraged to state fully their differences, (ii) experienced probation officers should be in attendance to assist both the court and the parties (they should be encouraged to see the parties privately before the hearings), (iii) the consequences of divorce and the merits and drawbacks of orders by magistrates' courts should be discussed with the parties and also the possibilities of reconciliation and the best interests of the children. Magistrates' courts have a useful power of making interim orders, without making any decisions about the conduct of the parties, for three months (Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 6). This power should be available for this new jurisdiction.

I propose to submit this matter to the Committee of the Magistrates' Association that will prepare the evidence of the Association. But I am doubtful whether agreement will be obtained.

(b) Those beyond the financial limits of magistrates' courts could be referred to marriage guidance councils. The Commission will probably receive evidence about these councils, so it is not necessary for me to explain their work.

16. When dealing with cases of desertion, cruelty and wilful neglect to maintain I used sometimes to be amazed at the comparative triviality of the grounds upon which husband and wife had parted. In domestic courts magistrates may not succeed in obtaining the whole truth about the causes of matrimonial unhappiness, but probation officers, who usually see both parties privately before the hearings in court, have often expressed the same opinion to me. My experience was that, even in cases where grounds for divorce existed, the fundamental trouble was often one, which, if it had been sympathetically handled at an earlier stage, could have been overcome to the satisfaction of both parties and the benefit of their children. Between us we succeeded in settling many cases where decrees of divorce could have been obtained.

17. These considerations emphasize the wisdom of introducing some form of conciliation before divorce cases

by parents, or parents-to-be, are submitted to the High Court.

18. I am gravely concerned about the effects of the Legal Aid and Advice Act, 1949, which may result in many cases, which but for this Act would have come under the conciliation procedure of magistrates' courts, proceeding direct to the Divorce Court. As I have inferred, I do not regard matrimonial disharmony, however grave, as a suitable matter for lawyers and courts until a conciliation process has been undergone. Solicitors often discuss generally the interests of their clients before filing petitions, but it has to be remembered that solicitors do not ordinarily receive any social training. They probably have little knowledge of the lives and conditions of those on the lower economic scale.

19. I have an open mind whether full divorce ought to be granted in cases where the income of the parties is only sufficient for the maintenance of their children and themselves. That in fact such decrees are at present granted, regardless of the economic needs of children, seems to me quite wrong. Repeatedly as a magistrate I had to divide an income that was adequate for one family among two, or occasionally more. There was no more difficult task and whatever decision I made, I knew that suffering would be caused.

20. (a) In these times of heavy taxation only a very few are financially able to provide for more than one family. So, if it were considered wise to withdraw full divorce from those with young children, such a step could not reasonably be regarded as class legislation.

(b) It will be said that refusal of full divorce on economic grounds might result in an increase of celibacy without marriage. To some extent this may be true, but my court experience was that a considerable proportion of those who were separated, but not divorced, did not enter into fresh alliances.

DIVORCE AND DELINQUENCY

21. There can be no doubt that the break-up of families by divorce or separation is one of the main causes of juvenile delinquency and failure. All authorities that I know are agreed about this. As this matter will be dealt with in the evidence of the Magistrates' Association, I do not enlarge upon it in this memorandum. But the following selection of references may be of use to the Commission.

One Thousand Juvenile Delinquents by Professor Sheldon and Eleanor Glueck, pages 73, 79 and 117.

Five Hundred Criminal Careers by the same authors, page 117.

The Young Delinquent by Professor Cyril Burt, pages 53 and 187.

Delinquents and Criminals, their Making and Unmaking by Des Healy and Bronner, page 122.

New Light on Delinquency by the same authors, pages 29 and 39.

The Roots of Evil by Sir Edward Cadogan, page 283.

Many other authorities could be quoted.

ENFORCEMENT OF HIGH COURT ORDERS FOR ALIMONY

22. It would be valuable if the law provided that all High Court orders for alimony below the rate of £5 per week (plus 30s. for each child) should come within the jurisdiction of magistrates' courts for enforcement and, if possible, amendment on fresh evidence being shown. At present only the High Court can enforce orders made by the High Court, but High Court procedure is both expensive and dilatory and even the provision of legal aid will not make such procedure suitable for those with small incomes. Magistrates' courts have effective and prompt remedies for non-payment of orders and, if necessary, arrests in different areas work together. Over and over again women came to me in court seeking help to enforce orders for alimony made by the High Court, but I was powerless. To endow magistrates' courts with jurisdiction in these cases would be an effective way of providing that the intentions of the High Court were carried out.

(Dated 27th November, 1951.)

17 June, 1952]

PAPER No. 38

SUPPLEMENTAL NOTE SUBMITTED BY MR. CLAUD MULLINS

In support of paragraph 5 of my memorandum I would like the Royal Commission to have the views expressed by Sir Frederick Pollock, K.C., shortly before his death. (Daily Telegraph, 14th November, 1934.)

The latter part of the letter from Sir Frederick was as follows:—

"For some time I have thought that the cause of discontent with English jurisdiction in matrimonial causes lies deeper than controversies over the grounds for divorce or separation.

When our Divorce Court was created, its method and procedure were modelled, rather as a matter of course, on those of our civil courts in matters of ordinary litigation.

The business of the court is to do justice on the claims and defences raised by the parties; it has little power of initiation or inquiry, very little of intervention. At most it can find occasion to make suggestions for a settlement.

Such is the frame of our civil procedure, and quite a good one for dealing with men's disputes on matters of trade and property and their individual and collective relations as neighbours and fellow-citizens.

The application of that scheme to family relations and to marriage in particular is, in my humble opinion, all wrong.

A better analogy may be found in the paternal jurisdiction of the old Court of Chancery over its wards, exercised in this day by the judges of the Chancery Division, to the general satisfaction of all concerned.

A court for matrimonial causes should have conciliation for its first object, should have the carriage of the cause in its own hands and should be entrusted with wide discretion. It should have power to grant a final decree of divorce when, after full enquiry and consideration, reconciliation proves impracticable, or to make a decree nisi with a discretionary term of anything from three to twelve months.

I see no reason why a court equipped with such power should not have jurisdiction to allow divorce by consent, but only by decree nisi, giving a reasonable time for a last chance of reconciliation.

The foregoing wholly unorthodox observations are offered with little expectation of approval from either lay or learned readers."

(Received 28th May, 1952.)

EXAMINATION OF WITNESS

(MR. CLAUD MULLINS; called and examined.)

3087. (Chairman): Mr. Mullins, we have your memorandum and also your supplemental note, which sets out certain views of the late Sir Frederick Pollock. Is there anything you wish to say by way of addition or explanation before we question you?—(Mr. Mullins): Might I refer to a question put to other witnesses this afternoon? The Association of Head Mistresses was asked whether in a decision as to custody, the child himself should be consulted. The witnesses' answer was a firm "no". I thought it might help the Commission if I said that in almost every case I did the exact opposite of that. In my court, when I was dealing with a conflict between parents about custody, I always consulted the child in private. My procedure—I made it legal by getting the consent of the parties, and I never had this withheld, even when there were barristers or solicitors—was to offer to see the child in private. That was always agreed to, and I would sit in my private room with the probation officer and the clerk—I never sat with the child alone. The clerk would sit in a quiet corner and take notes, and I would eventually, after talking about various things, ask the child whether he wanted to live with his mother or his father. The answers I got were extremely helpful. Perhaps I am not had with children, but I always got an answer.

3088. There is, I know, a considerable difference of opinion as to whether it is advisable to consult the child. It is very interesting to have your experience.—I thought I ought to say what had been my experience on that matter.

3089. In paragraph 2 of your memorandum, which is headed, "Divorce primarily a social problem", you trace the development of our present divorce law. At the end of paragraph 5, you go on to say:—

"The result today is that ordinarily the judges decide their cases solely according to their view of the conduct of husbands and wives and that the welfare of their children is dealt with later, usually by the registers of the courts."

I am not sure that you are accurate in saying that the welfare of the children is dealt with by the registers. However, the question I wanted to ask was this. Sir Frederick Pollock, with whose views you express your general agreement, suggested that the court should have jurisdiction to allow a divorce by consent, but only by decree nisi, thus giving a reasonable time for a last chance of reconciliation. Am I to take it that you support this

proposal?—No. I had to retain the reference in divorce by consent because it was in Sir Frederick's letter. It is totally opposed to my own view. I confine my agreement with Sir Frederick's letter to the administrative side. I am totally opposed to divorce by consent.

3090. Will you say why? One or two people have suggested it.—Because I think that there the parties are considering their own happiness, not their duties, and their duties involve the children. I think that that is the whole tendency today. We have had a series of Acts of Parliament all of which concentrate on the happiness, so called, of the individual—which is, in the end, the least important consideration to be taken into account.

3091. Supposing there are no children of the marriage, do you regard the interests of the community as being of importance in deciding the question of grounds of divorce?—In my memorandum I say quite clearly that I am not dealing with people who have not got children. My own view is that it does not really much matter what happens if the children are grown up, or if there are no children. I am concentrating in my memorandum on those with children under sixteen.

3092. But would you regard it as practicable to have two divorce laws, one applying to the children, or to people with only grown-up children, and another applying to those who have children under sixteen?—I regard it as essential.

3093. You think that there should be separate divorce laws?—Yes, definitely; divorce procedures rather than divorce laws.

3094. Divorce procedures only?—Yes, what happens before trial and during trial.

3095. I follow that, but I wondered if you went further and suggested that the grounds for divorce should be different, in the case of childless people, or people with grown-up children, from those which should be applicable to couples who have children under sixteen?—I have not finally made up my mind whether, where there are children, the present facilities for divorce should be curtailed. I cannot make up my own mind. In paragraph 19 your Lordship will see that I have said:—

"I have an open mind whether full divorce ought to be granted in cases where the income of the parties is only sufficient for the maintenance of their children, and themselves."

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[Continued]

That does not exactly answer your question, but it does include cases where there are children as a rule. Where there are children, there are few people affluent enough to support two homes. But where there are no children, I have an open mind. Also on whether or not there should be a curtailment of divorce, I have not made up my mind.

3096. It would appear from paragraphs 19 and 20 that you think it might be desirable in certain cases to withhold divorce from those with children. Would you give the court power to do that even in a case in which adultery or cruelty was proved?—My Lord, I have had much experience of helping to repair marriages where the worst things have happened. In the old days before the Legal Aid Act, where applications went through the Law Society, parties had to come before the court to get their signatures endorsed for divorce purposes. Everything was ready for divorce. Even at that stage we have reconciled them under my system, of which I was so proud. In one case, where a man was actually living with another woman, we got him and his wife together again. I am not so appalled at an act of adultery or an act of cruelty if it can be mended and put right, as it can be.

3097. Would you turn to paragraph 18, where you say:—

"I am gravely concerned about the effects of the Legal Aid and Advice Act, 1949, which may result in many cases, which but for this Act would have come under the conciliation procedure of magistrates' courts, proceeding direct to the Divorce Court."

What remedy, or what alteration in the Act, would you suggest in order to put that right?—My Lord, I must frankly say this: I am disappointed that the Magistrates' Association have not dealt with this adequately. I was on the committee that drafted their memorandum of evidence, but the first meeting was held at a time when I could not get to London. Otherwise I would have insisted on this matter being adequately dealt with in the memorandum. I believe that the old system, whereby the parties first came to the magistrates' court, had enormous social benefit. I believe that legal aid should only be granted after the applicants have attended a domestic sitting of a magistrates' court.

3098. To give opportunity for reconciliation before the parties apply for legal aid?—Yes, for examination by experienced social workers, who receive training about marriage nowadays. Wonderful things can happen that way, but the present tendency is to discard the idea of reconciliation too readily.

3099. (Mrs. Jones-Roberts): Mr. Mullins, in the last paragraph of your memorandum you say:—

"It would be valuable if the law provided that all High Court orders for alimony below the rate of £5 per week (plus 30s. for each child) should come within the jurisdiction of magistrates' courts for enforcement."

Why do you restrict this arrangement to orders of below £5 a week? It has been recommended to us by other witnesses that the magistrates' courts should be empowered to enforce all High Court orders that need enforcing. One knows that women suffer a good deal because of the dilatory ways of the High Court in enforcing orders. What reason did you have for specifying sums below £5?—Simply and solely that I thought it was wise to ask for an order when I went a pound. I entirely agree with the principle of wholesale enforcement in magistrates' courts because their legal machinery is adapted to provide a very quick remedy, which no other court provides. Frankly, I put in the £5 a week and the 30s. in order not to shock the Commission with my greed.

3100. So you really would join with those who have . . . —Yes, I would. I put the highest value on the magistrates' courts' procedure for enforcing debts.

3101. (Dr. Roberts): Mr. Mullins, have you any views regarding the value of the comparatively new service of children's officers with regard to conciliation?—No, it would not be right for me to answer that, because I have never done juvenile court work, although I have been a visitor to many juvenile courts.

3102. (Sir John Walker): In the second paragraph of your memorandum there is a sentence which reads:—

"It accentuates a concentration on questions of proof of matrimonial offences, thus ignoring the more essential questions whether it is really necessary in the

interests of the parties and of their children that application should be made for separation or divorce; also whether reconciliation is possible."

Are you altogether satisfied with the present law which, in general, allows divorce only in respect of a specified matrimonial offence?—Certainly not. Frankly, I view it with horror, that an act of adultery or two or three acts of adultery can result in a divorce without any social investigation. I think the present methods are barbarous.

3103. I would like to put to you another theory. Suppose one swept away all existing grounds of divorce and introduced a single ground of divorce, namely, that if the parties were not living together, and if the reconciliation machinery available had failed and there was no prospect of them ever coming together again the marriage could be dissolved. Would you agree that in those circumstances the legal tie might justifiably be dissolved?—That is such a revolution that it needs a little thought!

3104. There seems to me to be a choice between two things. Either you continue the system, as at present, of having divorce for specified matrimonial offences, or else you sweep that away and say instead that if the substance of the marriage has gone then the legal tie should be dissolved; but then only. I wondered whether that appealed to your mind or not?—I could answer in this way: that if there could be adequate social investigation and help, then the actual grounds for divorce would seem much less of a problem, because, whatever the grounds might be, I am quite certain that in a high proportion of the cases under every heading there would be an amicable settlement by agreement as a result of reconciliation, and thus disaster would be prevented.

3105. Supposing the reconciliation machinery were adequate and had been tried without success, you could say quite definitely, could you not, after a certain time, that the marriage was dead? And if it were dead for good and all, then you could dissolve the legal tie?—I do not really think I could accept divorce by consent.

3106. (Mr. Young): I want to follow up the question of legal aid. As I understand your evidence it comes to this, that there should be no divorce at all unless there is an attempt at reconciliation?—For those who have dependent children.

3107. You link it in that way?—I would.

3108. Assume that there are no children or, as the Chairman put it, that there are no children under the age of sixteen. Would you advocate any change in procedure there?—I have not had the experience that would make me an expert on that. I claim to be something of an expert in handling broken marriages where there are children, but quite frankly, I do not want to pose as an expert on cases where there are no children. That is a problem that has never particularly interested me, and I have not given it a great amount of thought.

3109. Your view is not so much a criticism of the Legal Aid Scheme as a plea that there should be no divorce where there are children—unless the parties have gone through the conciliation procedure?—That would make it a compulsory matter. I want to build a system that is so good that in ninety-nine cases out of a hundred it will be voluntarily accepted. The Denning Committee was definitely opposed to compulsory conciliation, and I am not so bold as to challenge that, especially as the marriage guidance movement is also against a compulsory conciliation procedure. Therefore I am convinced that there must not be, there cannot be, compulsory conciliation, but there can be a duty on someone to offer conciliation. I have made the suggestion of a year's delay, where parties refuse to undergo conciliation, but I do not emphasize that. If, however, it is someone's duty to offer conciliation in cases where there are children under sixteen, then my belief is that it will be accepted in a very high percentage of cases.

3110. But you have got to make up your mind as to whether you are going to compel it or not?—As I have just said, I do not think you can compel it. All you can do is if there is a refusal to defer the case for a year for further consideration by the parties.

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[Continued]

3111. You want then to build up a conciliation system which parties may use or not use as they think fit, but you would not make refusal a bar to their going direct for divorce if they so wish?—I have suggested that if they refuse conciliation they should have to wait for a year before they can lay their case before the court.

3112. But you said that they would not be compelled to go?—They will not be compelled to do so, but the State has a right to say, "We are going to make you think twice about this."

3113. Suppose you say, "You will either go or wait a year", what is to hinder them from going at once and then coming back and saying, "We do not want to be reconciled"?—I hoped I had made that clear in my memorandum. They could apply to the court for immediate action, as they can now in the case of marriages that have not lasted three years. It is a well-established principle that they can go to the court. Where the law says they must not, they can go to the court for a special ruling that a case can be heard. That is the present law about the restriction on petitions in the first three years of marriage, and I would adopt the same method. If people have made up their minds that they will not go for conciliation and they say it is unfair to make them wait a year, then I would throw the burden on the court.

3114. What is to guide the court?—The court will have to go into the gravity of the case and decide whether the interests of all parties, including the children, will suffer by a year's delay. It is quite a familiar task for legal tribunals when there is hardship; it comes in the Rent Act and all sorts of things.

3115. (Dr. Beard): Mr. Mullins, would you explain how your conciliation procedure would work? Could you tell us what the steps would be in a particular case? Who would deal with the parties—the probation officer or a marriage counsellor or the magistrate himself?—I think that I could help you best by telling you of the actual case I was thinking of earlier when I was asked about an act of adultery. Under the old system of legal aid before the new Act came into force, the parties had to come to a magistrate or a notary, or somebody like that, in order to make the document which they sent to the Law Society, which was an application for legal aid, into a document for which they could be punished if there were any lies in it. A woman came to me at the private part of the court early one morning. She was carrying a baby. From her application form I saw that there was another child at home. I asked the woman, as I always did in these cases, whether she had any advice from anyone. She said no, except from her husband. I said, "Would you like to see the lady probation officer?" Her eyes gleamed. I do not know if it was because she was so delighted at the thought of talking to some sympathetic and understanding person. I sent her straight off to the probation officer, who found out the whole story in the course of one or two interviews. Later the woman probation officer came to see me privately and told me about it and asked my advice. I said that the applicant had better see me again. I then saw the woman in the private part of the court again and explained to her, as simply as I could, the difference between an application for divorce and an application for separation on the grounds of adultery. The husband was actually living with another woman. Without any attempt by me to press her, she chose the magistrate's court. As I had handled the case a good deal I put it in my clients' list and issued the summons for separation on the grounds of adultery and left it with the probation officer. The husband turned up. He had had a nice letter from the probation officer—our usual practice—as well as the summons. Woman No. 2 had not proved quite the thrill that he thought she would. The probation officer, playing him rather like a trout, made it appear very difficult for him to get back to his wife, but she succeeded after a bit in opening the gate for him, and the two parties came back together. We followed them up for years afterwards and they were all right. There was a clear act of adultery, several times over, because the husband and the other woman had been together for about a week by the time we bustled in. I believe that a tremendous number of cases could be settled by that kind of method—I will not say the majority, that is perhaps asking too much of mortals, but a very high percentage of cases. And I would say

especially among the more simple people, because my experience lies among them and I do not know much about society divorces, but I know about the workers and their problems. I believe that if they could be handled in that sort of sympathetic way by people who know what they are doing and are not sentimentalists, then a tremendous proportion of cases could be settled, to the advantage of the children.

3116. In the new circumstances of legal aid how do you suggest . . . —That woman had a case from case for divorce and had she gone to legal aid then she and her husband would have been divorced within six to nine months and nothing could have stopped them.

3117. Can you help us now by telling us what should be done?—Put the cases through the magistrates' court, that is, those for whom the magistrates' court is suitable. I do not think you could ask the society women to go to the magistrates' court, because probation officers have no experience of people above the financial limits of the magistrates' court. In my time the financial limit was £2, plus 10s. for a child; it is now £5, plus 30s. for a child. Magistrates' courts work within those limits, and they cover the vast bulk of the population. Let that machinery be improved and extended.

3118. (Mrs. Allen): You instanced a case of adultery. Would cases of persistent cruelty be treated in the same way?—I am glad you asked that. Persistent cruelty is a horrible name and at once conjures up horrible things. But a tremendous lot of cruelty between husband and wife, I have learned, is due to their ignorance of decent sexual standards. I always had the services of a number of doctors in my area, that was in Wandsworth, and if the parties could be persuaded to go to one of those doctors I never had a failure, persistent cruelty or no persistent cruelty—because they knew that by going they did not bar the door to all hope of reconciliation. The ones who failed were those who would not go. But a doctor can explain life to these people, who are terribly ignorant even now. We talk about an emancipated age, but heaps of the people I had to deal with were as ignorant as they possibly could be—I have had men before me who did not know about the woman's monthly period. You have no idea of the tragedies that can happen among these simple people, and the doctor is often the man to put things right for them.

3119. (Mr. Neale): I gather that you would not object to giving a wife a maintenance order if she had children, but you would be against giving her a divorce or giving the man a divorce if they had children?—I have not said I am against that. In my memorandum I have said that I have an open mind about it.

3120. Are you in favour of giving a maintenance order or a separation order?—Obviously there must be one or the other, if the case is proved.

3121. So it is just divorce that you have doubts about in such cases?—Just divorce. In other words, whether there should be a right to re-marriage.

3122. Where there were children should it be left in the discretion of the judge to decide whether it would be in the interests of the children that a divorce should be granted?—It is so easy, Sir, to say, "In the discretion of the judge". A judge is a magnificent man in the job for which he has been trained, but no judge has had any social training. I hope I am not being disrespectful, my Lord, but a decision about children requires immense social experience, and a judge has not got it. He would have to have a staff of people like probation officers to help him. The magistrate would, of course, too.

3123. I am assuming he had all that help.—I think on the whole, yes. I am not absolutely convinced about it, but I think it would be more attractive to me than the present system, which I regard as highly dangerous.

3124. (Mr. Flecker): I was interested to hear that in custody cases you asked the child whether he would prefer to live with father or mother—it comes to that, does it not?—Yes, certainly.

3125. Would you say that generally the right thing to do is to do what the child asks?—By no means, Sir. But I think that a decision is all the better for knowing what a child wants, and the first thing of course is to make certain whether the child is speaking from his own desires or whether he is speaking at the dictation of his parent. I

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MR. CLAUDE MULLINS

remember one case when a child of four sat on my knee, and he made a reply to my question using words which I did not think seemed natural. I asked him, "Who told you to say that, Johnny?" He said, "Mother". There are all sorts of problems that arise when you are dealing with children in such cases. It is not simply a question of asking and getting an answer. You have to make sure that the answer is a genuine one. I certainly would not let the child decide.

3126. I suppose that by questioning the child you may gain a certain amount of background information. But supposing the child says that he wants to go to live with father, and you eventually assign the custody to the mother, that does not make too good a start for the new relationship, does it?—No, Sir. But one of the reasons why I wanted to ask the children was that by their reply I got some indication of how they had been hurt, whether father had been the force that was hurting them—I do not mean in the physical sense necessarily—or whether it was mother. That is very valuable information. Of course, I always read out in full the clerk's notes, so as to make sure that the parties could understand what had happened. I do attach great value to asking the children, provided it is done by someone who understands children.

3127. The suggestion put in an earlier witness was that the children should be allowed to choose which parent they wished to live with. That is a very different matter from asking them questions in order to get some idea of the background?—It depends on the age of the child, surely. I was referring to a child of four or five at most. When you come to a child of fifteen or sixteen I should be largely guided by the answer he gives.

3128. You would?—Yes, but I would not promise to be guided.

3129. The child would not naturally choose the parent who spoils him or her?—I retired in 1947—but I think that the life of those people is pretty hard, and spoiling could not go very far amongst the people I had to deal with.

3130. (Lord Kelt): I want to ask you a question, arising from paragraph 39, where you say:—

"I have an open mind whether full divorce ought to be granted in cases where the income of the parties is only sufficient for the maintenance of their children and themselves."

Mr. Mullins, in many cases the man is living apart from his wife with another woman by whom he has had a number of children. That is a common case, is it not?—It is a thing that happens, but I am not going to admit it is common, because men like that are not usual. . . .

3131. When I say, "common", I mean common among cases of broken homes. I do not mean common among the population as a whole. But it is a common case among broken homes, is it not?—I do not like the word—there are a large number, but it is that way.

3132. A large number. In such cases, of course, the man is responsible for the children of both unions, both for his legitimate children and for his illegitimate children?—Yes.

(The witness withdrew.)

(Adjourned to Wednesday, 18th June, 1952, at 10.30 a.m.)

3133. I am not clear what different problem arises if one has got to consider divorce in that case?—In that case, my Lord, no advantage will be gained by delaying divorce. But you could not grant divorce to that man without also granting it to those who have not yet started a second family, and that is what I am thinking of. If you did, it would be an invitation, in effect, to re-marry and have another family at the expense of the first.

3134. I must have mis-read your paragraph because I thought it really related to cases where there actually were children by perhaps two unions, but you are dealing here only with children by the first marriage?—Lawful children.

3135. Lawful children, and no other children to consider?—No.

3136. (Mr. Mac): Mr. Mullins, I was struck by your observation that judges have no social experience.—I was trying to be delicate.

3137. I had let pass the last few words of paragraph 18, which is an observation upon solicitors. I understand that you were at the Bar before you were honoured by appointment as a metropolitan magistrate?—Yes.

3138. For how many years, Mr. Mullins?—I was called in 1913, then came the war. I was appointed a magistrate in 1931.

3139. Would you say that practising at the Bar in matrimonial work gave you a very great knowledge of this problem?—I did not practise much in matrimonial work. I only did my share in poor persons' cases.

3140. Then you have obtained your knowledge sitting on the bench?—Yes.

3141. Would you agree with me that the lay client gives the greatest confidence to solicitors?—That is too general a statement. In the ordinary case, yes. But I would hesitate to say that is always true in poor persons' cases, assisted persons' cases.

3142. Then to whom does the lay client give the greatest confidence if it is not to the solicitor?—Under the present scheme the solicitor is the only person available, but I think he would give greater confidence to a trained probation officer or . . .

3143. Do not let us leave the point. The point is an allegation that solicitors have no social experience and that judges of the High Court have no social experience. Who have the social experience then, only metropolitan magistrates?—Well, Sir, I think I am quite clear in my mind, but perhaps I have not succeeded in putting it on paper. To have social experience means having an intimate knowledge of the lives of people with incomes below a certain number of pounds a week. That is not in the possession of most barristers, it is not in the possession of most solicitors, and it is not in the possession of anyone who has not gone in for intensive social work. I mean nothing more than that.

Chairman: Thank you, Mr. Mullins, for helping us.

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TAKEN BEFORE THE

ROYAL COMMISSION

ON

MARRIAGE AND DIVORCE

FOURTEENTH AND FIFTEENTH DAYS

Wednesday, 18th June, 1952

AND

Thursday, 19th June, 1952

WITNESSES

Mr. E. ADSCOW	} representing the Association of Children's Officers.
Miss K. L. RUDDOCK ...	...
Mr. K. BRIEL ...	...

Mr. O. BARNETT, B.E.M., B.A.	} representing the National Union of Teachers.
Mr. E. L. BRITTON, M.A.	
Miss A. M. EDWARDS ...	
Mr. W. GRIFFITH ...	

LADY CHATTERJEE, O.B.E., M.A., D.Sc.

THE RT. HON. LORD MERRIMAN, G.C.V.O., O.B.E., LL.D., President of the Probate, Divorce and Admiralty Division.



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1953

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MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

FOURTEENTH DAY

Wednesday, 18th June, 1952

PRESENT

The Rt. Hon. LORD MORSON OF HENRYTON, M.C. (*Chairman*)

Mrs. MARGARET ALLEN
Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
Mr. R. BELCH, M.A.
Mrs. E. M. BRACE
Sir WALTER RUSSELL BRAIN, D.M., F.R.C.P.
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Mr. A. T. F. OGILVE (*Assistant Secretary*)
Mr. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 39

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF
CHILDREN'S OFFICERS

INTRODUCTION

1. The Association of Children's Officers has a membership comprising ninety-seven per cent. of all persons holding the statutory appointment of children's officer to local authorities in England and Wales. The Association appreciates the opportunity to submit this memorandum because its members see, in their daily work, the acute unhappiness and waste of human potentialities which occur when children are deprived of normal home life with both parents.

2. The Association gives general support to those bodies whose evidence is directed towards the preservation of family life, even when this entails considerable hardship to adult members of the family, and it lays particular emphasis on the phrase in the Commission's terms of reference about the interests and well-being of the children of a marriage. We do not attempt to cover the whole field of the Commission's inquiry as this is already being done by specialist bodies, such as the Marriage Guidance Council whose summary of memoranda we have seen and approved. We give the strongest possible support to those proposals of the Marriage Guidance Council which would strengthen the enforcement of maintenance and affiliation orders and which would ensure that the tenancy and furnishings of the matrimonial home should vest in that parent who continues to look after the children. In addition the Association makes three simple proposals, designed to secure the welfare of the children of a marriage which is breaking up.

PROPOSITIONS

Appointment of guardian ad litem

3. Every child whose parents make an application to the court for divorce, separation or custody should have appointed for him by the court a guardian ad litem, who would see that factors relating to the child's welfare were fully investigated before any order was made as to his custody, care or control. This proposal is not new to English law. Every court which considers an application to adopt a child has, for the last quarter of a century, been required to appoint a guardian ad litem, whose duty it is to make confidential investigations and submit a report to the court, before a decision is made on the application. The use of a guardian ad litem is familiar to the High Court, the county courts and the magistrates' courts, all of whom have jurisdiction in adoption. The mode of employing guardians ad litem has been worked out in practice over a long period and there is available a body of persons with the necessary experience and training.

Child life protection

4. Every child whose parents make application to the court should be granted some degree of protection and supervision by a welfare authority until the court itself determines the supervision. This, too, is not new. Since the Infant Life Protection Acts of the 15th century, children placed with foster-parents for reward have been under the protection of a welfare authority. The Adoption (Regulation) Act, 1939, extended this protection to children placed by third parties for adoption and the Adoption of Children Act, 1949, placed under protection all children in respect of whom an application had been made to the court. This last measure (now consolidated in the Adoption Act, 1950) applies supervision to all children for at least three months before the hearing of the application, and, if the application is not granted, until the child reaches eighteen. It is not limited to children living apart from their real parents. It applies, for example, to an illegitimate child living with his own mother who now wants to adopt him, either alone or jointly with the child's step-father. When there is a home-breaking application under the divorce laws the child may need as much protection as he does during a home-making application under the adoption laws. In many cases, of course, it will be found that the child is adequately protected by the parent with whom he is living and who will ultimately be granted sole custody. Similarly the majority of children placed for adoption are protected by the goodwill of the adoptive parents (one of whom is often the real mother). Nevertheless Parliament has decided that, in order to ascertain and protect the minority who would otherwise suffer, all must be subject to supervision until the court determines the application. The existing service is carried out by statutorily appointed child protection visitors, drawing on an experience of sixty years of this work, who are discreet and careful and able to estimate the degree of supervision necessary in each case.

Power for the court to commit the child to care

5. When the court determines the application it should have power to commit the child to the care of the local authority or of some other fit person, as is done under Section 62 of the Children and Young Persons Act, 1933, when a child is in need of care or protection. The court is often in no doubt that one of the parents is unfit to have the care of the child and consequently it has no compunction in awarding the sole custody to the other. When, however, both parents are found to be unfit there is, at present, no third alternative, empowering the court to commit the child to some relative or friend

who is willing to look after him, or to the local authority which has a statutory service providing for children committed by the courts. This proposal is a corollary to the recommendation of the Care of Children Committee (Cmd. 6922) which stated at page 179:—

"Magistrates refusing an adoption order on the ground that the adoptive home is unsatisfactory should be empowered to make an immediate order committing the child to the local authority."

The common law equates children with chattels: he who holds has possession which is good against all except the real owner or parent. The modern conception of parenthood is that we are not owners but trustees of our children. The couple who fail in their joint parental duty that their children become the subject of legal action thereby imperil their common law rights, and must expect that the court will act as a court of equity, having regard solely to the interests of the children. No partner in a broken marriage can be held to disclaim all responsibility for the breach: at the very least he or she has selected for the children, in the person of the spouse, a mother or father who has proved unsuitable. It is the duty of each parent, when disharmony arises, to go much more than halfway to appease the other in order to preserve the home for the sake of the children. We do not see the parties in matrimonial actions as "guilty" or "innocent", but as persons who together brought into the world a life for which they are jointly responsible. If they fail in this responsibility they are jointly (not necessarily, equally) culpable, and they must expect that the court may set aside their parental rights if it decides that the child's interests are best served thereby.

EVIDENCE

6. We think it unnecessary to adduce evidence to demonstrate the need for the measures urged in paragraphs 3, 4 and 5. Every member of the Commission who has served in a judicial capacity must have been confronted with the difficulty of deciding what is best for the child on evidence which was presented, not with the primary intention of safeguarding the child's welfare, but to secure a verdict for one or other of the contending parties. It is an established practice of the courts, in their adoption, delinquency and child protection jurisdiction, to consider reports, based on informal investigation by trained social workers, before reaching a decision. Without such enquiries, which are conducted outside the atmosphere of the courts in the child's home surroundings, it would be impossible to comply with Section 44 (1) of the Children and Young Persons Act, 1933, which says:—

"Every court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person . . ."

7. Almost daily the Press publishes stories of the unhappiness of children whose separated parents are quarrelling over the possession of them. Some are enticed or abducted to get them from the possession of one party to another; others are kept shut off from the community to prevent such enticement; others run away from one parent to find the other and in so doing fall into physical or moral danger. For these reasons we urge the application to them of the child life protection provisions.

8. If necessary, the Association will produce true case-histories to support the above assertions.

METHOD

9. Our proposals could be brought about without the establishment of any new services or the creation of any new legal concepts. The Adoption Act, 1950, extends the duties of child protection visitors appointed by local authorities under the Public Health Act, 1936, to cover the protection of children in respect of whom an application is pending in the adoption court. Their duties could be similarly extended to protect the children of parties applying to the matrimonial courts.

10. The following are the relevant Sections of existing statutes. It would be a simple matter of draftsmanship to adapt the Sections to the needs of the children with whom this Royal Commission is concerned.

I. Provision for appointment of guardian ad litem for children in respect of whom an application is made to the court

Adoption Act, 1950

Section 8 (4) requires the court to appoint some person or body to act as guardian ad litem of the infant with the duty of safeguarding the interest of the infant before the court.

Section 8 (5) provides for the appointment of a local authority as guardian ad litem if the court sees fit. (The appointment of local authorities is common practice.)

The Adoption of Children Rules (S.R.O. 2396, 2397 etc.) are made by virtue of Section 8 (above) and provide, in the second schedule, for the enquiries to be made and the reports to be presented by the guardian ad litem.

II. Provision for application of child life protection to children in respect of whom an application is made to the court

Adoption Act, 1950

Section 2 (6) provides that no order shall be made by the court unless the applicant has, at least three months before the date of the order, notified the welfare authority of his intention to apply.

Section 28 (3) provides that Part III of the Act shall have effect where notice of intention to apply to the court has been given.

Part III of the Act provides, *inter alia*:—

Section 32. That the custodian of the child shall give seven days' notice of intention to change his address and shall inform the welfare authority and the coroner if the child dies.

Section 33. That where a child is being kept in an environment which is detrimental or by a person who is unfit, a summary court or a justice (acting *ex parte*, if necessary) may make an order for the removal of the child to a place of safety on the application of the welfare authority. The order can be enforced by a local authority's child protection visitor.

Section 34. That it shall be the duty of child protection visitors to visit and examine the child and the premises where he is kept, and provides for the grant of warrants to enter premises and makes it an offence to refuse to allow a visit or to obstruct a visitor acting in pursuance of a warrant.

Section 45 (1) defines a child protection visitor as a person appointed as such by a welfare authority for the purposes of Section 209 of the Public Health Act, 1936.

III. Provision for commitment of children to the care of fit persons (including to local authorities)

Children and Young Persons Act, 1933

Section 42 (1) provides that if a juvenile court is satisfied that any child brought before it is in need of care or protection the court may commit him to the care of a fit person, whether a relative or not, who is willing to undertake the care of him.

(There are at present about fourteen thousand orders in force, committing children and young persons to the care of local authorities.)

Section 75 (4) provides that while the order is in force the person to whose care the child is committed shall have the same rights and powers as a parent and shall continue to care for the child, notwithstanding any claim by a parent or other person.

Section 84 makes general provision as to the care of children committed to the care of fit persons, which may be regulated by rules made by the Secretary of State.

Section 84 (6) provides for the variation or revocation of an order by the juvenile court.

Section 87 empowers the court to make an order requiring the parent to contribute to the child's maintenance whilst in the care of the fit person.

(Dated January, 1952.)

18 June, 1952]

MR. E. AINSWORTH, MISS K. L. RUDDOCK and MR. K. BRILL.

EXAMINATION OF WITNESSES

(MR. E. AINSWORTH, MISS K. L. RUDDOCK and MR. K. BRILL, representing the Association of Children's Officers; called and examined.)

3144. (Chairman): We have before us three representatives of the Association of Children's Officers, namely, Mr. E. Ainsworth, Children's Officer, London County Council; Miss K. L. Ruddock, of Leicester County; and Mr. K. Brill, Honorary Secretary of the Association, from Devon. I see from the introduction to your memorandum that:—

"The Association of Children's Officers has a membership comprising ninety-seven per cent. of all persons holding the statutory appointment of children's officer to local authorities in England and Wales."

You point out, and this we can well appreciate, that your members:—

"... see, in their daily work, the acute unhappiness and waste of human potentialities which occur when children are deprived of normal home life with both parents."

Before we ask you any questions is there anything you would like to add to the memorandum by way of addition or explanation?—(MR. AINSWORTH): No, my Lord, except to say that our concern is with the welfare of the child both in its own home and outside its own home; that we are concerned about the position of children in broken homes; that our concern with the child sometimes begins at a much earlier date than the inception of divorce proceedings; and that our general aim is always to keep a child in its own home, provided that the conditions in the home are happy and secure.

3145. I see from the opening sentence of paragraph 2 that your Association gives:—

"... general support to those bodies whose evidence is directed towards the preservation of family life, even when this entails considerable hardship to adult members of the family, and it lays particular emphasis on the phrase in the Commission's terms of reference about the interests and well-being of the children of a marriage."

Many witnesses have laid great emphasis on the hardship entailed to adults who, for one reason and another, do not find their married life happy, but you are thinking primarily of the children and the family life as being of more importance?—Yes, my Lord.

3146. I am going to ask people more familiar with your work than I to take the leading part in questions to you, but there are one or two things I would like to ask. At the end of paragraph 3, where you deal with the appointment of a guardian *ad litem*, you say: "There is available a body of persons with the necessary experience and training". I think I know the body to which you refer, but would you specify it?—The children's departments nowadays have attached to them children's welfare officers, who are trained in social work generally; but at the same time, since the children's service is a fairly new service, there are within its ranks officers who were employed in a similar type of work prior to its inception, who have a very long experience of acting as guardians *ad litem*. The particular officers I have in mind were formerly in the education departments, and came over to the children's departments in 1948. They have as a body been exercising the duties of guardian *ad litem* since 1926, when the Adoption of Children Act came into operation. Officers of the children's service have in their work all kinds of opportunities and experiences which make them fully aware of the basic duties and qualities which are required of a guardian *ad litem*. Indeed, my own department deals with about 1,200 guardian *ad litem* duties per annum. Thus there is quite a substantial body of experience, and, as time goes on, that will be reinforced by the further experience which we are gaining generally through the working of the Children Act, 1948.

3147. I now turn to paragraph 4, where you say:—

"Every child whose parents make application to the court should be granted some degree of protection and supervision by a welfare authority until the court itself determines the supervision."

I wonder whether that was possibly stated too widely. What about a child who is living with an applicant who is also the mother of the child? Do you think that, even in that event, before an order is made there should be some protection and supervision?—I can only say that there is an analogy in the Adoption Act itself.

3148. I see that. But, of course, there is a little difference, is there not, between a child whose mother wishes it to be adopted and a child whose mother is seeking matrimonial relief? In the latter case, would it be right to subject the mother to supervision?—I would, if I may, suggest that it is not so much a question of subjecting to supervision as a question of having the assistance of a sympathetic and trained officer at a time when the most requires help. Under the Adoption Act, where application is made to the court for an adoption order, the procedure of appointing a guardian *ad litem* takes place even where a mother is applying for an adoption order in respect of her own child.

3149. I think that "to subject the mother to supervision" was the wrong phrase to use, but you know that some mothers might resent the appearance on the scene of some officer to exercise supervision?—I am assuming, my Lord, that the officer chosen for this delicate and difficult task would have a considerable degree of tact. I think that all of us in this week have encountered occasions when a person at the first blush has wondered at, and possibly even resented, the entry of an officer. But that state of affairs can be, and is, very quickly changed by the exercise of a little tact, particularly when the person to whom the approach is made is brought to realise that the officer's only motive is to help the mother and child.

3150. I quite appreciate your answer, which has dealt very clearly with the point that I was putting to you. For my part, I wish to raise only one further point. In paragraph 8, you very kindly offer to produce true case-histories to support your assertions. I am sure that the Commission would like to see some of these case-histories. Perhaps you could supply them in writing. They would, if you so desire, be regarded as confidential.—I take it, my Lord, that they could be submitted in such a form that the identity of the child would not be disclosed. I am sure we should be very happy to supply those in writing as early as possible. (Chairman): Thank you very much.

3151. (Dr. Robertson): Would you confirm that your Association has available already a body of persons with special experience, who might be used more fully by the courts?—Yes, we have.

3152. Can you inform me as to a minor matter of administration? Are the child life protection visitors now almost entirely under the control of the children's officers, or do some local authorities still use a persuasive power to link them up with the health and welfare department?—The responsibility rests with the children's committee. I think that as a rule the job is done by ad hoc officers of the children's department. In some authorities, indeed in my own authority, health visitors are at present acting as agents for the children's committee, particularly in regard to the very young child, where questions of physical health and well-being crop up—the child, say, under two years of age. The health visitor does that in our case—I do not know whether that is done generally. But my department feels that the health visitor, who would probably already be visiting the home where there is a very young child, can very well perform the duties of a child life protection visitor.

3153. And that avoids a certain amount of duplication?—Yes.

3154. Do the health visitors report direct to the children's officer or do they report through the medical officer of health?—They work under the direction of the medical officer of health, but they report to the children's officer.

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3155. I think that the Scottish Children's Officers' Association is linked with your organisation. Have you reason to believe that in Scotland, the Sheriff Courts employ the services of children's officers more frequently than the corresponding courts in England?—I have no knowledge of that.

3156. In most children's departments there are after-care officers?—Yes.

3157. Do you feel that their work might be extended, that fuller power might be given to your staff to follow up boys and girls from broken homes after they go into employment?—If our suggestion were to have fruit, then it would be possible to continue this supervision, as indeed is the case at present in child life protection cases. At present a child, supervised under the child life protection provisions, who has attained school leaving age, may continue under supervision until he reaches the age of eighteen, provided that at school leaving age he is still in the care of a foster-mother.

3158. And in that supervision you deal almost entirely with the home and not with the place of employment? Have you any rule about that?—We consider it our duty to follow the child into the home, and as far as may be necessary in order to get the child settled. And in cases where there is any difficulty with the employer, it is quite common for our officers to go into the place of employment. Indeed, if I may be permitted to quote the practice in my own department, we have a system whereby a child who is placed as an apprentice in a particular trade, not only receives the guidance of the after-care officer, but a member of the engineering staff of the control goes about once a year and checks up on the boy's progress in his trade. This is rather valuable, as it ensures that the boy's technical education and technical skills are watched over at the same time as his general social welfare. Our engineering department's representative and my own department's after-care officer work very closely together.

3159. That sounds admirable. You have encountered no difficulties in that scheme?—No.

3160. It has been suggested to us that the services of children's officers might be used more fully with regard to young persons placed in custody other than with one or other parent. Have you any experience of that so far?—We have a very wide experience. Local authority officers have since 1933 acted as a "fit person" in regard to a child removed from its own home under a court order. In such cases, the children's officer is virtually the parent of the child for so long as that child remains in the care of the local authority, which might be until he attains the age of eighteen.

3161. And do you feel that that power might be extended by statute?—We think that it might be appropriate that a child whose parents were divorced, for example, could have this same sort of paternal care and interest, if he were committed to the care of a "fit person", and that might well be the local authority.

3162. You have indicated in your memorandum that you are often the people who get the first indication of serious difficulties in a home from your contact with the children?—Yes, we are, unfortunately. We do encounter these cases sometimes before they reach the stage of a divorce. In fact, we feel that very often the conflict has been registered in the child's mind, and he fears the impending breakdown, sometimes even before the parents themselves realise what is about to happen. Children are very sensitive, and that is all the more reason for them to be safeguarded, rather than to be allowed to live in a perpetual state of tension, which they are acutely aware of, and only they can see the chain coming. It is that class of child that we would like to protect, as well as the child in respect of whom an application has been made by the parent in the courts.

3163. Do you have complete co-operation throughout the country with probation officers? There is no difficulty there?—Yes, as far as I know, we co-operate very well indeed. We seek every method by which we can work in harmony with the probation officers and they with us. Here in London we have particularly happy relationships. If there is a point on which we think consultation between us is necessary then we arrange a meeting—we discuss the matter and sometimes we go to the Home Office and ask them to help us out. There is every degree

of co-operation. Sometimes, of course, you get local difficulties but under any system that happens. Generally speaking, however, there is the widest possible co-operation.

3164. (Mr. Young): Mr. Ainscow, I was interested in your reply to Dr. Robertson that you would like to have custody cases placed in your care. Under the Children and Young Persons Act, 1933, as I understand it, you do not get a child committed to your care unless it is in need of care or protection. Under the Guardianship of Infants Act, 1925, which I take it applies in England, I think that the court is required to treat the interests of the child as the paramount consideration. Have you ever heard it argued in England that, under the Act of 1933, if the conditions which brought about the committal order are removed, then the court must recall the order irrespective of the interests of the child?—I think that the procedure is this, that a child is brought before the court as being in need of care or protection. The court goes into the case, and if it is satisfied that the case is established, then it is in its jurisdiction to prescribe a method of treatment. One of the possible methods is to commit the child to the care of a local authority. If, in course of time, then it is reason to believe that the home has improved, then it is competent for either side, the local authority or the parent, to make an application to the court for the revocation of the order. Then the case is re-heard and the magistrates decide as to whether it is now fit and proper that the child should be restored to his own home. Quite frequently, applications for revocation are made by parents, and it sometimes happens that those applications are refused. It sometimes happens, too, that an application is made by the local authority. I can well remember a case, where a child had been committed to the care of the local authority, and I myself had taken the case. The child had been found in what was tantamount to a house of bad reputation. We kept in touch with the mother—she was quite a nice little girl, and on the face of it a respectable woman—but for some reason or other, had got into an unfortunate way of life. About eighteen months later she came to me and said, "Mr. Ainscow, I am going to get married. I want to ask you whether if I get married and settle down again I can have my child back." I said, "That entirely depends on how things are with you and your husband". I went into the case very carefully and made the most careful enquiries about the prospective husband. In due course they were married, and on that occasion the local authority went to the court and I helped the mother to take out a summons against us. The magistrate, having reviewed the case, decided that the child should be returned to the mother, whose home had been rehabilitated. That happened some years ago, but, so far as I know, the arrangement has proved quite satisfactory.

3165. That was a case where you were quite satisfied that it was in the interests of the child that it should go back. But what I am putting to you is this: Have you ever heard it argued that if the conditions which necessitated the original order have been removed, then the order must be revoked irrespective of the interests of the child?—The magistrate would decide the case at the time, and I have not heard it argued that the order must be revoked.

3166. In Scotland that has been argued, and I am interested to know what your experience has been in England?—Our experience generally is that magistrates are exceedingly careful of the well-being of the child, and in the event of an attempt to revoke an order, they must be entirely satisfied that revocation is in the interests of the child before agreeing to such a course.

3167. Just take the case that you have put to me with slightly different facts. Assume that the child, instead of only being away eighteen months, had been away for eight years with foster-parents, and had settled down in its new home, and had forgotten all about its mother. Assume also that the parent has completely recovered in the interval—the is no longer a woman of ill fame, she is a perfectly good mother. In that case, which are the interests which you would allow to predominate in considering the revocation of the order, those of the parent or those of the child?—I should consider the child entirely.

3168. The Act does not specifically say so, does it?—No.

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3169. (Mrs. Allen): Would you think that probation officers could exercise care of children equally as well as children's officers? I am thinking of what you said earlier. You said that, in some cases, when you were entrusted with the care of a child, you visited the factory where he was employed in order to find out if things were satisfactory. Do you think that probation officers could equally well visit the factories in similar circumstances where children were under their control?—I would suggest that it is competent for any well-meaning person who has the right of entry to a place of employment to make enquiries. But if the care of the children is from the outset in the hands of the children's department, then it would be the right thing for an officer of that department to continue to maintain contact, because in the child's interests it is as well to keep a measure of continuity of supervision. As regards the possibility of the probation officer visiting, I would assume that if that were the case, under the present system the boy would normally be on probation. Some of us have felt that if you can remove from a boy's mind any idea that he is still a marked man in the eyes of the court, then it is as well to do so. We think that the child having once been through the courts—and presumably that is where contact with the probation officer would begin—then he ought at least to have the opportunity of making a fresh start right away from the machinery of the court and all that it implies. In some neighbourhoods, if the probation officer was seen calling at a home, some slight suspicion might arise, whereas in the case of certain other officers, including children's officers, that would not be the case.

3170. (Dr. Reid): You suggest that when a custody application comes before the court, first of all, a guardian ad litem should be appointed, and, in addition, you think that there should be a report on the family from an independent social worker?—Yes.

3171. Other bodies have suggested that the probation officer should be available to act as a conciliator before the petition is heard. Then, you suggest supervision later by child life protection officers after the order is made. I am rather concerned to know how in practice this is going to work out. Are we going to have an army of different kinds of social workers going in and out of the homes of people who may never have had any previous contact with local authority officers?—I should sincerely hope that that would not happen. As to the possibility of employing the services of the child life protection officer, and the question of appointing a guardian ad litem, and possibly the commitment to the care of the local authority, we consider that all those duties should in fact be carried out by the one person, a child welfare officer, who, in a properly conducted child care department, would tend to specialise in this sort of work, and would be working day in and day out on difficult matrimonial cases. You may have heard of the recent appointment of co-ordinating officers. That is an attempt to avoid the impression that you foresee and so rightly dread of an army of officers visiting one home. That is an attempt to get all the various services concentrated upon a particular social problem. In that event it is highly likely that a case of this sort—where there are matrimonial difficulties—will have been picked up before the divorce proceedings come along. In that case, the person whom we contemplate as doing this job may already have been at work on the family, and could thus act as the guardian ad litem, could act as the child life protection visitor, and could act on behalf of the local authority if ever the child were committed to its care. In the children's department, our slogan as far as possible—though it does sometimes fail—is "one child, one officer".

3172. But you do suggest in your memorandum that one officer should carry through all these duties in each case. The vast proportion of these children would not have had any previous contact with the children's officer?—In that event we can assume that the case has been totally unknown to any child care workers. Again, if the first contact arises at the stage of divorce proceedings, then it would still be possible for one officer from the local authority to work on the case, on the basis that he was particularly fitted to supervise the welfare of the child.

3173. Would there be any difficulty in a children's officer giving a report to the court? We have had it suggested to us that the children's officer is responsible to the local authority, and might thus be in possession of confidential

information which he or she could not be required to give to the court.—I can only refer to Section 35 of the Children and Young Persons Act, 1933, which lays a duty on the local authority to make available to the court information as to school record, health, character and home surroundings of a child brought before a juvenile court. And that phrase, "home surroundings" covers a great deal. Such a report can also be made by the probation officer. But it is the case that a statutory duty is laid on the local authority to make such information available to a juvenile court in respect of any child who appears before it. Thus, only a very slight further requirement need be made in order to make it compulsory for information of this kind about a child in a custody case so be made available to the court, not just as a matter of interest to the court, but as a statutory requirement.

3174. It would require an extension of power?—Very slight, I should say.

3175. Do you think then that the children's officer should act as the reconciliation officer also?—We are concerned with the welfare of the child. We do not pretend—and we are not, indeed, particularly interested in the question of patching up a matrimonial squabble, but if in the course of our work, either before or after an application has been made to the court, we had opportunities of conciliating a married couple who were in danger of going on the rocks, naturally we should do so with the object of helping the child. We do not want to invade any territory other than our own, which is the welfare of the child.

3176. But, of course, we have heard that probation officers are at present acting as conciliation officers. You would agree that for the sake of the children only conciliation attempts are of very great importance?—Entirely.

3177. In order to reduce the number of officers dealing with the family, do you think that children's officers could be equipped to carry out reconciliation also?—I see nothing to prevent it. But I am definitely not laying claim to wanting to do conciliation work, except on the general principle that in our work already—in the case of my own local authority, at any rate—we have conceived the possibility of using all its resources to deal with such problems, for example, by using health visitors to supervise very young children. As a result of all-round co-operation you could devise a means whereby you would avoid having a host of officers visiting a particular home.

3178. (Mr. Seloe): The point is, is it not, that the probation officer works under the authority of the court, whereas the children's officer, the health visitor, and so on, work under the authority of the county council or the county borough council?—That is right.

3179. And that is where the difficulty is co-ordination comes, does it not?—Given goodwill on both sides, Sir, even differences of that kind have been overcome. Provided that the people concerned are really interested in the welfare of the child, they will find a means of working together. It does happen with other departments, as we all know. It happens between the children's department and the education department. Here you get two different services who on occasion combine for the welfare of a particular child. And there is co-operation in the day-to-day work of the probation officers and the children's officers. But there is this distinct difference between the two services, that the probation officers are the officers of the court, and the children's officers are the officers of the elected local government authority.

3180. If the children's officers were clothed with the duty of reconciliation, that would be an entirely new duty for a local authority?—For the children's officers as such.

3181. Do you think that officers primarily concerned with the children in divorce cases might possibly not see everything that was required in regard to reconciliation? There is also this point, that some people might prefer to go to a voluntary organisation for reconciliation rather than to a public officer?—I do not think that there is a great deal in the point that a person would prefer to go to a voluntary organisation rather than to a public authority. It all depends, in my view, on the way in which the public authority does its job. Some people have got the impression that public authorities are a soulless kind of people. I can assure them that our children's departments are not, that we are all imbued with one idea. It so

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happens that we have to submit to certain rules and regulations, but we seriously believe in the value of child care. If anyone comes to us, or for that matter goes to a voluntary agency, sooner or later the question of the welfare of the child arises. What we have felt is that in the past there has been a tendency to regard the child as more or less a side-line to a matrimonial dispute—as a by-product of the problem which is thrown up. There has been a tendency to look at the mother solely in relation to the matrimonial application before the court. We are much more fundamentally concerned with the child, both before and at the time of the application.

3182. I fully recognise that. I was wondering whether possibly a slightly lesser rôle than you had contemplated might be found for children's officers. Assumes that the court, whether it be a magistrate's court or the Divorce Court, should have particulars of the children in every case of separation or divorce, and that the court should be free to call both the children's officer and the schoolmaster or schoolmistress to give their views about what was best for the children?—We could not quarrel with that at all. We are available to help in any particular case. We do not consider that our opinion is the only opinion, that our help and advice are the only help and advice that can be brought to bear. We stand for all possible sources of help. For example, on the relationship between statutory and voluntary services, we are all of us engaged in an increasing degree of co-operation with the voluntary associations. We believe that a concerted effort is needed, and that it can and must result in help for the child, irrespective of from where it comes.

3183. Would it be possible for you to give us some idea of the sources from which children come into the care of local authorities? By that I mean how many cases are the result of divorce and separation, or cases in which one parent has deserted the home, or how many are orphans, and so on?—I can only say, Sir, that the question of statistics is one on which we are not very good. Our interest is in the individual child as a human being rather than as a mere number for statistical purposes. But we do have figures for the three months ending 29th March, 1952. In that period we had 375 applications for children to be received into care . . .

3184. That is in London?—That is in London—375 children under 2 years of age, of whom 21 were the children of married parents who were separated. That is, about 6 per cent. of the applications were from married people who were separated. In respect of children aged 2 to 5, we had 447 applications, 32 of which came from the same source. We had from age 5 to 11—362, and 39 of those, roughly 10 per cent., came from the same source. Between the ages of 11 and 17 we had 87, and of those 9 resulted from marriage breakdowns.

3185. Would it be possible to say, very roughly, where the others came from?—The others come from all sorts of family crises. We get abandoned children, deserted children, etc. We get the short-term cases, such as those of children whose mothers have gone into hospital, maybe to have a baby. Today we are finding a preponderance of short-term rather than the long-term case.

3186. The children's committee is also charged with the duty of providing information to the juvenile courts when a child is brought before it?—Yes.

3187. Have you any statistics there about the incidence of broken homes?—I can only say, Sir, that some time ago I was asked to give certain statistics regarding children of divorced parents who had been before the London juvenile courts. At that time we found that of such children who were coming before the court, about 2 per cent. were from divorced parents. In the case of boys, about 8.6 per cent., and in the case of girls, about 13.6 per cent., were from separated parents. But when we came to look at the case of boys who were constantly coming back to the courts, we found that the percentage of divorced parents was 2 per cent. as before, but that the percentage of separated parents was 12.2 per cent. In other words, it was noted that whereas the incidence of "separation" cases was 8.6 per cent. in the case of first offenders, the figure rose to 12.2 per cent. in the case of repeated offenders.

3188. (Chairman): With regard to the figures you gave for applications for children to be received into care, you were not dealing with the result of the applications, is that right?—No, my Lord. These were what we call

approved applications, that is, applications such that had we had sufficient accommodation available, all those children would have been received into care. In point of fact not all of them were received into care.

3189. They would all have gone to foster-parents if you had had the foster-parents available?—Not necessarily. The way of dealing with the children, as laid down by the Children Act, is to deal with the child according to his best interests, and in order to decide which method of treatment is to be adopted, in the case of a long-term case, the child is taken to a reception home. The reception home is specially equipped to decide whether a child should be boarded-out or, alternatively, should receive institutional care.

3190. (Mr. Selous): It would not, I suppose, be possible to say that the fact that the child came from a broken home was the reason that he came before the court. There may have been other contributing factors?—Sir, I would hesitate to be dogmatic in any way concerning juvenile delinquency. But such research as has been made appears to support the view that there is a high incidence of juvenile delinquency from broken homes.

3191. Would the same figures probably be obtainable throughout the country? Do you think that other authorities have had such a check as London recently?—I think that there has been a check in two or three cases, but I do not think there has been a nation-wide check. The figures that I have given are taken from the Report of the London Committee on Juvenile Delinquency, of which, I think, a copy could be made available to the Commission.

3192. Through your Association it might be possible to find out whether other authorities have similar figures?—Yes, I am sure we could make enquiries from our colleagues and find out what information there is available.

3193. It has been suggested to us, Mr. Ainsworth, that difficulty occurs at the age of sixteen, when the parent who is responsible for the maintenance of the child cannot any longer be required to maintain him, if that child wants and ought to go on with education. Have you come across such cases?—No, Sir, because in our case the children we are dealing with are already in care at that age. If they are in care—and I think this is one of the advantages that would come from one of our suggestions—if the children of divorced parties, or indeed of any parents, are committed to the care of the local authority, it is possible for the authority and is indeed its duty to see that the child is seen through life until he becomes self-supporting.

3194. Suppose that a child is given into the custody of a mother, who dies. I understand that the father then gets the custody. Have you ever been called in any such case to take a child before the court as being in need of care or protection?—Not on those grounds. I do not know if my colleagues have. (Miss Russell): I have recently had a case where the mother died and shortly before her death we were called in in the interests of the three children. She had custody and the father had married somebody else. After her death the father stepped in and simply collected up the children and made his own arrangements. We were extremely worried. They moved out of the county and we took the liberty of writing to the children's department of the county where they had gone to, asking them to keep a friendly eye on them and do what they could. But it did worry us very much, because under the present law there was nothing we could do until something really went wrong.

3195. That was what I wanted to ascertain. There is a very great difference, is there not, between a court awarding custody of a child to somebody, and a court saying, "This child is in such a bad condition that he has got to be committed to the care of a local authority"?—The divorce had been on grounds of cruelty, which worried us even more, but there was nothing we could do until something happened.

3196. It has been suggested to us, rather on the lines of the fifth paragraph of your memorandum, that spouses who become parents must accept greater responsibility and not think so readily about divorce as those spouses who are not parents. Would you feel that any good would come from an alteration of the law to the effect that where there were children of a marriage, the judge must decide in the light of the welfare of the children whether

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there should be a divorce?—(Mr. Anscow): I think, Sir, in answer to that, that if the judge were required to consider the welfare of the children he would have the problem before him of deciding whether the welfare of the children would be served by either granting a divorce or not granting a divorce. And that, I think, depends on the circumstances in the individual case. We feel in our work, having observed the unfortunate results in certain children of divorced parties, that in some cases it might be better, always providing that the parents are going to be stable and secure, and that the child is going to live in a stable environment, for the divorce not to take place. On the other hand, there are cases that we have come across where it was obvious that if that child were compelled to remain in that particular household, where there was no hope of the parents reforming the home, no promise of a home, then it would be far better that divorce should go on, and that the child should be completely cut adrift from such a home.

3197. There is one rather different question I want to ask you. Can you envisage cases from your knowledge in which a divorce would be for the benefit of the children because they were children of an illegal union, that is, the parent who is already tied by marriage to someone else should obtain a divorce from that someone else?—Again, if it is a question of the welfare of the child, then the ethics of the situation, as between the parents, is not so frightfully important. It is a sad thing to have to say so in these days, but we do know of cases where children are living happily with parents who have formed an illicit union. In such a case, if the question of the child's welfare is to be considered, then it is surely better that the child shall be happy rather than that the child shall be living in a false state entered into merely because of, shall we say, national feelings of propriety.

3198. You would, I imagine, stipulate in the first place that the parents should be good parents and should be bringing the child up properly?—Precisely. I can imagine parents—in fact I have known of parents—who have formed an illicit union, and yet have made it their business to see that the child has had—apart from the immediate disability of living with parents of that sort—every opportunity of being brought up in a proper Christian way. It is a sad reflection on society, but there it is.

3199. I do not know if it is fair to ask you this, but no doubt you will tell me if you do not want to answer it. A number of people have suggested that the age of consent should be raised to seventeen. Do you in your work see a very large number of failures of marriages which were contracted before the age of seventeen?—I have no information about that.

3200. (Sir Russell Brown): In the light of your experience, do you think that if divorce were made considerably easier it would in general be in the interests of children?—I do not think so. I think that anything that reminds parents of their moral obligations to their children—and surely that means the nullification of divorce—if everybody with children were really convinced of their duties to their children, then there would be fewer divorces, because, for the sake of the children, the parents would see to it that the marriage did not get on to wrong tracks. So I would suggest that it would be serious to loosen up the grounds of divorce—on the view that the moral stability of parenthood is something that really matters and that it must not be broken lightly.

3201. It has been argued that if divorce were easier it would enable certain people, who now cannot do so, to get married and set up a home. I wondered whether that was an inference which one was entitled to draw from the figures on the difference between children of divorced parents and separated parents, which you give in answer to a question put by Mr. Belos?—No.

3202. You do not agree with that?—No.

3203. You emphasize the importance of reconciliation between parents, though I appreciate that reconciliation is not in itself within your province. Have you found, from experience, that by putting the claims of the children to parents who are having difficulty in their married life, they are often influenced by these considerations?—I can only say that in my personal experience I had some knowledge of a broken marriage, and the break persisted for some time. In the end, I think, the marriage was

really held together because the people concerned realised that they were wrecking the career of their own child, whom they had gone to some pains to put on a very satisfactory way of education. I think that they were brought back ultimately by reason of the claims of that youngster to a settled background. You cannot on the one hand produce the material conditions for a child's education, and then throw them away by breaking up his home.

3204. (Mr. Brown): Mr. Anscow, in your introductory remarks you said that a large part of your work was concerned with children before the divorce takes place.—I may not have made that quite clear. I intended to say that we have knowledge of many cases where unhappiness is arising before ever there is a question of divorce. It is true that in many cases divorce never comes. But we do have cases of broken homes to deal with, and it is the broken home that we are really interested in, in putting that right.

3205. I take it that much damage may have been done to the child of a bad home before the divorce takes place?—Unfortunately, Sir, yes.

3206. You said that the child realises the home is going to break?—Yes.

3207. Would you say that that causes greater conflicts in the child than the fact of divorce?—Yes, I should think that it is more important to the child to live with happy parents, no matter what their labels are, than to live with unhappy parents.

3208. And vice versa, that the child takes more harm out of a bad home than out of the mere fact of divorce?—Yes.

3209. (Mr. Flecker): Continuing from what Mr. Brown has just said, you would not agree, then, that "a bad home", unless a superlative is used for the word "bad", is better than a half home, or home, or the home with only one parent? A lot of people have taken that view.—I think that we have to define what "a bad home" really means. We do not mean a place that is squalid; we do not mean a place that is deficient in furniture or amenities of any kind. We regard "a bad home" as a home where the fundamental conditions of happiness for the child, a sense of security, a sense that he belongs, are absent. That is what we look upon as "a bad home".

3210. When the parents are quarrelling fairly consistently—we will not say going to the extent of using violence—but where they are pretty rude to each other and the child can sense constant bickering, quarrelling and nagging, would you rather that the child carried on in a home like that, or that those parents separated for the child's sake?—I should really want to know the home, to live in it myself. Those of us who have families of our own will realise the nature of the problem—I have got three children of my own, and bickerings have occasionally occurred with those three children and in the family circle—but these do not mean a thing. When we talk of "a bad home", we mean a home where there is an essentially evil outlook as between the one partner and the other, where there is no hope of reconciliation in anything like the true sense of the word. The fact that a man is unnecessarily and rude, particularly over the breakfast table, and the child happens to have breakfast at the same time, does not matter twopence. What does matter is if that man is persistently trying to score off the wife through the child, or the other way round. I think you know what I mean?

3211. Yes. You have helped us very much by describing it in that way. Of course, in the end it is impossible to have definitions of that sort of thing. One has got to feel that a thing has arrived at a certain pass, when it is no longer suitable for the child to be there. But that is quite a long way along the road?—Our thesis is that if there is a really evil home, then somebody should be there who is capable of recognizing that fact and, even if it is not so bad, of assessing the real state of affairs. Somebody who is trained to observe and who knows what is best for the child.

3212. Throughout your memorandum you talk about "the court". Am I right in thinking that you have in mind the magistrates' court rather than the Divorce Court?—Not necessarily. We have used the word "court", in a general sense, as being appropriate to any of the classes of court which should be competent to deal with the situation.

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[Continued]

3213. Is it really the case, as you suggest in paragraph 5, that where, on an application by one parent for custody, both parents are found to be unfit, then there is at present no third alternative empowering the court to commit the child to anyone else? (Chairman): I was going to ask the question myself. It may be a confession of ignorance, but if there is no such power how does it ever happen that from the court there comes to you a child to look after? I thought that often happened, and I was wondering how it happened, if there is no power in the court to do so. (Mr. Justice Pearce): I do not think that there is any doubt that a judge has the power to make any order he thinks fit with regard to the custody of the child. I have known of such cases where another relative was brought on to the scene, largely I think, at the instigation of the welfare officer. Certainly I have ordered a child to go temporarily to some authority, and it has never been questioned that one has such a right. (Chairman): And certainly as a judge of the High Court, when I occupied that position, where one parent, for example, was dead, and I thought the other parent unsatisfactory, I never hesitated to commit the child to the care of an aunt or grandfather. Is the matter not too widely stated where you say:—

"When, however, both parents are found to be unfit there is, at present, no third alternative, empowering the court to commit the child to some relative or friend who is willing to look after him, or to the local authority which has a statutory service providing for children committed by the courts."

—Could we put it this way, my Lord—that we were under the impression that such is the case. If it is not the case, then we should be very happy to assist by being present in such cases. We should be most happy to see that power brought more into the open, if it is in fact the case that it can be used. We were under the impression, certainly as regards magistrates' courts, that there was no such power. (Chairman): It may be that the magistrates have not got that power. (Mr. Mallock): A High Court judge can do it, my Lord. But Mr. Ainsworth is quite right; the magistrate cannot.

3214. (Chairman): It comes to this—when you say, "the courts", you have perhaps stated it too widely, but you do think still that the magistrates' courts ought to have that power—which they have not at present?—Exactly. (Mr. Bell): May I add another difficulty which might arise in the cases your Lordship has referred to? Presumably in those cases the aunt has been willing to maintain the child. I have on occasion been asked to stand before a judge in chambers—and I have agreed on behalf of the local authority to receive a child into care, and an order has then been made by the court saying that the child should come into the care of the authority. In that case, certain other conditions were satisfied, which made it possible to spend public money in maintaining him. I am not at all sure that in all cases in which the judges of the High Court might wish to ask the authority to maintain children, there would be any power for the local authority to spend money. (Chairman): It is certainly a matter that the Commission will look into and ought to consider.

3215. (Mr. Flecker): May I return to the question of whether every child whose parents make application to the court for divorce, separation or custody, should be granted some degree of protection? What process would you make available to ignorant people in a humble line of life? They would come along and, I suppose, the first person they would see might be either the probation officer or the clerk to the magistrates' court, or somebody of that sort. One parent comes along and says he wants a divorce. The first question would be "Have you any children? If so, you must go and see so and so, before you can do this". Is that what you have in mind?—(Mr. Ainsworth): Not quite. We do not want parents to have to go from one office to another. We have seen too much of that in the old days. All that would be necessary would be this. Immediately an application came before the court, a *pro forma* notification would be sent by post to the person charged with this duty of child life protection. I take it that it is that aspect of the problem which you have in mind?

3216. Yes.—And the welfare authority would pick it up, just as at present it is the law that the authority should be notified, if a mother wants to place a child with another woman to nurse for reward. In the case of

divorce, it would arise on an application to the court. It would be the easiest possible thing for the court itself, or the parent, there and then to fill in a form and have it posted off to the authority, who would then link up with the case. From that moment it would be their job to endeavour to secure the welfare of the child.

3217. You have certain things to say on the one hand about the attitude of the courts towards the parents who are bringing a case—it may be divorce or separation—and the children on the other. You feel on the whole that too much attention is paid to the adults and too little to the children?—We are really wondering, Sir, whether we have yet arrived at a stage when the child has ceased to be regarded as a chattel. We started on the long road from that—

3218. May I interrupt? By whom so regarded, by the magistrates or the officials or the parents, or all three?—Originally, Sir, everybody thought that the child was a chattel. Today, by a series of statutes, very wise and humane statutes, the child is at last coming into his own. We think that in this matter of divorce there is still an element of property attaching to the child, that he is something to be bandied about as between the parents, and it may be that if one parent is not guilty of a matrimonial offence that parent tends to be favoured when custody questions are being considered. We would prefer to look at the question from the point of view of the individual child. The child is an entity, a personality in his own right, and not something to be made the subject of a bargain. We wonder sometimes whether our very beneficial legislation has gone quite far enough in this emancipation of the child from the idea of being a mere chattel.

3219. It has been suggested that in some cases it might appear to be in the interests of the child that the parent who has not been given the custody, should be denied access entirely. But it is also said that the courts are rather unwilling to do that because it seems unduly hard on that parent. Do you think that complete denial of access might sometimes be justified?—I think that the real clue is to be looked for in the child's own affections. Where does he feel he belongs? Never mind who is guilty. If the child loves his mother, and she is the worst woman alive, nothing will alter the fact that he loves his mother. It is to her that he should go.

3220. Would you ask the child, or would you ask some trained person, such as one of your own officers, to get that information for the court?—I think, Sir, that one would require the services of somebody who could really ascertain what is in the child's mind. We all know that sometimes children give the answers that they think are expected of them, but it is a matter of some skill getting to know what is in a child's mind. All we are asking for is that somebody who would act as the protector of the child for the moment should really find out what the child wants and then be able to advise the court as to what is in the child's best interests.

3221. (Lord Keith): Mr. Ainsworth. I understand that children who are in need of care or protection, and children who are beyond control, can be put under the local authority's care, and so come under the control of the children's officers. Is that right?—It is, my Lord.

3222. Are there any other circumstances in which the children's officers are brought into contact with children?—Yes, my Lord. The whole object of the Children Act is that if the parents of a child are unable for any reason, either temporarily or permanently, to provide for his proper upbringing and maintenance, then that parent can go along to the authority and ask for his child to be received into care, and it is the authority's duty to receive the child.

3223. That is really just another aspect of a child requiring care or protection, but with the initiative coming from the parent?—The initiative may not always come from the parent. It may arise through someone else informing the local authority about the case. Under the Children Act the child is received into care. It is not taken into or committed into care. There is that difference between Children Act cases and committed cases.

3224. Then all the powers by which you are brought into charge of a child are under the Children Act. Is that right?—Broadly speaking, yes, Sir.

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3225. Then, when you have charge of a child you may either place the child with a foster-parent or you may give it some form of treatment in a special home or institution where the child can be brought up in a family atmosphere, as it were?—Yes.

3226. If in these circumstances a child commits some offence which brings him to the notice of the courts, the probation officer would come in then, would he not?—He would come in as the court officer.

3227. I suppose that in such a case the child might be put on probation and come under the control or supervision of the probation officer?—It could happen, Sir, but it is normal not to have two officers supervising the one child.

3228. In such a case, how would the local authority treat the matter? If the child was a delinquent and acquired some measures of recognition of his offence by the court, if the court does not put him under a probation officer, what could the court do, apart from punishing him in some other way? Would the court merely leave him under your charge, with an admonition to you to be more careful and to look after him better?—The court treats us as the normal parent. If it were of opinion that we were failing in our duty, or, alternatively, that the circumstances under which the child was living should be changed, it would probably make an order. It might be that the child was in need of approved-school training, and in that event the court would commit him to an approved school. If, on the other hand, the court did not consider residential treatment suitable, it might make a probation order. In other words, the child is treated in exactly the same way as a normal child living with the normal parent.

3229. Or the court could leave him in your control, but under the supervision of a probation officer?—No, that is not regarded as very good. It can happen, but generally speaking, it should not and does not.

3230. I can appreciate the difficulties. I am not suggesting for a moment that the local authority or the children's officer is negligent. All I am suggesting in the example which I have cited is that the child is such a child that nobody apparently can control him properly, not even a children's officer.—It all harks back to our thesis that these cases very often arise from broken homes or from the child having been pushed around in all sorts of homes and places.

3231. They may arise from hereditary tendencies?—Well, I think that is a very wide subject.

3232. In paragraph 3 of your memorandum you make the suggestion that in every case where an application is made for divorce, and where there are children, the court should appoint a guardian of them even if custody of the children is not asked for?—Yes, Sir. We suggest that that should be ascertainable.

3233. If no application were made for custody, would it be the duty of the guardian of them to bring the question of the child's custody to the notice of the court?—As I see it, it would be the duty of the guardian of them to bring to the court a picture of the child *vis-à-vis* the application, so that the magistrate or the judge would be able to have information on which to make up his mind as to the appropriate method of dealing with the child.

3234. That means this—that in every application for divorce the court must, either on application made for custody, or on its own initiative, deal with the question of the custody of the child?—Yes.

3235. (Chairman): I want to try and clear up one point. When you answered Mr. Brown I thought that your views were directly contrary to the next body that is coming before us. But when Mr. Flecker pursued the subject, I came to the conclusion that possibly the difference simply arises in regard to the definition of "a bad home". I would like to read to you what is said by the next body that comes before us and see if there is really any difference between you. The next body to be heard is the National Union of Teachers. For the purpose of presenting their memorandum, the executive of the Union asked their local and county associations to reply to certain questions. They were asked:—

"Do you think that the children's future rather than the relief of one or other parent ought to receive more consideration in divorce cases?"

"Do you think enough attention is given to the future of the children mentally and spiritually as well as physically?"

I think you would probably agree with the Union in answering both these questions—you think that more attention should be given to the child's welfare?—Absolutely.

3236. Then we come to this point:—

"How bad must a home be before, for the children's sake, it ought to be broken up?"

The answer given in their memorandum is:—

"A child cannot develop normally in a home environment where there is no love, affection and sympathy."

That you would agree with?—Entirely, yes.

3237. The Union's memorandum continues:—

"It is, however, important that the home should be kept together until the last possible moment. Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken. . . ."

So far I think you would agree?—Yes, Sir.

3238.

" . . . for children appear to accept their homes and the standards set therein with very little question, and provided there is a modicum of affection . . . which, I apprehend, means as between the parents and the children—

" . . . they suffer less from what is termed a bad home than from the breaking up of such a home."

It appears to me, and please correct me if I am wrong, that if there is any difference between you and that body it simply rests upon what meaning you attach to a "bad home". Is that not right?—Yes, Sir. I think, too, that the body concerned is not as intimately concerned with the results of bad homes as we are. We are dealing with and large with children deprived of a normal home life, a majority of whom come from bad homes. We see the effects every day—far more frequently than persons who are dealing with children generally.

3239. That I quite appreciate, but what I am suggesting is that if one can find out, as we shall shortly, exactly what that body means by "a bad home", it may turn out that there is no difference between you?—We do subscribe to the idea that if a home is at all endurable then from the point of view of the child it is infinitely preferable not to take that child away. But we must be sure of the home, and the question cannot be settled merely on outward appearances. You really have to get down to it with the child and find out what he is thinking.

3240. (Mr. Justice Pearce): I suppose that if you rather over-simplify the matter, there are three problems about children in connection with the break-up of the home. There is the class of too little wanted children, by which I mean children whose parents are not prepared to exert themselves to any extent in order to behave properly towards them or to look after them. Secondly, there are the too much wanted children, whose parents are individually quite reasonable people but who must fight about the child to get it entirely for themselves. Then there are the parents whose attitude to the child is reasonable but who make bad arrangements over custody. Roughly speaking, those three classes cover all the cases where children suffer on a divorce?—I should think it is likely, Sir, that there will be people . . .

3241. I only wanted to know if you roughly agreed with those three categories?—Yes.

3242. If you find there are other categories or that that is wrong you can retract your steps. Now, assuming that is so, it is the case that the too little wanted child is the problem which has called your service into existence?—Not exactly, Sir, no.

3243. Then which of the other two classes has called your service into existence?—Our service is in existence to meet the needs of a class of child by and large whose parents may never come . . .

3244. We are at cross-purposes. What I meant was that your service started by looking after the too little wanted children whose parents have not enough interest or self-control to look after them properly?—That is not

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quite true, Sir. If you are regarding us as a product of the Children Act, we exist to look after children whose parents cannot—not will not but cannot—for any reason . . .

3245. Yes, I will include them. My definition was not wide enough—it ought to include parents who will not or cannot properly look after the child?—Yes.

3246. That is the type of case with which you are chiefly, though not solely, concerned. But the type of case with which a judge is chiefly concerned is the too much wanted child, that is to say, who has, as a rule, parents who are reasonable in all respects except that they quarrel about the child. It seems that the difficulty at the moment is that the child who is not catered for is the child who has reasonable parents who make bad arrangements. Do you follow what I am getting at?—Yes, I do, Sir.

3247. The question is whether there are so many of these cases that something ought to be done, and whether there is anything that one can do which will prove better than the existing bad arrangements?—Yes.

3248. Supposing that in the many divorces where the parents agree about the custody of their children one investigates every case, of course that is going to put a large additional burden on someone?—Yes, I agree.

3249. Of course, in some cases undoubtedly such an investigation might improve the position?—Yes.

3250. On the other hand, in some cases, against the possible advantage of improving the existing arrangements you have got to weigh the possibility that the court and the welfare officer, whoever it is on whose recommendation the court acts, may not be such a good judge as the parents. Would you agree that that is a probability, or not?—I should say that because of the facts of the situation it is more likely that the same judgment would come from the impartial observer rather than from one of the parties to the application.

3251. Another consideration is this—that in these cases almost the worst thing one can do for a child is to make it a storm centre, when it was not before. Do you agree?—Yes, Sir.

3252. And if investigation shows that the parents, who normally appear to be reasonable-minded people, have made an arrangement which you nevertheless think is unsatisfactory, it is going to be a case of the court, plus the court's officer, as against the parents?—Yes.

3253. And that is, of course a bad start if you are trying to improve the custody arrangements in the interests of the child. You agree, do you not?—It is a matter of judgment again, is it not? The ultimate thing is the welfare of the child. It is a question as to which shall prevail, the considered judgment or the somewhat hurried and, shall we say, impassioned arrangements of the parents.

3254. What worries me is whether the resulting improvement would confer benefit in enough cases to justify investigating all cases in which custody had been agreed between the parents—I feel that it would be worth while. If the investigation were not universal, then there is always the chance that what on the face of it seemed reasonable, might turn out to be a bad arrangement. If there were a common practice, people who were doing the job from day to day would acquire the facility of knowing whether a given set of suggested arrangements was satisfactory and would report to the court accordingly. Probably these officers would not find any reason to quarrel with what was generally a reasonable arrangement, but only with an unreasonable one.

3255. Yes. Your recommendation about a guardian of *litem* would of course be met by having a responsible officer who would put a point of view to the judge. That is to say, the investigation need not incur a lot of expense?—No.

3256. Because the case is heard in chambers and all you want really is an officer who is entitled to say his say on behalf of the child to the judge?—That is precisely what happens now in adoption cases. There are 1,200 cases a year where a report is made to the court.

3257. There has been some discussion about who are the right people to investigate these matters, but it seems to me that the person you want is an all-rounder, somebody who has a human interest in children and in

parents, because the two things cannot be separated?—I agree. And I think that some degree of training is essential; some degree of facility in finding out what really does lie behind a child's mind.

3258. Speaking for myself, I should assume that your officers or probation officers, other things being equal, if they extended their purview a little further, would both be admirable, but not both at the same time. Is that fair?—I think that is very fair.

3259. You have talked about children being banded about and so on. Are you expressing a definite view that one parent ought to be cut off from the children—because it is the case that it is now common practice to let each of the parents see the children?—I should hate to be misunderstood on that. I think it is frightful to contemplate the necessity of separating the child completely from one or other of its parents. Even the worst parents after all are parents, and children have a habit of having regard for parents be they never so bad.

3260. Complete denial of access to one parent is easier talked about than done, because it is very rare to find that a child has not got some affection for the parent proposed to be cut off. And of course it is not necessarily good for the child if an impression is created in the outside world that an innocent mother or father is cut off from the child. In other words, it is not solely the child's immediate interests you have got to study. If you create an unjust position that surrounds the family, the child gets the backwash from it in the end?—We feel that our proposal would enable that sort of situation to be avoided.

3261. You were asked about bad homes and broken homes. But at that stage the problem may not have reached final fruition. Do you find that often the child's sense of security is more impaired—not when the home is broken, not when there is a divorce—but when the mother to whom the child was all in all is the home marries somebody else, and thereafter a step-father becomes master of the home that the child formerly regarded rather as her personal property?—I think we have all heard of cases where step-fathers or mothers have been suspect in the eyes of the child, but I think it would be quite wrong to generalise on the subject.

3262. Some are successes and some are not, I suppose; that is the only way you can leave it?—Yes, like parents.

3263. (Mrs. James-Roberts): Mr. Ainsworth, you raised a very big issue today when you made the suggestion of appointing a guardian *ad litem* and, following from that, that the children's officer might be a very suitable person to perform those duties. I am right up to that point?—Yes, we are not claiming that . . .

3264. It does follow, does it not? There are two separate propositions but the second follows on the first?—Yes.

3265. I would like to put another aspect of the question to you. There is a feeling in some quarters that it would be better for the children's officer, to use a common phrase, "not to be too much mixed up in the courts". Do you know what I mean?—Yes.

3266. Some people may think that children's officers are already too much involved in the courts—bringing reports and so on. We know very well that one of the chief duties of the children's officer is to find foster-homes for children deprived of normal home life and there is often a question asked "Are you quite sure that this child is not a bad child? He has not been in the courts?" It is very useful for the children's officer to be able to say "I have nothing at all to do with the courts". It might be better, from the children's officer's point of view, for his or her duties to begin only when a child comes into care. May you not be in danger of imperilling the vital service you are performing by extending it too much in the direction of court proceedings?—That is a painful question for me to answer, because since 1933 the work of caring for deprived children—formerly carried out by the education department, and now by the children's department—has been dovetailed with the work of the courts. Indeed, the Children Act itself requires a local authority to receive any child whom a court desires to commit to its care, and it is wrong for us to say that we can avoid it. It is part of the very roots of our job. It is part of the responsibility of the children's department to carry out Parts III and IV of the Act of 1933 which deal

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with all juveniles before the juvenile court. I think that the answer in a case of that sort is, if we are asked whether a child has been before the court, to say either yes or no. If a foster-parent whom we are approaching is not prepared to take a child who has been before the court, then far be it from us to foist such a child on such a parent, who is obviously unsuitable. It is the parent who is prepared to tackle the child from the courts whom we want to use for that class of case. Our biggest job is matching the child to the home, and in so far as the magistrates can commit children to our care from the courts—speaking for myself we get 500 a year—then I should have to tell a lot of stories if I wanted to board out any of those 500 and pretend they had not been through the courts. It is inseparable from the job.

3267. (Chairman): Would you say that a child "has been through the courts" in the meaning in which you use the phrase if there has merely been some contest about custody? The child has nothing to do with that at all. Is there not a gulf between that case and the case in which you have an unsatisfactory child committed to you by the magistrates?—I was only answering the argument that the foster-mother makes a distinction and is afraid to take a child who has been before the courts in delinquency. (Mr. Jones-Roberts): There are people who boast in my part of the country that they have never been inside a court. If you have been for any purpose whatsoever you are slightly suspect. That is the type of case I had in mind.

3268. (Mr. Moore): Would you help me with regard to reconciliation in so far as it concerns you. I was very interested to hear you say that you had knowledge of a broken home very early, before any divorce is thought of. Please do not misunderstand me, I am not criticising in the slightest. What do you do about it if you do hear that a home is breaking up?—Have I been guilty of a mis-statement? What I intended to convey earlier was this: that we have evidence of children who have become disturbed long before the question of divorce arises. We obviously cannot know unless a child develops symptoms of maladjustment that anything is happening in the home. Something has got to give rise to the smell of gunpowder, if you like. A child may be showing symptoms of distress in school and he is referred to a clinic and the clinic find that it is unhappiness at home that is causing the trouble. That is one of the few ways in which such a case could come to our notice. I am afraid I was speaking in retrospect and looking at children in our care whose records show that the trouble began long before anybody was aware of it. But it is the case that the children themselves are aware very often of what is coming long before anybody outside the home can have any knowledge.

3269. Would it be right that the education officer might also have the first hint of trouble in the home showing itself through the children, when he deals with their non-attendance at school?—He might get it that way, he might get it through a disability. The teacher in the class might suddenly see that a boy hitherto working on a high level of competence falls away. He would naturally want to know why, and that would prompt him to refer the case to a child guidance clinic. That is another way in which it might appear.

3270. Would you agree that when the parents do start to talk about divorce it might be preferable if your officers acted solely in the interest of the children without entering into reconciliation negotiations between the parents?—I am inclined to think, Sir, that that might be right, though anybody having anything to do with children would naturally try to improve conditions if they were capable of improvement in the ordinary way of events. I think that we all tend to do that sort of thing. If any of our friends have troubles, we tend to act as conciliators in spirit, almost, of our better judgment sometimes. I think that might happen with a child guardian, but I think there is something to be said for separating the question of the care of the child from the question of mending the marriage as between the two parents.

3271. Therefore, if as soon as a rift occurred between husband and wife, it could be suggested to them—on a voluntary basis—that they should see some reconciliation officer, you would support the view that that should be somebody other than the children's officer?—I would put it that the reconciliation officer need not be, and probably should not be, the person primarily concerned with the child, because the question might arise of trying to

approximate two conflicting points of view—that of the parents and that of the interests of the child.

3272. Your officers have a course of training before their statutory appointment?—By and large, yes, particularly the new officers. Of course, being a new service which has inherited from the past, we are still in a state of transition.

3273. At the present time does the training course include any subjects dealing with the reconciliation of husband and wife or the divorce law or matrimonial law?—No, it is a course dealing with the social sciences generally and with some degree of psychology. Its emphasis is on the child in his social environment.

3274. The child, of course, is the main object of the course?—Yes.

3275. (Mr. Maddocks): I want to return to your recommendation in paragraph 4, that every child whose parents make application to the court for divorce, separation, or custody, should be granted some degree of protection and supervision. As you may know, I am a metropolitan magistrate. What I want to know is—how is this going to work in practice? Let us take the stages one by one. Mrs. Smith comes to court; she walks into the box and tells a story about persistent cruelty of her husband and applies for a summons. In the ordinary way I listen to it and if it sounds like a bona fide case I grant a summons. The summons is served by the warrant officer and in due time—usually about a fortnight or three weeks—the parties appear before me. What is going to happen in between about supervision of the child? Mrs. Smith comes in, takes it on from there, will you?—Mrs. Smith comes in and, by an adjustment of the present machine, notification would be made to us, if the child protection service were to operate in such cases.

3276. That means I have to say to Mrs. Smith "Have you any children?" and she says "Yes, two". As soon as I know that she has children my clerk or deputy chief clerk, when the summons is granted, would have to notify the case to the L.C.C.—I am afraid so, Sir.

3277. We work very well together, do we not? The L.C.C. get the notification. What happens then?—The officer would go round and see Mrs. Smith and see the children.

3278. Notification goes to one of your officials; he goes to Mrs. Smith, bangs on the door. Mrs. Smith comes to the door and says "Who are you?" He replies, "I have come from the Children's Department of the L.C.C. You made an application to the magistrates for a summons and I have come to supervise your child". Mrs. Smith bangs the door in his face—probably says something. Are you suggesting that your official would have any power of entry, any power of protecting her child against her or her husband?—No, I am suggesting that our officer's job would be to safeguard the interests of the children where there were any. They would, I hope . . . we are talking about L.C.C. officials?

3279. Yes . . . be sufficiently endowed with a degree of tact to get the job done without the dire consequences that have been depicted.

3280. Please do not think I have got anything but the greatest admiration—indeed, every metropolitan magistrate has—for the L.C.C.—but you know the awkward people that we have to deal with. This is the point—are you suggesting that this Commission should recommend legislation which would empower the children's officers, once they received a notification from a magistrates' court that an application had been made in which children were involved, to get entry into a house or give them any power whatever over the children in that house?—That happens at present in child life protection; it also happens in the question of adoption.

3281. I think you will agree with me there is just no analogy between adoption and matrimonial disputes. Let us keep to the husband and wife dispute. I want to know whether you are suggesting that we should recommend legislation giving your officers power over the children in homes in respect of which an application has been made?—Yes, Sir, I am.

3282. What power are you asking for?—I am asking, as suggested in our memorandum, that the child should be placed in the same position as the child in child life protection. We are agreed that there is difficulty about the question of entry. There is difficulty about the ultimate powers of removal under child life protection.

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[Continued]

Removal can be carried out legally, but as a matter of practice it is difficult. We are saying in effect that despite its difficulties it would be very useful and very proper that a child whose parents had seen fit to apply to the court for divorce should have the same degree of protection as child life protection cases have at present. We are asking for no more than to put the child in the position of a child who is put out to nurse for reward.

3283. (Chairman): When you say parents who have applied for divorce you would include also parents who have applied for a separation order?—Yes.

3284. (Mr. Maddocks): I am afraid you are driving me into the unenviable position of having to admit that I do not know anything about the Child Life Protection Act—It is the Public Health Act, 1936, which enables a local authority to supervise a child placed out to nurse by its parent to another woman for reward. It gives us the right of visitation and the right to apply to the court if in the opinion of the visitor the child is being kept on premises to its detriment. It then becomes a matter for a court or a magistrate to make an order, which the child life protection visitor has the power of carrying out, to remove that child.

3285. I suspected that. That is where the child is in some place other than its normal home, where it has been placed out. As far as I know that is the only time when you have any kind of power at all?—No, Sir, if a child is placed for reward at all.

3286. For reward, yes, but the child must be out of its home?—That is under child life protection. Under adoption, which is a model we are suggesting might be followed, we have the right to supervise it even where the application is by the child's own mother.

3287. That is the adoption procedure?—It is that, Sir, we are suggesting might be the model regarding guardianship as it lies in matrimonial cases. (Chairman): Of course, in that case the mother has at least taken the step of seeking to have her child adopted. She has invited intervention of a kind.

3288. (Mr. Maddocks): That is the whole point. In adoption you have the woman coming along saying "I want to have the child adopted". For the protection of the child your excellent officers make quite sure that the child is looked after, but you have willing parties on both sides, you have the mother and the adopters?—May I say, my Lord, that in adoption cases we have got a state of affairs where there is a "home-making" application, where the parties are adopting and increasing a family, and the law and public opinion say "Right, in these circumstances we will have jurisdiction over the child. We will have some degree of supervision". In matrimonial cases, the court is considering a "home-breaking" application, and yet on the face of it if one is to follow the suggestion which has been advanced, we are not to afford to these children, who are the subject of detrimental action on the part of their nearest and dearest, we are not to afford them the same protection as is afforded in the case of a "home-making" application by parties who are willing that that should be done. I am suggesting that that only gives point to the suggestion that the child who is going to be affected by divorce proceedings needs somebody to look after him, and unless something of that sort happens then he is going to be left to his own devices.

3289. You want all the powers to enter the house, to take the child, and to look after the child before any decision has even been come to about the case?—My colleague reminds me, and it is obvious, is it not, that we are not asking for any more power in this case than we have now in child life protection cases. It does not include the right of entry unless we get a warrant. In other words, supervision is all done through tact and kindness. Only if there is a real dispute can we go to the magistrate and get a warrant. That is a good old English way of doing it.

3290. Your proposal would mean legislation. At the moment you cannot get a warrant out of me to go and see a child?—We can get a warrant out of you, may I suggest, if we have a case where a child is being neglected and we know that, and we want to get into the home and have a look at it; and you grant the warrant hands down.

3291. What you have to do is to come into my court and swear written information to the effect that honestly and verily you believe that the child is in a condition

which needs protection. You could not do that where you have never seen the child, not been into the home, did not know the people?—All we are asking for is the opportunity to befriended this child. Leave it to us to do the rest, except in the really hard cases where we come back to you and ask for help. It is a matter of working the machine. It is a matter of officers who know the job, working for the benefit of the child within the law and with not too much of the "stand and deliver" attitude. We do not want that but co-operation. (Mr. Maddocks): Nobody who knows your department will say otherwise—you always try to help—but what I am afraid of is how it would work out in practice.

3292. (Mr. Young): Mr. Ainsworth, I want to put, as I see it, the position right, because I do not think it fair to yourself you have done so to Lord Keith in connection with the Children's Acts. I am familiar with them in Scotland, and they appear to be much the same in England. Under the Act of 1933 a child may be committed to your care by a court. You do not take it, it is committed to you by a court if it is in need of care or protection?—Yes.

3293. Care or protection is defined in that Act?—Yes.

3294. And a child needs to come into one of two categories before it comes within that definition. In the first place, it needs to have no parent or a parent who is not exercising fit guardianship or is not a fit guardian. Secondly, it needs to be either falling into bad associations, exposed to moral danger or beyond control. So that you do not get a child committed to you under that Act unless it comes within these two definitions. Is that right?—Under that Section of the Act.

3295. There is no other Section as far as care or protection is concerned?—May I put that right. If a child is permanently a truant and his father has been before the adult court and fails to make any progress and the child is deemed to be the miscreant himself, then the magistrates can make an order which directs the education authority to bring the child before the juvenile court under Section 40 of the Education Act of 1944. Having done so, the magistrate then deals with him exactly as if he had been brought before the court as being in need of care or protection and he is so deemed. Thus, you could find a truant who, at the end of the line, would come to us as being deemed to be in need of care or protection, and yet in fact the genesis of the case was truancy.

3296. You still have to have, under the Act of 1933, a quasi-criminal proceeding before you get a child committed to your care?—No, Sir, I would suggest that if a parent appears before the court on the ground that his child is not attending school, and the court refers the case to the juvenile court on the ground that the child is beyond control, that is not really a criminal business. (Chairman): I am reluctant to intervene, but this is a question of interpretation of a statute, is it not? (Mr. Young): I just want to get it on to the record, because I do not think the position has been properly put. (Chairman): I was not questioning the propriety of the question in the least, but I thought it really was a question of the witness's interpretation of an Act of Parliament.

3297. (Mr. Young): Can I put this to you? The distinction between the 1933 Act and the 1948 Act is that under the 1948 Act you do not take a child, but you receive a child?—If you will permit me, Sir, for one moment, the 1948 Act includes within its scope child life protection, adoption of children, and children committed under the provisions of the 1933 Act. Section 1 of the 1948 Act deals with the receiving of children into care. In Section 2, there is the opportunity for assuming parental control in exactly the same way as if the child were committed by a court. If a child is received into care because its parents are unfit to exercise proper care the authority can pass a resolution—as they could even before the Act of 1948—assuming parental rights. Not only do we get children who are purely in need of care or protection, but we get a whole host of children who for various reasons come into the net of the children's department and who are looked after according to their needs.

(Chairman): Thank you very much for coming here and helping us and for your memorandum. You have been most helpful to us.

(The witness withdrew.)

PAPER No. 40

MEMORANDUM SUBMITTED BY THE EXECUTIVE OF THE NATIONAL UNION OF TEACHERS

1. Convinced that the country's future depends on its individual members whose personalities are largely the result of influences and environment experienced during childhood, the National Union of Teachers has always based its policy on the needs and aspirations of children.

2. Because the problems which the Royal Commission are considering must be inextricably linked with the life and welfare of many children the Union's Executive have prepared the following statement for the Commission's consideration. For the purpose of preparing the statement the Executive asked their local and county associations to reply to questions, the answers to which, in the opinion of the Executive, might be of assistance to the Commission. Those questions and answers (which relate only to children or adolescents) are appended.

QUESTION 1. *What is the effect of divorce, separation, or desertion on children? Do children of divorced or separated parents feel that they are different from other children? If so, in what way?*

3. Children who are deprived of a parent on account of divorce, separation, or desertion usually lack the sense of security necessary to their well-being and development. They feel different from other children and often suffer a sense of shame when they are asked, particularly by other children, why they have either no father or mother. Frequently they answer evasively or by half truths and they feel resentful, inferior and at a disadvantage and consequently lack confidence in themselves. This gives rise to emotional instability, which varies according to the type and comparative violence of emotional stress leading to the separation of the parents, the consequent domestic environment after separation, and the age and temperament of the individual child.

4. In some cases a child may become reserved and secretive, seeking satisfaction in keeping to himself and not mixing with other children, or may get beyond the control of his father or mother and show signs of glorying in his position and wanting to bully other children. Of course many children through the love, affection and understanding of the father or mother are able to overcome these strains and stresses.

5. Nevertheless, behaviour difficulties arise both at home and at school. Sometimes at school the standard of work deteriorates, and it is not uncommon for home disturbance to affect the child's opportunities for educational advancement by failure in examinations normally within his ability. None more than teachers know how children crave affection.

6. While there are many instances where, after separation, there has been an improvement in the child's position the opposite often appears, for the love of the parent may be so lavish as to spoil the child, which in turn creates further difficulties.

7. Many children in residential schools or homes for maladjusted children are there as a result of broken homes. The following incident reported by a teacher in one of these homes is an illustration. Three fifteen-year old girls coming to say good night saw a photograph of a wedding in a newspaper. One of them remarked, "Don't you ever get married will you?" When asked "Why?" the second replied "Because your husband may be unfaithful to you". The third girl added "Men are all the same—never trust them". The teacher remembered that the three were children of divorced parents.

QUESTION 2. *Should boarding education be provided as a palliative or as a means of restoring morale of a child who loses one or other parent in this way?*

3. Boarding education cannot restore the sense of deprivation that a child who has lost his parent may feel. While it may sometimes provide a temporary relief, there is a danger that he may feel that he is being removed from his home for other reasons than his own immediate welfare. If the parent is suitable and can provide a reasonable home and environment the child under eleven years of age should not be placed in a boarding school, but

where neither father nor mother or close relative can provide a good home, boarding education should be made available. The financial insecurity of the parent or the need to be away from home may make it impossible to provide an adequate home environment. Then boarding education may become a necessity and it is to be noted the local education authority is empowered to give financial aid. Boarding schools cannot replace the home as a stabilising factor in a child's life, they can, however, provide valuable help where neither parent is of the right type to be responsible for the child's upbringing. It is important that after separation or divorce there should be some "follow-up" of the children by a social worker so that the child may be kept under observation.

QUESTION 3. *Do you think that the children's future rather than the relief of one or other parent ought to receive more consideration in divorce cases? Do you think enough attention is given to the future of the children mentally and spiritually as well as physically? How had most a home be before, for the children's sake, it ought to be broken up?*

9. A child cannot develop normally in a home environment where there is no love, affection and sympathy. It is, however, important that the home should be kept together until the last possible moment. Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken, for children appear to accept their homes and the standards set therein with very little question, and provided there is a modicum of affection, they suffer less from what is termed a bad home than from the breaking up of such a home.

10. If both parents could be made to realise the effect of broken homes on children it might, in some cases, prove to be a means of reconciliation, but it is difficult to see how the position of the children can affect the decision of a court in favour of, or against, granting a divorce, as the law stands at present. Nevertheless, consideration might be given whether through some change in the law, more attention could be given to the position of children before the granting of a divorce.

11. At present the custody of the children is a matter for consideration or decision when the divorce or separation has been granted, but the reasons for the decision are not always clear. It is important that guidance should be given to those who are to have the custody of the children, for many mothers, fathers, or other relatives, while conscious of the physical wants of children are unaware of their psychological and mental reactions and consequent needs.

QUESTION 4. *Do you think that divorce being available to innocent or guilty party after, say, seven years' separation would be generally good or bad for the children?*

12. Divorce after seven years' separation will not usually be more harmful than separation, since the child has already suffered from a broken home for so long. A divorce gives the parent the opportunity to make a fresh start in the setting up of a new home atmosphere in which the child might be happy, but in this there is an element of risk to the child on the re-marriage of the parent. The introduction of a substitute for the defaulting parent is not always a success for this depends on a number of factors including the attitude of the step-parent to the child.

QUESTION 5. *If the parties have to separate, on what principle should the judge allot care of the children, bearing in mind that at present the court takes as the criterion the welfare of the children and no other?*

13. If the parents have to separate, the following should be taken into account:—

- (a) The physical and moral welfare of the children.
- (b) The amount of affection felt by the child for either party.
- (c) The spiritual and mental calibre of each parent.

PAPER NO. 40.—MEMORANDUM SUBMITTED BY THE EXECUTIVE OF THE NATIONAL UNION OF TEACHERS

18 JUNE, 1952]

MR. O. BARNETT, B.E.M., B.A., MR. E. L. BRITTON, M.A., MISS A. M. EDWARDS
AND MR. W. GRIFFITH

(d) The security and steadiness of the home, including material conditions.

14. It is difficult to state categorically as to which should have the greatest weight, but great weight, especially in the case of younger children, should be given to the desirability of a child being with its mother.

15. Whether it is wise for the child to maintain contact with both parents is a moot point. Consequent division of affection sometimes causes more harm than good and experience seems to suggest that a complete break may be the lesser of two evils.

16. It should be stated that many teachers are of the opinion that great care is at present taken in deciding who shall have the custody of the children.

QUESTION 6. *Are the arrangements for (a) assessing (b) securing payment of separation allowance or alimony and maintenance (in the case of divorce) satisfactory from the point of view of the children?*

17. Teachers agree that the assessing of the maintenance allowances in respect of the children should be on the most generous scale possible. It is pointed out, however, that there is much evasion of payment and that accumulated debt can be eliminated by imprisonment—with further adverse effects on the children. Apparently the parent or guardian has to take the initiative in recovering any money not paid. It is suggested that some improvement would be effected if there were machinery whereby action to recover payments could be taken by the court in the absence of an application by the parent (usually the mother), thus avoiding the accumulation of large amounts unpaid.

18. In respect of some orders made by local courts it is possible to make adequate arrangements, which in some areas ensure that payments are made regularly.

QUESTION 7. *At what stage ought preparation for marriage (not merely biological) to be given? Should it be provided within the educational system? Should it be compulsory?*

19. Preparation for marriage is desirable, but it can be argued that the general education of the child in school, at home and in the church, is a preparation for life of which marriage is one phase. However, there is a need for special preparation to help young persons to make a success of marriage, and to enable them to overcome some of the obstacles or difficulties which lead to unsuccessful or unhappy marriages. For instance, inefficient home

management of income often leads to unhappy married life, and it is suggested that courses for engaged couples should be made available where this and other problems could be tackled. In these days, when there is a tendency even in schools for many pupils to specialise in a few subjects, and subsequent to leaving school, to follow a specialist career, often away from home, opportunities should be available for them to attend courses in housework.

20. As far as the psychological and biological aspects of marriage and married life are concerned, it would be advantageous if these could be dealt with immediately before marriage—during the period of engagement. It would be difficult to make attendance compulsory but nevertheless the local education authorities at institutions of further education should provide courses under the supervision of suitably trained and experienced staff. Churches, marriage councils and other voluntary bodies are already taking steps to provide these. It is probable that many young persons who need most guidance would not attend, but that should not prevent an extension of this important work. If county colleges were in being as envisaged in the Education Act, 1944, for young persons of sixteen to eighteen years, opportunities could be provided, especially during the last few months of their attendance.

QUESTION 8. *Is sixteen too old or too young an age for marriage?*

21. The general opinion of teachers is that sixteen years is too young an age for marriage. It may be true that judged solely from a biological point of view sixteen years may not be too young, but the complex social and economic factors of modern society call for a long preparation before the individual has reached a stage of sufficient maturity to enable him or her to carry the responsibilities of citizenship, including those of family life.

22. To advocate marriage as a means of "making an honest woman" of a pregnant girl of tender years is to be deprecated. The resultant marriage starts in the wrong way, and is less likely to stand up to the wear and tear of life than a marriage based on genuine affection.

23. While nearly all express the view that the minimum age for marriage should be raised, and some express the view that the age should be raised to twenty-one years, the majority express the opinion that the age should be raised to eighteen years.

(Dated 2nd February, 1951)

EXAMINATION OF WITNESSES

(MR. O. BARNETT, B.E.M., B.A., MR. E. L. BRITTON, M.A., MISS A. M. EDWARDS AND MR. W. GRIFFITH, representing the National Union of Teachers; called and examined.)

3298. (Chairman): We have here Mr. Barnett who is the Vice-President of the Union, Mr. Britton, the Chairman of the Education Committee, Miss Edwards, the Vice-Chairman of the Education Committee, and Mr. Griffith, the Secretary of the Education Committee. To whom should I address my questions in the first instance?—(Mr. Barnett): To me.

3299. As I understand it, the National Union of Teachers covers the whole of the United Kingdom?—Only England and Wales.

3300. Of the teachers in England and Wales, about what proportion do you suppose are members of your Union?—I should say a very great proportion, ninety per cent. or something like that; we have 200,000 members.

3301. We had yesterday the Headmasters' Conference and the Association of Head Mistresses. Would I be right in thinking that all, or nearly all, of the headmasters and headmistresses who do not belong to these two bodies are members of your Union?—Yes, I think that would be a fair assumption, Sir; some who belong to these two bodies would also be members. (Mr. Griffith): Those two bodies consist of a very small proportion of the schools in the country. There are over 30,000 schools

in the country and I suppose the Headmasters' Conference would be able to speak for about 200. We claim to be able to speak on behalf of the overwhelming majority of the 30,000 schools.

3302. I understood that was so. Do you know for how many schools the Association of Head Mistresses speaks?—I am not quite sure, they consist not only of the independent schools but also of a number of grammar schools; there is a considerable overlapping of membership, dual membership.

3303. Then you of course have to deal with children from a very early age, I suppose?—(Mr. Barnett): The whole school range.

3304. What is the constitution of your Union, of what does the governing body consist?—The executive, which is freely elected by the constituent local associations.

3305. That is by the local and county associations?—Yes, the country is divided into districts and each district sends up members to the executive, who are all serving teachers.

3306. Before I ask you questions is there anything you would like to add to your memorandum or to explain in it?—Only this, my Lord Chairman, that we welcome the opportunity to give evidence before the Commission.

18 June, 1952]

MR. O. BARNETT, B.E.M., B.A., MR. E. L. BRITTON, M.A., MISS A. M. EDWARDS
and MR. W. GRIFFIN

[Continued]

I was struck this morning, listening to the evidence given by the Association of Children's Officers, how much we have in common with their point of view. While as a Union, which has a membership of very widely varying individual opinions, we could not give you a view on divorce where there are no children, we are vitally interested in questions where children are concerned, and we feel that no time is too early for consideration of the children's point of view.

3307. This is just a broad general question, would your Union be in favour of or against extension of the grounds of divorce, or do you not wish to express any view on that?—I think we would find it difficult as an organisation to give you a view on that.

3308. I thought you might; I shall not press the matter. Would you turn to the answer to Question 3 in your memorandum. You say this:—

"Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken, for children appear to accept their homes and the standards set therein with very little question, and provided there is a modicum of affection, they suffer less from what is termed a bad home than from the breaking up of such a home."

First of all, when you speak of a modicum of affection, you mean a modicum of affection passing from the parents to the children?—Yes, Sir.

3309. You are not speaking of affection as between the husband and the wife, as I understand it?—No, the affection of the parents for the child.

3310. Then I want to know what you had in mind when you spoke of "what is termed a bad home". Could you give us a definition of what in your view is a bad home, and what you would describe as an indifferent home, and what you would describe as a good home? What is it that renders a home a bad home in your opinion, from this point of view only?—Where it is bad for the child I think is the answer. We in the schools see unhappy children, children whose personalities are spoilt by the environment in which they live; there, I think, is our definition of a bad home. Children vary and homes vary and to make a broad generalisation is very difficult in this respect, but where there is a real affection for the child on the part of the parents we would regard that as being the kind of home which, whatever the other considerations, should not easily be broken up.

3311. In other words, you do contemplate, as I understand it, that there may be what you would term a bad home but if the parents, even in that bad home, have affection for the children, you prefer that to the breaking-up?—Yes, I think so, Sir.

3312. (Mr. Brown): I would like to go back to Question 3. At the beginning you say:—

"A child cannot develop normally in a home environment where there is no love, affection and sympathy."

Would you agree that the greater the friction between the parents the greater the chances of abnormality, and the greater the chances of creating a problem child?—(Mr. Brown): I think that it depends to some extent upon the nature of the friction. The child does require upon the home a degree of affection and a degree of feeling of security. I think that if the friction between the parents gets as far as blows or physical violence that does upset the child very considerably. I think also that if the friction between the parents results in tears on the part of one parent, that upsets the child very considerably, because, in the eyes of a young child at least, it is completely and utterly wrong that an adult should cry. But if, on the other hand, the friction between the parents is backing, argument in words, then I think a great deal of that passes over the children's heads without their realising that anything very much is untoward. I would point out that a child of three, four, five or six years is a very different being from a child of thirteen, fourteen or fifteen years. I think that whereas with the young child words and, shall I say, actions of infidelity have very little effect, possibly that may not be quite so true with the older child who does understand the implications far more. On the other hand, it is probably the

younger child who is far more in need of parental affection and is going to be far more upset psychologically if it does not get it.—(Mr. Barnett): I would add to that, that in my view the worst kind of friction is where the parents have grown to hate each other and each wishes to enlist the support of the child against the other and the child is torn between the two and often does not know what to make of the situation.

3313. At the end of the paragraph you say:—

"... and provided there is a modicum of affection, they suffer less from what is termed a bad home than from the breaking up of such a home."

I would suggest that a bad home may be defined as a home where there is quarrelling and friction, the mother crying, the very things that you have mentioned, to the extent that strong emotional reactions and tensions develop in the child. Do you think that is a fair definition of a bad home?—Yes, particularly the last point. There are some children who can live in homes of that kind without being seriously affected because of their own particular temperament, and there are other children who cannot.

3314. And now a broken home. By that I would say is meant one where the parents are separated by divorce, legal separation or desertion—your definition under Question 1. That is the situation where one child can turn to another and say: "Where is your Daddy?"—Yes.

3315. Do you think that the act of divorce itself may create emotional tensions in the child? May the mere fact that the mother as divorced have some reaction on the child?—I think it depends entirely on the age of the child. I think Mr. Britton has already made this point. It has not that effect on the younger children, the children of primary school age. (Mr. Britton): I would say that the really significant thing in the eyes of the younger child is the separation. How the separation happens is quite immaterial. It is not the relevant point in the eyes of the younger child.

3316. Would you agree that before the marriage was dissolved by divorce there must have been considerable friction between the parents?—(Mr. Barnett): Yes, I think we could assume that.

3317. Therefore, as far as the children are concerned, it was a bad home; it was a bad home where there was considerable friction, friction to the extent that the parents decided they would have to be divorced?—I would still return to what I said earlier on, that the temperament of the child is a very important point. All sorts of friction can be taken by some children without apparently serious harm, whereas in other cases it is very serious.

3318. Would you agree that the normal sequence is a bad home, a divorce and then a broken home?—Yes, I think so. (Miss Edwards): There is a broken home sometimes before divorce, is there not?

3319. I am talking of the case where there is a divorce first. Would you agree that each stage there, the bad home, the decree of divorce and the broken home, might possibly cause tensions in the child sufficient to make it maladjusted?—(Mr. Barnett): In some cases, yes.—(Mr. Griffin): Does it not depend on the definition of maladjustment? It has been said that we all suffer at one time or another from some form of maladjustment.

3320. In assessing the damage done by a broken home, would you agree that one would have to take into account the damage that had been done by the fact that before there was a broken home there had been a bad home?

(Mr. Barnett): Yes, I think one would have to take that into consideration.

3321. Would you agree that a broken home is the end of a sequence where damage has been done all the way along, or may possibly have been done all the way along, from the bad home, the divorce and then the broken home?—I should think that is, in general, a fair assumption.

3322. Do you think that it is possible to evaluate accurately the amount of damage that is done at each stage?—(Miss Edwards): I would think not. I think the amount of damage done at each stage would vary considerably, according to the age of the child and its temperament.

18 Jan., 1952] Mr. O. BARNETT, S.E.M., B.A., Mr. E. L. BRITTON, M.A., Miss A. M. EDWARDS
and Mr. W. GRIFFIN

[Continued]

3323. You would find it very difficult to evaluate the amount of damage done at each stage? You would not like to say that most damage is done from the bad home or from the act of divorce or from the broken home?—I would not like to make any decision on that.

3324. Would you say that it follows from that that it is dangerous to argue that broken homes are necessarily more harmful than bad homes, because most broken homes were some time previously bad homes, and the major part of the damage may have been done to the child when it was a bad home?—(Mr. Britton): Where the child is not fitting normally into the school environment we find in the overwhelming majority of cases a back history of a broken home. It is much more usual to find this than parental disagreement and the home still whole. I believe we would say that the fact of separation is a very relevant turning point in the damage that is done to the child in robbing it of the affection and security that it acquires from the home environment. I think we would find it very difficult to assess how much of that damage might have been done before the actual separation and how much of it was subsequent to the separation.

3325. Let us take the case of a really bad home, one where there is frequent cruelty on the part of the father to the mother and the child is a witness of that cruelty, perhaps there is drunkenness and gambling, and the wife bears it for a year just, shall we say, for the sake of the children. If it is an intolerable home like that, would you think that at the end of a year that would probably result in a case of a maladjusted child?—(Mr. Barnett): My own experience of that is this: that very frequently when we talk about a maladjusted child it is the parents themselves who are maladjusted. I have had one or two examples of that in my own personal experience, where a child appeared to be, so far as I could see at school, quite a reasonable individual. In one case the child was sent away to a home for maladjusted children. When I examined that particular case it did appear that really it was the parents who were maladjusted rather than the child, the child could actually do well in different circumstances.

3326. Supposing the parents are so maladjusted that they are doing harm to the children and that the marriage is brought to an end by a divorce. From the point of view of the child, speaking as a teacher, what do you think the effect of the legal dissolution of the marriage is on the child? Do you think it has a big effect or a little effect?—(Mr. Britton): I should say that it has this effect: that it makes quite obvious and public the fact that there has been this difference of opinion between the parents culminating in quarrelling and actual separation. There is a mark of hostility about it in the eyes of the child, more particularly in his relationship with his fellow children at the school. It rather underlines the fact that "My mummy and my daddy do not live together like everybody else's mummy and daddy".

3327. Would you say that in certain cases the bringing to an end of a marriage might be beneficial to the child if the conditions were almost intolerable?—I do not think any of us would want to maintain a home where the child was a witness of constant cruelty which it could understand as cruelty, particularly in the form of physical violence.

3328. And you would say that in certain cases the actual act of divorce itself might be of benefit to that child?—(Mr. Barnett): If I may go back to my earlier case where I thought it was the parents who were maladjusted, then I would prefer to see them split and the child with one of these parents, rather than that the child himself should be sent away.—(Miss Edwards): In no case would I say that a divorce was of benefit to a child, it is probably the lesser of two evils.

3329. Would you turn to Question 5 on custody? Would you like to say anything more on this?—(Mr. Barnett): I would only like to say that we think the process of deciding all the issues should start as soon as possible. We are quite sure the courts do their best with the evidence that is before them, but we do feel that if the collision of that evidence started at the earliest possible time then some of the few mistakes that are made now could possibly be avoided.

3330. (Chairman): Arising out of that, might I say that of course the court is in a difficulty in taking any steps until it has decided whether or not there is to be a divorce or a separation?—If I may follow up that point, what we mean is that as soon as a petition for divorce is brought, then we feel, like the body which gave evidence before us, that some machinery should be set in motion immediately to look after the interests of the child and collect the best possible evidence.—(Mr. Griffin): We make the point in paragraph 10. We realise the difficulty there is as to the way in which the interests of the children should be taken into account, but we think that the court itself should have the welfare of the children in mind, even before the case is heard.

3331. (Mr. Brown): In paragraph 10 you say:—

"Nevertheless, consideration might be given whether through some change in the law, more attention could be given to the position of children before the granting of a divorce."

Apart from what you have said, have you anything in mind?—(Mr. Barnett): We have thought of the various avenues through which this might be done, immediate contact with the children's committee, for instance, but what we are most anxious to see is that something should be done. (Mr. Griffin): We were wondering whether perhaps there should be somebody connected with the court whose duty it would be to investigate the position of the children, so that it would be quite certain that the interests of the children had been looked into before the case came on. It might not be sufficient to leave it to some outside person to do this, it might be better that the court should have some person responsible for this investigation.

3332. In paragraph 11 you say:—

"It is important that guidance should be given to those who are to have the custody of the children . . ."

Who, in your opinion, should give the guidance?—There are some bodies at present in existence which do give guidance.

3333. I was wondering if you had some special new body in mind?—No.

3334. (Mr. Flecker): In paragraph 3 you say:—

"Frequently they answer evasively or by half truths and they feel resentful, inferior and at a disadvantage and consequently lack confidence in themselves. This gives rise to emotional instability, which varies according to the type and comparative violence of emotional stress leading to the separation of the parents . . ."

I wonder if you would make it a little clearer just what you mean there? Is the emotional instability in the children?—Yes.

3335. And that emotional instability in the children varies according to the comparative violence of emotional stress in themselves, or in the parents?—I am afraid that is badly worded. It is the parents who have the emotional stress.

3336. One of the instances that you give in which a boarding school may be useful is when the one parent who is left is unavoidably away from home at a time when the child will be at home. Is that in your experience one of the greatest and most widespread difficulties?—(Mr. Barnett): Yes.

3337. One answer to it would be more part-time work for these mothers?—It would depend on the economic position of the parent.

3338. It has been said that the employer dislikes having to pay the national insurance contribution at the full-time rate and that consequently part-time jobs are not easy to get? Is that your experience?—I think there are areas in this country where you can get part-timers very easily. I do not think the scarcity is general. It is quite easy to get people for part-time work in my own city.—(Mr. Griffin): May I add that the local education authorities have the power to give help to the parents in cases of this kind to pay for boarding school education, but I think there is quite understandably a certain reluctance among the heads of boarding schools to take many of these cases, on the ground that they already have a proportion of children whose parents are disturbed. I am also not quite sure whether all local education authorities are using all the power they have to help people who need boarding

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school education for their children for reasons such as have been mentioned. There are 146 local education authorities and there is a variety of treatment among them—indeed we take some pleasure sometimes at the variety of British education—but it does mean that in some cases there is a reluctance on the part of the local education authority to spend the money and also to find a suitable boarding school for the children. Sometimes there is a reluctance on the part of the parent to apply.—(Mr. Barnett): Could I develop that. The provision for boarding school education for the brighter children is relatively better than it is for those, say, from the modern school. Most of the boarding schools would be regarded as grammar school type, and many local authorities will only send boys or girls to boarding schools, whatever their circumstances, if they think they have already shown by their ability and aptitude that they are of grammar school type. So it is at the moment easier for the child coming from the broken home who is intelligent to be catered for in this way than it is for the child coming from a modern school. I am sure that is a fair statement of the position.

3339. You say that boarding schools cannot replace the home. Would you agree that nothing can replace a good home; and that the people who say, send a child to a boarding school and the problem is solved, are living in a fool's paradise? The child may get more chance in a boarding school than a day school and a good teacher can help to build up some security for the child, and may help the lone parent who is trying to do the job of two parents. Would you agree that both those are good things to be attempted?—(Mr. Brinton): I think we should be in general agreement.

3340. The third thing which a boarding school can sometimes do is to give the child from a home where the parents are constantly fighting a respite from the tension, so that the child is then better able to face the difficulties in the home on its return. Do you think that is so?—I think it might be, but there is the other side of the picture as well. I think that the child who responds best to boarding school education, or to going away from home at all, is the child who has got a very stable home behind him. No child who has got a stable home minds going away because he knows the home is going to be there when he comes back. On the other hand, if the home is broken, children often react very unfavourably to going away from what little home they have got because they are afraid it will not be there when they come back. To some extent I think the danger of the boarding school is that the child who has lost one parent may feel that the other one is being taken away as well.

3341. Would you turn again to paragraph 11? In replying to Mr. Bewen's question you did not say who you thought should give guidance to those who are to have the custody of the children. It has been suggested to me that insufficient use is made for this sort of work of retired teachers whose experience might be very valuable and who might be glad to undertake this work when they reach pensionable age. Would you care to comment on that suggestion?—(Mr. Barnett): It is the first time I have had the question posed to me. My first reaction would be against the suggestion. I find that the older people get the less tolerant they become. The type of person I had in mind would be somebody not as old as that and full of human understanding. I should doubt very much whether it would, in general, be a good idea to appoint retired teachers for that type of work, on the ground of their age alone. (Mr. Brinton): My immediate reactions are exactly the same as Mr. Barnett's. I think we would say that that does not mean there are not some retired teachers who have got that understanding and flexibility of outlook which would make them satisfactory.

3342. With regard to paragraph 15, do you think that there is too great reluctance to refuse access to the parent who is not being given custody of the child, and that access is allowed in many cases where it might be better for the child to be entirely separated from the one parent? Do you think that, because it seems hard to deprive a parent of access, perhaps too little regard may be paid to the real interests of the child?—(Mr. Barnett): I rather think that is true. If I were a judge I would probably do the same. This right of access has caused some of the worst problems. I find that often the parent who has the right of access uses the access to sow dissension in the child's mind against the other parent. It would not happen in

every case and these cases have to be judged individually, it depends on the attitude of the parent to the divorce itself, but where the feelings are extremely bitter when the divorce takes place, that kind of thing is likely to arise and to cause very grave difficulties in the minds of the children concerned. (Mr. Brinton): I think that is particularly true when the parent who has not got the custody sees the child for a short time on fairly frequent occasions. That sometimes happens. Then you have the situation where the parent who has got the custody has to do the general disciplining of the child and where the other parent tends to give sweets and outings and become a competitor for the child's affections. (Mr. Barnett): I had myself one case where the parent was given access to the child only at school in the presence of the headmaster. I think that must be very unusual, it is the only case in my experience. In that very short interval when the child came in to see the parent that parent did everything possible to sow dissension against the other parent, by saying that the child was not too clean and its clothes were not very good, and attempting to give money, and so on. (Mr. Griffith): May I say this; since our memorandum was submitted, I have been approached by a person who is not connected with the National Union of Teachers to ask whether I would put forward a case. I would like to do this, because it is a difficult case to understand. It is a case, an account of which appeared in the Press about two years ago, of a husband who was granted a divorce because the wife was misconducting herself with her step-son, and yet I understand that she is still allowed to see and have the young children with her.

3343. (Chairman): I think perhaps if you would send the case in to the Commission you could do so without going into details here and now—I would like to do that, but I want to point out that it is not connected with our evidence at all. (Chairman): By all means send it in.

3344. (Mr. Fletcher): In cases where teachers are worried about the conduct of a child or its reactions, and feel that the home circumstances, for instance separation of the parents, are at the root of the trouble, would you say that there are services available to teachers, from which they can get all the support and help that they desire? I have in mind people like the children's officer or the probation officer.—(Mr. Barnett): I think the present services in that respect are utilized for much particular case. There is no need, in my view, to appoint new people to make these enquiries and to do these jobs, the people are there already in various organisations. What probably is lacking is someone to start the machinery working and to ask these people to do these jobs.

3345. Can you not do that yourselves as teachers?—We could not in a case of divorce, because we would not know anything about it.

3346. If a child is showing signs of being unsettled you can be responsible. . . . That is normally part of the head teacher's duty, but on this special issue of divorce we probably do not get to know of it until the divorce has taken place. (Mr. Griffith): There is also this, that the teacher is not always aware as to whose function it is. We had hoped at one time that the children's service would be a part of the educational system of the country, but that has not happened. In the schools we generally get in touch with the chief education officer, or his representative, and let him sort out the responsibility.

3347. (Mrs. Bewen): Do I gather from what you have said, Mr. Griffith, that the fact that the children's officers come under another local government department would rather deter the teachers from seeking the help of a children's officer?—(Mr. Griffith): Not at all, but we would rather do it through the education department.

3348. (Lord Keith): Does your Union cover teachers in boarding schools, or only in day schools?—No, teachers in all types of schools, colleges and universities, also teachers in approved schools and all kinds of special schools. You cannot mention a type of school our members are not in.

3349. How exactly do you assess the information that enables you to answer the various questions that are put in this memorandum? If I might put it in this way; is it

information you derive from the children?—No, we have more than 600 branches and we circulate each one of our branches. The branches will sometimes consider a matter themselves; at other times they will put it to the people in the branch who are interested in the particular problem. These answers have therefore been obtained in a variety of ways, from the experience of individuals, of committees, of teachers who are magistrates, of teachers in approved schools, and so forth.

3350. What I am getting at is this, is the source of your information in all cases teachers?—Yes.

3351. How do the individual teachers go about getting the information that we find in this memorandum? Is it the result of their experience that enables them to answer these questions?—(Mr. Edwards): If there is the right atmosphere between a child and its teacher, the teacher soon comes to know when there is anything wrong with the child—the child comes and talks to the teacher or the teacher will find a child acting in an unusual way and makes enquiries to find out what is causing the trouble.

3352. That is what I asked before, do you get the information from the child?—(Mr. Barnett): Can I put it in this way? I do not think the teachers questioned any of the children but they answered the questions from their long experience and contact with children.

3353. So the real source of their experience is their acquaintance with children and the enquiries made of children?—Yes.

3354. In other words, it is not based upon experience inside the home or experience of parents, is it?—(Mr. Griffith): Many of our teachers are parents, they know the homes of the children and they know the fathers and mothers. Nobody could say they did not know what was going on in the homes in their own villages and their own towns.—(Mr. Brington): If I might add to that. The experience also comes from contact with parents, because if you find a child is not reacting favourably to the school circumstances one of the first things the majority of head teachers and class teachers do is to try and make some sort of contact with the parent, drop a line to the parent and get him or her to come along and talk. Sometimes you meet with a blank refusal, the parent will not come; at other times the parent comes and discusses, often quite intimately, with the teacher the details of the home life. You also get direct approaches from the parents, because some parents who are having difficulties at home will try to enlist the co-operation of the school on their side of the argument. It is not unknown for both parents to come along and try and enlist the co-operation of the school, each on his own side.—(Mr. Barnett): If I might follow up what Mr. Brington has said. We tend to meet a bigger proportion of parents of this type than of the normal parents. As Mr. Brington said, parents frequently come to see us. A school is a very complex organisation nowadays. One of the first signs if father goes off is poverty in the home. Through the schools parents can obtain free meals for the children and often there will be a visit from a parent in this situation to try and get free meals or help in that way to meet the temporary financial difficulty. One does get the impression as head of a school that a far bigger part of the population comes from broken homes than is actually the case. One would imagine it was a high percentage, something like thirty per cent, if one did not realise that was not the case. So we really do get first-hand evidence from the parents. Then, we have in our membership many teachers who are magistrates, and because they are teachers, they serve in the juvenile courts. Many of those send evidence in to our education department when an inquiry of this kind is made. So we are giving evidence based on real experience.

3355. I might as a last word indicate what was in my mind, whether people like probation officers were more in direct touch with the homes that we are concerned with, and with the problems arising in those homes, than, say, teachers, who perhaps see things from outside the homes?—I think the answer to that is this, a probation officer goes inside the home more than the teacher does. It is not true to say that teachers do not visit homes, because they do, but the probation officers visit the homes far more. What the teachers do get very often is the report of the probation officer on his visit to the home.

3356. And that will be part of the source of your information embodied in this memorandum?—Yes.

3357. (Mr. Justice Pearce): Mr. Brown put to you the sequence of the bad home, the divorce and then the broken home, and suggested that the damage to the child might have been done by the bad home, before the divorce occurred. The example was given of a divorce on the ground of cruelty where obviously serious damage might be done to the child by its witnessing the acts of cruelty. Would you agree that where the break-up of the home arises from desertion or adultery or separation by mutual consent, in these days the parents do not as a rule have rows and scenes in the presence of the child, of so serious a nature as to do harm to the child?—I think that is often very true. I have in mind one particular case, a boy in my own school, where until the mother left the child was happy, worked hard and was doing well. When the mother went off with someone else, that immediately caused a serious change in that child in school, which still persists after two years. There was, as far as I could see, nothing before that; the child was happy, worked hard and was a perfectly normal child.

3358. If it is true that there are more breaks of that kind, that is to say without serious rows, it would look as if the damage to the child had not as a rule been done before the break in the home?—I think that in many cases it has not been done before the break. (Mr. Brington): I think our experience very largely would be that the break is the really damaging factor in the majority of cases. Obviously, if there is a break the home cannot have been entirely happy beforehand, but as a general rule we find that no serious damage has been done until that break comes and then that is a very serious damaging factor.

3359. (Mr. Jones-Roberts): From what you have said, I understood that the National Union of Teachers has members in schools in every village and every town throughout England and Wales so that you are in a very favourable position to discuss some of these matters with us. I would like to know whether you were able to localise the incidence of divorce in scrutinising the answers you received to your questionnaire. Evidence from some organisations suggests that the problem is formidable. We were told the other day that one in twenty of the children of this country would come from some kind of broken home. Now I put it to you, because you would know conditions in rural and urban areas, do you find that the problem is different in the villages from what it is in the large towns? If the problem could be localised to some extent that might throw light on some of the basic causes of divorce.—(Mr. Griffith): We can only give an impression, and my impression is that we did not have as many replies from the countryside as from the towns.

3360. That means that your organisations in the country would not have taken it as quite such a serious matter and would not have devoted the same amount of attention and time to answering your questionnaire?—The circular was sent around to each local and county association, some of which are in towns and some in the countryside. These associations meet frequently and the circular would be brought to their notice. My impression, I must say it is only an impression, is that we had more replies from the urban areas than from the rural areas. (Mr. Brington): I think that is bound to be true in any case on numbers of population alone, apart from the other factors of village life. There would be very few cases in the villages. Our members would probably feel that on the few cases that came to their knowledge they were not prepared to offer evidence. On the other hand, teachers working in the large cities deal with much bigger numbers and would therefore come across more cases and would feel they could give some guidance in a matter of this kind.

3361. I realise that it is very difficult to get the exact information one is seeking. I wonder, for instance, if your members are able to tell you to what extent they have to refer children to child guidance clinics, because of maladjustment? That might give you some kind of precise information?—(Mr. Edwards): Quite often the children who have to be referred to child guidance clinics are found to come from homes where there is disturbance but I could not say that all maladjusted children come

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from such homes. Quite a number I have had to deal with during the last few years have been cases of children where there has been this kind of disturbance in the home, and they have had to seek satisfaction in some way or other and that is how they have sought it.

3362. That again would not help us very much?—I do not think it would.

3363. There is one other point. In paragraph 10 you suggest that more attention should be given to the position of children before the granting of a divorce, and in paragraph 8 you say that after separation or divorce there should be some "follow-up" of the children by a social worker. I wonder if you have thought this matter out and what your recommendations are. Can we take first of all the position of the children before the granting of the divorce? What exactly have you in mind there?—(Mr. Barnett): We did not feel that anything could happen until the point where one of the parents filed a petition for a divorce, but we did feel that when that point was reached there were serious implications for the children concerned and that therefore the State had some say in the matter then and would ultimately have to make a decision on the children. We felt that the best decision would be made if at that point, which we felt was the earliest opportunity, some investigation could be made as to the best that could be done for the children if the divorce were granted.

3364. You mean in regard to questions of custody that would have to be decided?—Yes.

3365. Had you in mind, for instance, that where there were children of the marriage, there should be a longer period between the divorce nisi and the decree absolute, in order to enable these enquiries to be made?—I do not think we have gone into that question, though my own personal sympathies would be in that direction. It matters much less if a home where there are no children is broken up, and the break-up of a home where there are children should be the last resort.

3366. (Mrs. Jones-Roberts): I wonder if Mr. Justice Pearce could say what happens now?—(Mr. Justice Pearce): The position now is that either parent can make an application to the court for custody immediately a petition is filed, but no steps, such as those you are envisaging, are taken by the court in order to ascertain the position of the children at that stage.—That is where we think we can offer some concrete suggestion. (Mr. Griffith): We thought that if it was somebody's business to look into the position of the children, there might not be a divorce. At the present time it seems to me that there is no way of trying to reconcile the parents in the interests of the children. Even if only a few families were reconciled in that way it would be worth while.

3367. (Mrs. Jones-Roberts): Some of the bodies who have given evidence have suggested the appointment of a child welfare officer, who would be attached to the Divorce Court. You heard the suggestion made this morning by the Association of Children's Officers. You would also know that in the magistrates' courts use is made of probation officers. What are your views?—I can only give a personal view. My view is that the interests of the children should be taken into account during the divorce proceedings and that the court dealing with those should have some responsible officer answerable to it for the children. If you put responsibilities on all kinds of other organisations you get into the position where nobody is really responsible for the child.

3368. Had you in mind that the officer who had made the original investigation would be the person who would keep an eye on the children after separation or divorce?—I cannot say so to that. All I would say is that even the children's officer is confined to one area, and people may get a divorce in one area and afterwards move to another. There should be a better way of following up. After all, the person responsible for the children is, say, the London court can hardly be responsible for them if they move. If they happen to move to, say, Blaenau Ffestiniog, it should be someone in Blaenau Ffestiniog who would be responsible for the follow-up, and that person would send a report to the court.

3369. It would be a very big development, an entirely new departure, that after a divorce or a separation

somebody should be entitled to come and talk to the parents about their children?—Yes.

3370. You favour that?—Yes.

3371. Up to the age of sixteen or longer?—Yes.

3372. In paragraph 10 you say that it is difficult to see how the position of the children could affect the decision of the court in favour of or against granting a divorce. Had you in mind differentiating between marriages where there are children and marriages where there are no children? It was not clear to me what you meant there.—We did not know enough about the law to see how children could affect the granting of divorce. We thought that divorce was something between two adults. But we did think that the position of the children should nevertheless be taken into account.

3373. (Chairman): I think Mr. Justice Pearce would agree when I say that at the moment the position of the children cannot affect the decision of the court in favour of or against granting a divorce. There are certain grounds for divorce and certain other matters that are not grounds for divorce. That is what you mean?—Yes.

3374. You think that there ought to be some way of bringing in the children?—Yes.

3375. (Mr. Mace): When an application was made for a separation order, and not a divorce decree, would you still want an officer to investigate the position of the children as soon as the application was made?—(Mr. Britton): Yes, that is our view. We do feel that we want to defend the interests of the children, and damage can be done to them if the home is broken up, whether by separation or divorce.

3376. Would it apply to separation whether asked for in the High Court or in the magistrates' court?—We are not conversant with the legal problems involved, but we would say "yes", from the point of view of the child.

3377. (Lady Pears): In paragraph 15 you say:—

"Whether it is wise for the child to maintain contact with both parents is a moot point."

You go on to say that the consequent division of affection sometimes causes more harm than good and that a complete break may be the lesser of two evils. If in a divorce case, custody was granted to one parent and the other refused access altogether, do you not feel that would cause a great anxiety to the child, and that anxiety would last many months? Can a complete break really be made if the other parent has not died?—(Mr. Barnett): If the parents are divorced or separated but there was some kind of friendly relationship, not the bitter hatred there often is, that is a different case and access might be granted to the other parent, but where the only effect of giving access to the other parent is to disturb the child when that access takes place, that is the situation where we doubt the wisdom of granting access. On the point you have put about the lasting effect, a young child has a very short memory and I am quite sure that in the case of very young children the step would not be serious from the point of view of the child. It would very soon have forgotten the other parent. In such cases the parent becomes almost a stranger. The children wonder who the person is that they must see.

3378. I was not considering the young child, but the child of twelve or thirteen.—The case I had particularly in mind was a child of eleven or twelve; the divorce had taken place a year or two previously and it was my job to see the mother three times a year when she interviewed her child. It was obvious to me that the child was very quickly forgetting the mother and was very disturbed, and became increasingly disturbed every time that he had to see her. He did not really want to see her.

3379. I gather from that, that in your opinion a complete break would really not be very harmful to a child eventually? It might be at the start?—In many cases I do not think it would be harmful, it would be better for the child.

3380. (Sheriff Walker): I understand that in the case of cruelty you say that much of the damage may be done to the child while living in the family with both parents, is that right?—Yes.

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3381. Leaving aside the cases of cruelty, am I right in thinking that in other cases there comes a stage when one of the parents leaves the home, and there is a separation or desertion? In those cases, is it the fact of separation or desertion that causes damage to the child?—I think Mr. Britton developed this point. Where there is real cruelty going on in the home, I should say the separation was for the betterment of the child.

3382. That is why I wanted to leave aside the case of cruelty and take only the other cases such as desertion or adultery?—The answer is that it is the separation that is the cause of the damage.

3383. That really invades the child's sense of security?—Yes.

3384. Supposing that after the separation or desertion, there is a divorce. Does that in itself do any further damage to the child? Take the case of a husband who goes away with another woman leaving the home with only the mother and children. If a divorce follows on that, does it do any further damage to the children, beyond what has been done by the fact of the father going away?—(Mr. Britton): I would say no, the divorce does no appreciable further damage. The real damage is done when the home visibly and obviously in the child's eyes breaks up.

3385. It is the fact of the conduct of the parent that does the damage rather than the court's act in dissolving the marriage?—That is what I would say.

3386. In paragraph 7 of your memorandum you give an illustration of three girls of fifteen who on seeing a photograph of a wedding made certain remarks. What is that an illustration of?—(Mr. Barnett): I think that this was intended to give the Commission an idea of the effect of divorce on the minds of children. Whereas marriage to a normal girl is something to look forward to, this is the way certain girls reacted where there was a background of divorce.

3387. I was rather struck with the form of the observation, "Do not marry, your husband may be unfaithful to you." It was not "Do not marry, your marriage may be dissolved." I am not sure what the point of that is?—(Mr. Griffin): The girls had a distorted view of things.

3388. You think that is the implication of it?—Yes.

3389. (Chairman): I thought the clue lay in the last sentence:—

"The teacher remembered that the three were children of divorced parents."

It was an illustration of what sometimes happens when children have parents who have been divorced. Is not that the point of it?—Yes.

3390. (Sheriff Walker): The girls are really saying: "Your husband may be unfaithful and you may have to divorce him"?—(Mr. Britton): I think the illustration is intended to convey rather that a background of divorce causes girls and boys to grow up with a distorted view of marriage in so far as they look on it with a certain amount of suspicion.

3391. (Mr. Bence): Have you any experience of difficulties in the continuation of education owing to the fact that a parent is not required to maintain his child after the age of sixteen?—I could not quote a definite case but it is a general view amongst teachers who deal with older children that that is one of the factors in causing some children to leave school rather earlier than they ought. I would not like to say that it is a clear-cut "Yes", but there is a general feeling on the part of teachers with older children that that does at times enter into the matter.

3392. From all that you have said about the effect of separation of the parents on the children, I would gather that you would feel that reconciliation should be attempted at as early a point as possible?—(Mr. Griffin): Yes.

3393. Have you any views as to whether the kind of parents whom you know would prefer to go to a probation officer or to a voluntary association, such as the Marriage Guidance Council?—(Mr. Britton): I think that,

speaking from experience of the kind of parents in my own locality, the difficulty is that they do not think in terms of going anywhere to seek advice; rather it would be desirable if the advice could be brought to them, incidentally to some other activity, particularly, I feel, if it could be brought in connection with difficulties that arise over children at school. Often the first indication that all is not well between the parents may be slight difficulties that the teacher notices the child is experiencing in school. I think that if the follow-up of those difficulties caused somebody to go to the home in a sympathetic manner, that might do a great deal of good in the way of reconciliation.

3394. It is a very difficult thing to do, because it almost amounts to interference in other people's affairs?—Yes.—(Mr. Barnett): That is where I think the reaction of the parents might be different, according to the type of parent. Whereas in some districts I know in Nottingham the probation officer would be recognised and accepted by the parents because he is so frequently visiting in the district, then are other parents to whom he might give offence because of the nature of the rest of his work; that type of parent would, I think, prefer the Marriage Guidance Council.

3395. So you would really like the two services?—I think there should be both.

3396. Do you feel that the opinion of the schoolmaster or the schoolmistress could be of assistance to the justices or to the judge, as the case may be, when the custody of children is being considered?—As part of somebody else's report, yes.

3397. Like Section 35 of the Children and Young Persons Act?—Yes. I would not like a headmaster's report to go into a judge in a case of custody. Rather I would think that whoever compiled the report for the judge might obtain, among his other enquiries, the opinion of the headmaster.

3398. You would not like to be asked to attend the court?—I should personally be afraid of the time it would involve.

3399. Would it mean attending more than, say, once in three years?—I should say it would, it might take up considerable time.—(Mr. Britton): I think we ought to say that we have not discussed this matter in any way. My personal reaction would be that I should be unhappy about sending in a written report, but I personally would feel that some good could be done by the head teacher, or in a large school, possibly a teacher who has had contact with the child, attending the court in some sort of advisory capacity in regard to the child, but that is a purely personal reaction on this.

3400. Of course, whatever a teacher says would have to be known to both parents and he would run the risk of incurring the displeasure of one or other of them?—Our fundamental point in being here is that we have the interests of the children at heart, therefore I think that the majority of conscientious teachers would be prepared to take the risk of offending one of the parents in the interests of the child. We do it in other respects when parents come to us on certain points.—(Mr. Barnett): If the head teacher were called upon to give evidence and he came down, as he might, on one side or the other in a case of this kind, the court might take a decision in the opposite sense, the child might stay in the same school, and there might be considerable friction on a point like that.

3401. You would think it was worth it?—Yes, definitely, so long as the incidence of such cases was not heavy.

3402. With regard to paragraph 21, have you any experience as to whether marriages contracted before the age of seventeen have been very unsuccessful, or less successful than others?—No experience.

3403. It is just a view?—My own view, it may be the view of other members here, is that we would definitely prefer a later age.—(Mr. Britton): This was a majority opinion as obtained from the evidence we collected from members of our local associations.

3404. (Mrs. Brace): In paragraph 17 you speak about the father evading payment of maintenance and going to prison, and you go on to speak about the further adverse effects on the children. Do you suggest by that that the

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MR. O. BARNETT, B.E.M., B.A., MR. E. J. BRITTON, M.A., MISS A. M. EDWARDS
AND MR. W. GRIBBIN

[Continued]

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child suffers, from the actions of other children, if it is known that its father has had to go to prison for not paying the mother's maintenance?—(Mr. Barnett): I do not know whether that is what was meant, but I am sure it would be true. If a child's father goes to prison, whatever the cause, that does not help the child's social standing with the rest of his fellows. Other children are not sufficiently interested to consider whether it makes a difference what the offence is. All they say is "So-and-so's father is in prison", and that is a very serious thing for the child concerned.

(The witness withdrew).

PAPER No. 41

FIRST MEMORANDUM SUBMITTED BY LADY CHATTERJEE, O.B.E., M.A.,
D.Sc. BARRISTER-AT-LAW

PREAMBLE

This memorandum, based on many years experience as a barrister practising in the Probate, Divorce and Admiralty Division of the High Court as well as experience in other civil cases and as a social worker in London, contains the following submissions.

RECOMMENDATIONS

CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

1. Change of name

(a) As a deterrent to so-called "good office marriages", it is suggested that identity cards should not be issued to persons who assert that they have lost their cards as well as those of their children, without the applicant producing a marriage certificate and birth certificates as proof of identity.

(b) Representations made by several organisations to the Committee on the Law of Intestate Succession¹ are some indication of the prevalence of these irregular practices.

2. Changes in legal preliminaries to marriage

(a) *Minors*

(a) When one or both applicants are minors, each applicant is required to sign a declaration that the required consent has been given, or that there is no one qualified to give it. In support of this declaration, a written consent should be deposited with the authority who publishes the banns or issues the common licence. In the case of civil marriages the consent should be deposited with the Superintendent Registrar and no certificate with licence should be issued by him, unless the applicant alleges strong reasons for urgency in writing and proves the same to the satisfaction of the registrar.² In addition, this written consent should be accompanied by a statement that to the best of his or her knowledge and belief the party is not suffering from any mental or physical disability which would render the marriage either void or voidable.

(b) These recommendations are based on the facts that a large number of minors, both boys and girls, are married every year and that a certain proportion of them marry men and women who have already been divorced.³ There is frequently great disparity of age between the parties,⁴ and a large number of illegitimate children have mothers under twenty years of age.⁵

(i) *Adults*

(a) It is suggested that in the case of both religious and civil marriages, both applicants, in addition to signing a declaration that there is no legal impediment to the marriage, should add that to the best of their

3465. Would you be prepared to suggest that the man should not go to prison for non-payment of maintenance?

—(Mr. Britton): The point I wanted to make was that in many cases where the money is not obtained from the parent the child has poverty added to its other disadvantages, therefore we feel that the money should be obtained from the father and that he should not be able to work off his debt by going to jail.

(Chairman): We are very much obliged to you for the memorandum and the help you have given us this afternoon. Thank you very much.

knowledge and belief they are not suffering from any mental or physical disability which would render the marriage either void or voidable. In the case of civil marriages, no certificate with licence should be issued by the registrar unless the applicant alleges strong reasons for urgency and proves the same to his satisfaction. This will bring the procedure into conformity with Scottish law, where "a Sheriff's licence, which has the effect of dispensing with the requirement of proclamation of banns or publication of notice", can be obtained "only in exceptional circumstances of urgency."

(b) All applicants, whether minors or adults, should be required to produce their birth certificates and identity cards and where these do not tally they should give reasons.

3. Marriages voidable by statute⁶

(a) It is suggested that medical opinion be taken as to whether the period of twelve months should be extended to cover cases that may become apparent at a later date.

(b) Where a declaration is required regarding mental or physical disability and it is later found that such a disability did exist, the person or persons who signed such declaration may be required to show that they had no reasonable ground for not signing the required declaration.

(c) As a certain number of marriages are annulled each year on grounds of mental and physical disability at the time of marriage,⁷ the above safeguards have been suggested, with a view to reducing the number.

4. Where marriage is sought to be upheld

(i) *Decree for restitution of conjugal rights*

It is suggested:—

(a) That the grounds on which a marriage may be annulled or avoided during the first year of marriage should also be grounds for refusal of a decree of restitution of conjugal rights.

(b) That development of insanity even without apprehension of physical violence and the convicting or imprisonment of a husband or wife for a criminal offence, may also be made additional grounds for refusing a decree.

(c) The number of decrees for restitution granted each year is comparatively small,⁸ but it is suggested that further relief is required.

(2) *Legitimacy*

(a) Until the passing of the War Marriages Act, 1944, and the Law Reform (Miscellaneous Provisions) Act, 1949 (now consolidated in S. 18 (1) (b) of the Matrimonial Causes Act, 1950), it was only when the husband was domiciled in England that the Divorce Court exercised its jurisdiction and granted a decree. But now the Divorce Court has the power to grant a decree to a wife who is and has been ordinarily resident in England

¹ Report of the Committee on the Law of Intestate Succession, paragraph 28.

² Abstract of Legal Preliminaries to Marriage, 1951, page 4 of rev.

³ Statistical Review of England and Wales, 1950, Table G, pages 49 and 51.

⁴ *Op. cit.*, Table J, page 55.

⁵ *Op. cit.*, Table AA, page 154.

⁶ Abstract of Legal Preliminaries to Marriage, 1951, page 11.

⁷ Matrimonial Causes Act, 1957, Section 7.

⁸ Civil Judicial Statistics, 1951, Table XI, page 97.

⁹ *Op. cit.*, page 28.

for three years prior to her petition. The present position makes the legitimacy of the children who may be born to the woman should she marry again, subject to doubt. This point needs consideration in order to remove any such doubts.

(b) Children of voidable marriages are now deemed to be legitimate by virtue of Section 9 of the Matrimonial Causes Act, 1950, but children born before the passing of this Act are still deemed to be illegitimate. It is suggested that this enactment be given retrospective effect.

(c) The duty of re-engineering the births of children legitimated by subsequent marriage should be strictly enforced in all cases.¹²

(d) It is suggested that there should be a statutory obligation to publish statistics regarding:—

(i) Custody orders in the High Court.

(ii) Number of children legitimated by subsequent marriage.

(iii) Number of children for whom orders regarding "care and control" have been made.

5. Grounds for divorce

(1) Cruelty

(a) It may be considered whether the test should not be the degree of cruelty rather than the mental or physical effect caused thereby. A man or woman who, though subjected to cruelty, has sufficient strength of body and mind not to let his or her mental and physical health be affected is disentitled to a decree on the grounds of cruelty.¹³

(b) It is suggested that as a petitioner may obtain an order on the ground of persistent cruelty to children under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, Section 1 (2) and (3), this may well be made an additional ground for relief in the Divorce Division.

(2) Adultery

(a) When the person charged is a woman she should be made a co-respondent in the same way as a man and not only "if the court thinks fit".¹⁴

(b) A similar right to claim damages from the co-respondent should be given to the wife petitioner as is enjoyed by the husband petitioner.

(c) Section 196 of the Judicature Act, 1925, may be amended to permit, in suits for divorce on the grounds of adultery, questions to be put to a party or witness in the suit, tending to show that the party is guilty of adultery.¹⁵

(d) When the husband is petitioner, damages should be assessed not merely on the loss of his wife but on the damage done to the children. When the wife is a petitioner, loss of a home and financial support for herself and her children should be taken into consideration.

(e) Children should be given a right of action against the guilty party.

(f) The co-respondent (man or woman) should be required to make an affidavit regarding his means when damages are claimed.

(g) Both the respondent and co-respondent (man or woman) should be required to be present at the hearing.

(3) Desertion

(a) The rule requiring a period of three years immediately preceding the petition on the grounds of desertion should be changed, so as not to act as a deterrent to reconciliation.¹⁶

(b) The law regarding agreement to separate and deeds of separation, needs to be clarified to enable the parties to know when such conditions are a bar to a

petition and when they are not, and what constitutes repudiation; and to prevent needless litigation.¹⁷

6. Additional grounds for divorce

Cruelty

(a) Since a petitioner may obtain an order on the ground of persistent cruelty to his or her children against the respondent in a court of summary jurisdiction¹⁸, it is suggested that it should also be a ground for relief in the Divorce Division.

(b) Where the respondent is a "habitual drunkard"¹⁹ the petitioner should be granted a decree for dissolution of marriage. Relief in such circumstances is obtainable in a court of summary jurisdiction.²⁰

7. Proceedings after divorce

(a) Statutory rules, it is urged, should be made permitting deductions from wages, earnings or income, in order to enforce compliance under an order for maintenance.²¹

(b) Imprisonment should not wipe out arrears of maintenance.²²

SUGGESTED CHANGES IN THE POWERS OF COURTS OF INFERIOR JURISDICTION

8. Courts of summary jurisdiction

It is suggested:—

(a) Magistrates should have power to make interim orders for maintenance up to the time of the order of the Divorce Court.²³

(b) Before hearing a summons, the court should require information as to whether the parties have considered the possibility of reconciliation, and for this purpose probation officers should be available. (See opinion of Lord Justice²⁴)

(c) When deciding questions of custody the court should always have the assistance of a probation officer and should require both parties to appear. The wishes of the children should be considered and their welfare should be the paramount consideration.

(d) The court should be required to keep statistics of all matters arising out of their matrimonial jurisdiction.

(e) There should be a close liaison between these courts and the juvenile courts.

(f) The courts should have all proceedings taken down by a shorthand writer.

(g) The courts should be peopled over by a stipendiary magistrate and if the stipendiary is not a woman the magistrate should have the assistance of a woman lay magistrate.

(h) Special probation officers or court welfare officers (women as well as men) qualified to deal with matrimonial matters should be available to assist the court.

(i) The court should be empowered to enforce orders for maintenance made by the Divorce Court.

(j) Immediate effect should be given to those Sections of the Legal Aid and Advice Act relating to legal aid and legal advice in the lower courts.

9. County courts

It is suggested:—

(a) Legal aid and legal advice should be made available by the immediate implementation of the Legal Aid and Legal Advice Act—in accordance with Lord

¹² *Report on Divorce*, Chapter 3, page 112, paragraph 125.

¹³ *Summary Jurisdiction (Separation and Maintenance) Act, 1925*, Section 1 (2) and (3).

¹⁴ *Habitual Drunkards Act*, Section 9, as amended by Section 3 of the *Summary Jurisdiction (Separation and Maintenance) Act, 1925*. See also *Bocher v. Bocher* (1947) 1, pages 25 and 30, per Lord Green, M.R.—*Divorce Case Book*, page 70, line 37 of seq.

¹⁵ *Summary Jurisdiction (Separation and Maintenance) Act, 1925*, Section 5.

¹⁶ *Army and Air Force (Marriage) Act, 1945*, Part 1, Section 5, and *Naval Forces (Enforcement of Maintenance Liabilities) Act, 1947*, Chapter 24.

¹⁷ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

¹⁸ *Final Report of Lord Justice Denning's Committee*, page 33, paragraph 87, III (2).

¹⁹ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

²⁰ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

²¹ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

²² *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

²³ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

²⁴ *Report of the Commissioner for Prisons, 1950*, Table XII, page 154.

¹⁸ *Legitimacy Act, 1926*: Schedule, Registration of Births of Legitimated Children.

¹⁹ *Ramsell v. Ramsell* (1897) A.C. 395 and *Divorce Case Book*, page 116 of seq.

²⁰ *Matrimonial Causes Act, 1950*, Section 3 (1) and (2).

²¹ *Final Report of Lord Justice Denning's Committee*, page 28, paragraph 70.

²² *Op. cit.*, page 36 (iii).

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Jowett's view; because, as he said, "The county court is the poor man's court. I should have thought that if there was one court where it should be available, it was the county court."²²

(b) Before hearing a petition, the court should require information: (i) whether the parties have considered the possibility of reconciliation; and (ii) if there are children, what arrangements are proposed for their custody and maintenance.

(c) Same as in courts of summary jurisdiction.

(d) Same as in courts of summary jurisdiction.

(e) Same as in courts of summary jurisdiction.

(f) Special probation officers or court welfare officers (women as well as men) qualified to deal with matrimonial matters, should be available to assist the court.

(g) Court welfare officers should be present at the hearing of divorce petitions when questions of custody arise, and they should represent the interests of the children before the court.²⁴

(h) Decisions concerning children should normally be made by the judge at the hearing of the suit or immediately after it.²⁵

(i) Both parties should be required to appear, if possible, and the wishes of the children should be taken into consideration.

(j) Decisions concerning maintenance should normally be made by the judge at the hearing of the suit or immediately after it²⁶ and no decree absolute should be granted before such an order has been made.

SUGGESTED CHANGES IN THE PROPERTY RIGHTS OF HUSBAND AND WIFE

10. It is suggested that a guilty husband should be restrained from compelling his wife and children to vacate the matrimonial home.

SUGGESTED CHANGES IN THE ADMINISTRATION OF THE LAW

11. Matrimonial causes are at present dealt with by three different courts. It is suggested that:—

(a) The procedure throughout should be the same.

(b) Prior to the institution of actual legal proceedings the parties should be encouraged to consider the possibility of reconciliation and the arrangements regarding custody and maintenance for the wife and children, should reconciliation prove impossible. Before a legal aid certificate is granted, the legal aid committee should be satisfied on both these points.

(c) The legal advice centres should have their functions extended and they should be run on lines similar

²² *Op. cit.*, Col. 307.

²³ Final Report of Lord Justice Denning's Committee, page 33, paragraph 61, II (1) and (2); III (1).

to those of Cambridge House and Mary Ward Settlement. Settlements with wide experience, such as these, should become an integral part of any legal advice scheme.

(d) For the purposes of legal advice, as distinguished from court work, barristers with knowledge of the work of the courts and with social experience should be employed as well as solicitors.

(e) Legal aid should be available in all courts.

(f) The question needs consideration whether parties who have themselves committed adultery should be given legal aid.

(g) Cases where children are concerned should be put into a separate list and heard at a different time from cases where childless couples are concerned. All questions of custody should be dealt with by the judge who has heard the case and he should, in all cases, have the assistance of a court welfare officer or a women's officer. Both parties should have to appear, and the wishes of the children be taken into consideration.

(h) Discretion cases should be dealt with separately from others, so as to enable the judge to have time to deal with all the issues involved.

GENERAL RECOMMENDATIONS

12. It is respectfully suggested that the Royal Commission should consider publishing an interim report with such recommendations as have already the full force of unqualified opinion. If ameliorative measures have to wait till the final report of the Royal Commission is published and their recommendations embodied in legislation, there will be meanwhile numerous broken marriages, with all the consequent misery to the spouses and their minor children.

13. The Royal Commission may consider recommending in their interim report the adoption of the following:—

(1) The recommendations of the "Royal Commission on Population", regarding education for marriage.²⁷

(2) The recommendations and suggestions of the Final Report of Lord Justice Denning's Committee regarding reconciliation, advice, children, alimony, maintenance, and custody.²⁸

(3) The publication of detailed statistics regarding matrimonial causes with special reference to the number of children involved.

(4) The full implementation of the Legal Aid and Advice Act.

(Received 2nd January, 1952.)

²⁷ Royal Commission on Population, page 211 *et seq.*

²⁸ Final Report of Lord Justice Denning's Committee: pages 12 and 13, paragraph 28; pages 13-17, paragraph 29; pages 17-19, paragraphs 30, 31, 32, and pages 32 and 33, paragraph 37, I, II and III.

PAPER No. 42

SECOND MEMORANDUM SUBMITTED BY LADY CHATTERJEE, O.B.E., M.A., D.Sc., BARRISTER-AT-LAW

To supplement the recommendation in my memorandum, regarding the publication of detailed statistics regarding matrimonial matters—a recommendation which is based on the view that the basis and support of effective legislation is sound public opinion and accurate knowledge—I humbly suggest that the whole question of collecting and collating the relevant facts be thoroughly reviewed. In this connection I beg to draw the attention of the Royal Commission to the following:—

(1) The statistics relating to matrimonial and divorce matters are scattered over no less than six separate Government publications:—

A.—*The Registrar General's Statistical Review of England and Wales* (compilation taking two years—e.g., figures relating to 1948 published in 1950) contains annual tables relating to:—

(i) Table J. The combined ages of husbands and wives who inter-married, i.e., what the ages of women were who married boys of sixteen, etc., and vice versa.

(ii) Table Q. The number of decrees relating to the dissolution and annulment of marriage over a period of years.

(iii) Table P. The duration of marriage and the number of children involved in divorce petitions.

(iv) Table G. The marital age and numbers of bachelors, widowers and divorced men, and the number of spinsters, widows or divorced women whom they married, and vice versa.

(v) Table AA. The ages of mothers who gave birth and the number of such legitimate or illegitimate births.

B.—*The Criminal Statistics of England and Wales*, containing tables relating to Magistrates' Courts—Certain other Proceedings:—

Table X or XII containing numbers of orders relating to:—

Married women—maintenance orders.

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Married women—separation orders.
Guardianship of infants orders.
Poor law: orders for maintenance of wife, children and young persons for maintenance.
Adoption.

C.—Report of the Commissioners of Prisons and Direction of Convict Prisons.

Table XII.—Non-criminal prisoners.
Non-payment of wife's maintenance.
Non-payment of children's maintenance.

D.—Report of National Assistance Board.

Table 1. Number of separated or deserted wives receiving assistance.
Table 2. Number of dependants or applicants.

E.—Civil Judicial Statistics.

Table 10. Matrimonial Causes heard by Special Commissioners.
Table 11. High Court of Justice, Probate, Divorce and Admiralty Division—Divorce Proceedings.
Table 11. D. Comparative Table 1938-1949, relating to grounds for divorce and nullity.

F.—Criminal Statistics: Magistrates' Courts.

Table IX. Juveniles aged fourteen and under seventeen dealt with summarily.
Table X. Juveniles under age of fourteen years dealt with summarily.
Table XI (including juvenile courts). Indictable offences.

G.—Annual Abstract of Statistics.

(2) The above statistics are collected by different government departments with differing objects in view.
(3) Many important questions which could be elucidated, by adequate statistics collected with particular ends in view, are in consequence left to guess-work.

In this connection it may be pointed out that in Western Australia statistics are collected, showing:—

(i) The grounds on which decrees absolute have been founded, and these have been divided into two categories according to whether they have been obtained by the husband or the wife.

(3) The duration of marriage and the number of children in each year group.

(iii) The number of children involved in the husband's petition and the number in the wife's.

(iv) The ages of the husband and wife at the time of divorce.

(v) The age of wife at marriage and duration of marriage.

(4) Other memoranda submitted to the Royal Commission have also made recommendations regarding the need of adequate statistics.

(5) The Magistrates' Association has for some time past been urging the necessity of improving the statistics which are available, on the ground that the marshalling of the facts will be of material help in assessing the value of the work that is being done by juvenile and adult courts, but apparently without much success.

(6) The statistics that are available are very inadequate relating to marriage and divorce and the numbers of children involved, and give no indication of the size and importance of the subject.

(7) No adequate system of collecting statistics can be compiled unless it is done by a co-ordinating body and designed to answer certain specific questions.

(8) Most of the important facts are available in the records of the Divorce Registry of the High Court, in the district registries and in magistrates' courts.

(9) The present arrangements for the collection and analysis of statistics relating to marriage and divorce are not adequate to meet modern needs and in consequence there is grave lack of knowledge and no possibility of research into the social, economic, medical and psychological problems connected with marriage, divorce and the children of divorced parents.

Finally, I beg to make a suggestion, similar to the one embodied in the recommendation of the Royal Commission on Population that:—

1. The collection and tabulation of the statistics relating to marriage and divorce should be entrusted to the Interdepartmental Committee on Social and Economic Research.
2. The functions of the Committee should be extended to include the necessary executive powers.
3. It should have adequate funds at its disposal.

(Received 13th June, 1952.)

EXAMINATION OF WITNESS

(LADY CHATTERJEE, O.B.E., M.A., D.Sc., Barrister-at-Law; called and examined.)

3406. (Chairman): I am sorry that we are starting your evidence so late as the afternoon but your memorandum is so clear and your reasons and references so fully given that I personally have very little to ask you. I see that you base your memorandum on many years' experience as a barrister practising in the Probate, Divorce and Admiralty Division of the High Court as well as experience in other civil cases and as a social worker in London. Can you indicate the nature and extent of your social work, for the information of the Commission?—

(Lady Chatterjee): My social work has been mainly in connection with government departments but it has always had its human side. I had originally to do work for the Board of Trade and in that connection I had to find out whether certain factories were suitable places for young persons. I also worked in the welfare department of the Ministry of Munitions and there again I had to deal with the human side of the work and to see that proper and adequate arrangements were made for the workers. When I worked in India as an adviser to the Government of India, there again it was the human element that I had to consider, how far legislation should improve the conditions under which women and children worked. So my work has not been social work in the ordinary sense of the term although it has always had the human angle to it.

3407. Before we ask you any other questions, is there anything you wish to add either to your memorandum or

to your supplemental memorandum?—I should like to make a few remarks. I should like to say in the beginning that I am here in my individual capacity and solely responsible for any views or statements of fact in my memorandum or that I may make now, that in my capacity as a member of very large official organisations both of men and women I have had opportunities of inter-changing views with many people and benefiting by their knowledge and experience and that I have also had international contacts because, as you know, the United Nations are at this moment engaged in enquiring into marriage laws in various countries all over the world.

There are three points in respect of which I would like to elaborate my memorandum. The first is with regard to the supplement on statistics. I would like to say that I do not think that I made it quite clear that I was advocating there both an immediate collection of data and a long-term policy. These statistics could be collected from the existing available material; the offer of the Justices' Clerks' Society might be accepted because there is a great deal of information which could come from the justices' clerks. The table that is at present provided is very vague and just leaves one with a sense of frustration. I am referring to Table XII of the Criminal Statistics of England and Wales. I am making this suggestion because I think that the public should be made aware of the number of children connected with broken homes, the number of custody orders made and, in the Divorce Court,

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LADY CHATTERJEE, O.B.E., M.A., D.Sc., BARRISTER-AT-LAW

[Continued]

the number of men, for instance, who file petitions for adultery against their wives, and the number of women who file petitions against their husbands; though statistics as to the number of petitions filed are given, the grounds on which they are founded are never divided up to distinguish between husbands and wives. There are many statistics available but they are scattered over at least six or seven different government publications and I have not come across anybody, except myself, who has had the energy to buy all these sets of statistics and collate them. They are not officially collated and brought into correlation with each other. You see given the numbers of boys and girls who married under twenty-one but you are not given any information relating to whether the marriages have been a success or not. Such statistics could be obtained from the Divorce Registry, because the ages of the parties are given in the divorce petition. Those sort of statistics, I think, could easily be collected here and now. I feel that if they were collected the public would get to know them and would be in a position to support any recommendations that may ultimately be made by this Royal Commission.

3408. I confess that in some cases I am not quite sure what would be the results that we should get from additional statistics, but that is a matter I should like to think over and reflect upon and I do not think I need trouble you at the moment. Of course the Civil Judicial Statistics, just to take one point, do show the number of petitions by husbands, the number of petitions by wives, but maybe there is a great deal more information which might be given. We will study your suggestions from that point of view.—In paragraph 9 of my memorandum, I did not make it clear as to whether I was envisaging that county court judges should continue to act as judges for divorce work. I would like to say here that I do think, if I may say so in my humble submission, that they are completely suited to act in that capacity with their very wide knowledge of law and the very wide experience they have of human nature in various aspects. In that connection, I would like to draw attention to three reports, which have been mentioned, which rather lead me to believe that the appointment of commissioners to act as divorce judges was not regarded as very satisfactory. The Report of the Denning Committee has been quoted, but I have read through the Report—it is the Second Interim Report—and reading that Report I do not think that that view is borne out by what is said there; the Committee did quote what the Royal Commission of 1912 considered but that was said a long time ago, and all the subsequent remarks go to show that the Committee had the very highest opinion of the county court judges. The Committee thought that they would handle the cases with efficiency and a full sense of responsibility if they should be appointed as commissioners, that the proposal that there should be itinerant divorce judges was not very satisfactory and that all the jurisdiction of a High Court judge and all the dignity attaching thereto should be made available to the county court judges; it regarded their appointment not only as an immediate useful measure but also as a solution for the future. Then in the debates in the House of Lords and the House of Commons, which were also referred to, mention was made on both those occasions about the unsatisfactory position of having commissioners dealing with matters in the place of judges, but in both cases the commissioners referred to were either solicitors or barristers not in actual practice; they were not county court judges and the work of the county court judges was very highly praised on both occasions.

3409. You think as long as commissioners are employed, county court judges are the most suitable to be selected?—I think so.

3410. Of course as long as divorce maintains its present level it is difficult to see how the High Court could deal with all the work without very considerable delays?—I think that the fact that the county court judges know local conditions is a great advantage.

3411. I follow that. Is there anything else you wanted to add?—I wanted to say, with due deference to lay magistrates, that all that has been said about county court judges and the necessity of having High Court procedure and the dignity attaching to a High Court when matrimonial cases are being considered, should be applied to the magistrates' courts, because the magistrates have as wide a jurisdiction as the Divorce Court. It is true that

they do not pronounce decrees of divorce but their separation orders and their maintenance orders have a very wide effect and their findings are the basis very often of Divorce Court proceedings, and therefore I would suggest that the lay magistrates should be assumed in all cases by a Chairman who would be either a stipendiary magistrate or a Chairman with legal qualifications. I make this suggestion because, as was pointed out to you yesterday by the Justices' Clerks' Society, the question of adultery is dealt with in the magistrates' courts in a manner very different from that in the Divorce Court. In that connection, may I refer to the Report in 1943 of the Matrimonial Causes (Trial in the Provincial) Committee, the Chairman of which was Sir Ralph Wedgwood. At page 7 of the Report it says:—

"Thus the rules are directed, amongst other things, to making sure that the party charged with such a matrimonial offence as entitles the other party to relief has in fact been made aware that the proceedings are on foot, and that the allegations upon which the application for relief is based are true and not artificial, and, where adultery is alleged, that those implicated are existing and not artificial persons, and have been served and can be identified before the court."

The Justices' Clerks' Society yesterday made it quite clear that that sort of procedure did not take place in magistrates' courts. The fact that there are no pleadings in the magistrates' courts, that the people who appear before the magistrates have not got the advantage of counsel to help them to conduct their case, that the parties are frequently asked to conduct a cross-examination themselves which is extremely difficult—all these, I think, are pointers to show that it would be extremely useful to have a person with legal knowledge as a Chairman in a magistrates' court.

3412. Is there any other addition you wish to make?—No, those were the three points I wished to make.

3413. Perhaps I should point out that the first two paragraphs of your memorandum are outside our terms of reference. It is quite true that we are called a Royal Commission on Marriage and Divorce, but our terms of reference do not include, for example, changes in the legal preliminaries to marriage. The only marriage problem that is specifically referred to is whether any changes should be made in the law prohibiting marriage with certain relations by kindred or affinity. I want to ask you about cruelty as a ground for divorce. You suggest that the test should be the degree of cruelty, rather than the mental or physical effect caused thereby, and I see you refer to *Russell v. Russell*. Why do you think that the degree of cruelty is more important than the effect of it upon the person who is cruelly treated?—I do not think that it is more important but I do think that a person with a strong character and a strong mental and physical make-up may be able to stand up to a greater degree of cruelty and would therefore not now be entitled to a divorce, whereas a person of less strong character would succumb more easily and would come to the court with obvious traces of having had greater cruelty but the first may have been treated with greater cruelty but have had the courage to stand up to it whilst the other may not have the physical or mental calibre to stand up to the cruelty but would thereby become entitled to a divorce.

3414. That may be true, but there is room for difference of opinion as to whether the important thing is, what effect has the cruelty had, or what is the amount of cruelty. That is a matter upon which there may be two opinions. Will you explain something on paragraph 3 (b) which says:—

"Where a declaration is required regarding mental or physical disability and it is later found that such a disability did exist, the person or persons who signed such declaration may be required to show that they had no reasonable ground for not signing the required declaration."

I could not understand that—I am afraid I have used a double negative there. This suggestion really turns on a previous suggestion in paragraph 2 (ii), which is "out of court", where I have suggested that parties about to marry should be required to make a declaration that they are not suffering from a mental or physical disability which would render the marriage void or voidable. I wish to suggest that, if such a declaration were to be required

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 QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

[Continued]

and it is found later on that such a disability had in fact existed at the time, the parties should be asked to show cause why they did not declare its existence if they had reasonable ground for knowing of it. It is a bit involved.

3415. Will you turn to paragraph 5 (2) (d) where you say:—

"When the husband is petitioner, damages should be assessed not merely on the loss of his wife but on the damage done to the children."

I was not sure as to the basis on which you thought the court should assess the damages. If the damages are to be assessed on the injury done to the children, on what principles would you assess them? The children have lost their mother, she may have been a good or a bad mother. What sort of loss would the court follow?—I do admit that it is rather a vague suggestion, but I think that when damages are being assessed on the loss of a guilty wife, the damages can never be very high because obviously the husband has lost a wife who has committed adultery, but the people who have suffered are the children. Their home is, to some extent, broken up and they need rehabilitation, but how the damages should be assessed is, I do admit, extremely difficult.

3416. Then you go on:—

"When the wife is a petitioner, loss of a home and financial support for herself and her children should be taken into consideration."

I was not quite sure how much further you were suggesting the court should go. At the moment the court has full power to make the guilty husband provide for his wife and family. Were you thinking of some damages from the woman named?—Yes, because whatever a wife obtains as alimony or maintenance is generally a very small proportion of the man's income. She is supposed to be able to live on less than the husband living alone has to live on, though she does get financial support for her children in addition. Where the home is broken up the division is more in favour of the guilty husband than the wife and enough consideration is not given to the fact that she has lost a home and has to endeavour to maintain her children in the state of life in which they have hitherto been brought up.

3417. Would you turn to sub-paragraph (g) where you say:—

"Both the respondent and co-respondent (man or woman) should be required to be present at the hearing."

(The witness withdrew.)

(Adjourned to Thursday, 19th June, 1952, at 10.30 a.m.)

PAPER No. 43

WRITTEN ANSWERS SUBMITTED BY LADY CHATTERJEE TO FURTHER QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

1. Does Lady Chatterjee advocate setting up a special domestic court from amongst the magistrates in a given division? (See para. 8 of Paper No. 41.)

Yes. A special domestic court consisting of magistrates specially chosen for their experience and knowledge of the work, one of whom should be a woman, would, in my opinion, have certain advantages:—

(i) Such a court would enjoy many of the privileges now enjoyed by juvenile courts. There would be attached to it a panel of magistrates with special qualifications.

(ii) Such a court would be able to deal with applications for summonses as a routine matter. The court could ensure the attendance of a probation officer or a court welfare officer; and as it would be dealing with the initial stages of the trouble, it might, with the help

I wondered whether the purpose of that was to give effect to your proposal under sub-paragraph (f) where you say:—

"The co-respondent (man or woman) should be required to make an affidavit regarding his means when damages are claimed."

Is that the reason why you think they should be present? It does add to the cost of a divorce suit requiring them to be present?—Yes, it does add to the cost and there I was following, and I ought to have quoted it, a recommendation that I obtained from the Report of Lord Justice Denning's Committee where it is said that there would be many advantages if the respondent and co-respondent were in court. I think in any case as far as the respondent is concerned it is very important because the question of custody of the children and so forth would arise.

3418. But as regards the co-respondent, I thought the reason why you were suggesting it was because of your proposal in sub-paragraph (f). Is that right or wrong?—That is partly the reason and it is partly because of what the Denning Committee said. It thought that a greater degree of truth might often be arrived at, especially in hotel cases and social matters, if the parties were there and could, if necessary, be questioned.

3419. I think I follow all your other proposals very fully and I have nothing else to ask.—May I make another supplementary remark? I have tried not to go outside the terms of reference of the Commission but I would like to draw attention to the fact that when Mrs. White asked the former Prime Minister whether the terms of reference would be narrow or wide, and whether such questions as marriage guidance and advice and help to avoid the break-up of marriages would be considered, the Prime Minister said that he would certainly take into account the points put forward by Mrs. White when considering the terms of reference. They were eventually left out, as we all know, but he did make such a statement.

(Chairman): I am very familiar with that Answer but we have to look at our terms of reference as they are. If other matters had been intended to be investigated the personnel of the Commission might have been different. I do not know about that, but we have to see our terms of reference as they are, and I can assure you that the terms of reference embrace a very great deal. May we leave it like this? If the Commission want further light upon your memorandum we will ask you to come and help us again. (See Paper No. 43.) If we do not, you will understand that we have read and considered your memorandum and we are very grateful to you for it.

of the probation officer, be able to help the parties to settle their differences without pursuing their legal remedy.

(iii) As the work and popularity of such a court increased it would be possible to have special premises set apart, so that the link between it and the ordinary police court would eventually cease to exist.

(iv) Applicants would feel their matrimonial difficulties put them in a class apart from other police court cases and this would have a wholesome psychological effect on them. They would feel more inclined to approach the court at a much earlier stage of their difficulties.

(v) When the provisions of the Legal Aid and Advice Act are made applicable to magistrates' courts, the existence of a special domestic court would be a useful link, not only between the court and those administering the Act, but also for those solicitors and barristers wishing to specialise in matrimonial cases.

PAPER No. 43—WRITTEN ANSWERS SUBMITTED BY LADY CHATTERJEE TO FURTHER
QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

2. *Would every such court throughout the country have to be presided over by a stipendiary magistrate? (See para. 8 (g) of Paper No. 41.)*

In view of the importance of the matrimonial work done by magistrates it is advisable, in my humble opinion, that domestic courts should be presided over by stipendiary magistrates. The reasons for holding this opinion are set out in my answer to question 3 below.

3. *Is this feasible . . .*

Admittedly it would be difficult to obtain the requisite number of persons with suitable legal qualifications and social experience to undertake the work in the beginning. Lay magistrates with suitable legal qualifications may be willing to be appointed as stipendiary magistrates. The importance and social significance of the work would undoubtedly make a large appeal so that the supply would eventually meet the demand.

The fact that there are a very large number of magistrates' courts would make it necessary for stipendiary magistrates, in certain cases, to preside over a number of different courts as is done by county court judges.

. . . and is the nature of the work such that lay magistrates could not cope with it?

The following facts, in my humble submission, make it difficult for magistrates to cope adequately with the matrimonial cases on which they have to adjudicate:—

(i) The wide matrimonial jurisdiction conferred on magistrates by the Summary Jurisdiction Acts and the Guardianship of Infants Act, which is similar in many respects to the jurisdiction exercised by the divorce judges of the High Court, lays a heavy burden on them without there being any provision to ensure that they have legal qualifications. While the magistrates have the assistance of legally qualified clerks, the final decision and responsibility rest with the magistrates.

(ii) The volume and complexity of the work have increased considerably since 1895 when the Summary Jurisdiction Act was passed extending the powers of magistrates, and now require a knowledge of many statutes amending and extending their powers as well as a knowledge of case law.

(iii) There are no pleadings. Except in the case where adultery is charged, the defendant does not know before trial in detail what charges he has to answer, the petitioner is unaware of any counter-charges.

(iv) Adultery may be charged by either the husband or the wife, without the person with whom the adultery is alleged being made a party to the suit. It would appear to be rather difficult, in these circumstances, for the magistrates, especially in an undefended suit, to satisfy themselves that there is no collusion or that adultery has in fact been committed.

(v) The fact that the provisions of the Legal Aid and Advice Act relating to legal aid and advice in magistrates' courts have not yet been implemented means that the parties as well as the magistrates are deprived of the legal assistance to which they would otherwise be entitled.

(vi) The parties are, in many cases, not legally represented and, though there is a provision in the Summary Procedure Act, 1937, Section 6, enabling them to obtain assistance in cross-examination, their lack of knowledge of the law puts them at a grave disadvantage and may prevent the court from being seized of relevant and important matters which so often form the basis of applications to the Divisional Court. Further cross-examination and re-examination cannot be satisfactorily done by the court as it needs to be done for both parties separately by persons acquainted beforehand with the relevant facts. The prosecution and defence need to be represented from different angles. To cross-examine satisfactorily needs considerable legal experience and legal knowledge as to what questions are admissible.

(vii) As the findings in a magistrates' court are often used as corroborative evidence in subsequent Divorce Court proceedings it is essential that as far as possible all relevant facts should be brought to the notice of the magistrates' court. The parties to the suit are

comparatively ignorant of the law. They have frequently had no legal help beforehand in the preparation of the statements and often do not know how to elicit all the relevant facts, and without pleadings it is difficult for the magistrates to assess them adequately. It is also necessary that there should be an accurate transcript of the evidence. There is no statutory requirement that shorthand notes shall be taken of the matrimonial proceedings in magistrates' courts.

(viii) There is no panel of magistrates specially qualified to deal with matrimonial matters as is required in juvenile courts, although their orders relating to separation and maintenance may result in separating the spouses as effectively as a decree nisi pronounced in a Divorce Court.

(ix) Desertion, and what amounts to constructive desertion, legal cruelty, condonation, connivance, collusion, are all legal terms requiring to be interpreted in the light of legal knowledge and determined by a knowledge of case law.

(x) The parties having recourse to the court need to understand on what grounds their case has been decided. Without the assistance of solicitors and barristers, this throws an extra burden on the court.

I have ventured to state some of the difficulties with which magistrates are confronted because, in my opinion, many of these difficulties could be removed if there was sufficient recognition of the importance of their work and of the far-reaching consequences of their decisions, and if adequate financial assistance were given and the necessity of giving legal aid and advice were recognised.

4. *Is it feasible to have special probation officers for this particular work in every part of the country? (In rural areas the volume of work is small.) (See para. 8 (h) of Paper No. 41.)*

Admittedly it would be difficult, especially in rural areas, but, in my opinion, it is essential that for work of this importance there should be uniform procedure and adequate facilities throughout the country so that no persons need be penalised.

The probation service is sufficiently flexible to allow for expansion and strengthening to deal with the new work. There is already in existence machinery to deal with new situations and as there are in each petty sessional division in the country at least two officers, it is possible for arrangements to be made for courts to be attended.

As the officers on whom the courts would rely—whether they are called probation officers or court welfare officers—would have to have special qualifications and ability to enable them to undertake conciliation work and court work, they would need to be specially trained in social service, particularly in marriage guidance and the welfare of children, and have the qualities envisaged for such persons by Lord Justice Denning's Committee (see Final Report, page 14, para. 29 (iv)). This recommendation is based on general recognition of the successful conciliation work being done by probation officers and on the need for training additional specialist officers.

5. *Does Lady Chatterjee envisage the county courts continuing to function as divorce courts on special occasions as at present? (See para. 9 of Paper No. 41.)*

(i) Yes. The courts are undoubtedly meeting a great need. The statistics for the year 1949 show that the matrimonial cases heard by special commissioners, who have usually been county court judges, totalled over 20,000 undefended cases, over 1,000 short defended cases, and 26 long defended. (See Civil Judicial Statistics for 1949, pages 10 and 21.)

(ii) The wide experience and the extensive jurisdiction exercised by the county court judges gives them an insight into all classes of people confronted with many different kinds of legal difficulties. This is a considerable asset when they have to deal with matrimonial cases. Further, their familiarity with children's cases, arising out of their jurisdiction under the Guardianship of Infants Act, brings them into close contact with parents and with welfare officers of the local authority on whom they can call for enquiry and report. The experience gained thereby is invaluable when dealing with applications for custody of children. The accessibility of the courts in such cases to the parties and their witnesses is an additional advantage.

MINUTES OF EVIDENCE

TAKEN BEFORE THE

ROYAL COMMISSION
ON

14-15

MARRIAGE AND DIVORCE

FOURTEENTH AND FIFTEENTH DAYS

Wednesday, 18th June, 1952

AND

Thursday, 19th June, 1952

WITNESSES

Mr. E. AINSWORTH ... }
Miss K. L. RUDDOCK ... } representing the Association of Children's Officers.
Mr. K. BRILL ... }

Mr. O. BARNETT, B.E.M., B.A. }
Mr. E. L. BRITTON, M.A. ... } representing the National Union of Teachers.
Miss A. M. EDWARDS ... }
Mr. W. GRIFFITH ... }

LADY CHATTERJEE, O.B.E., M.A., D.Sc.

THE RT. HON. LORD MERRIMAN, G.C.V.O., O.B.E., LL.D., President of the Probate, Divorce and Admiralty Division.



LONDON: HER MAJESTY'S STATIONERY OFFICE

1953

FOUR SHILLINGS NET

MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

FOURTEENTH DAY

Wednesday, 18th June, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (Chairman)

Mrs. MARGARET ALLEN
Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
Mr. R. BILGE, M.A.
Mrs. E. M. BRACE
Sir WALTER RUSSELL BRAIN, D.M., F.R.C.P.
Mr. G. C. F. BROWN, M.A.
Mr. H. L. O. FLECKER, C.B.E., M.A.
Mrs. K. W. JONES-ROBERTS, O.B.E.
The Honourable LORD KIRSH
Mr. F. G. LAWRENCE, Q.C.

Mr. D. MACE
Mr. H. H. MADDOCKS, M.C.
The Honourable Mr. JUSTICE PEARCE
The Viscountess PORTAL, M.B.E.
Dr. VIOLET ROBERTSON, C.B.E., LL.D.
Sheriff J. WALKER, Q.C., M.A.
Mr. THOMAS YOUNG, O.B.E.

Miss M. W. DENOHEY, C.B.E. (Secretary)
Mr. A. T. F. OGDYNE (Assistant Secretary)
Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 39

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF
CHILDREN'S OFFICERS

INTRODUCTION

1. The Association of Children's Officers has a membership comprising ninety-seven per cent. of all persons holding the statutory appointment of children's officer to local authorities in England and Wales. The Association appreciates the opportunity to submit this memorandum because its members see, in their daily work, the acute unhappiness and waste of human potentialities which occur when children are deprived of normal home life with both parents.

2. The Association gives general support to those bodies whose evidence is directed towards the preservation of family life, even when this entails considerable hardship to adult members of the family, and it lays particular emphasis on the phrase in the Commission's terms of reference about the interests and well-being of the children of a marriage. We do not attempt to cover the whole field of the Commission's inquiry as this is already being done by specialist bodies, such as the Marriage Guidance Council whose summary of memoranda we have seen and approved. We give the strongest possible support to those proposals of the Marriage Guidance Council which would strengthen the enforcement of maintenance and affiliation orders and which would ensure that the tenancy and furnishings of the matrimonial home should vest in that parent who continues to look after the children. In addition the Association makes three simple proposals, designed to secure the welfare of the children of a marriage which is breaking up.

PROPOSITIONS

Appointment of guardian *ad litem*

3. Every child whose parents make an application to the court for divorce, separation or custody should have appointed for him by the court a guardian *ad litem*, who would see that factors relating to the child's welfare were fully investigated before any order was made as to his custody, care or control. This proposal is not new to English law. Every court which considers an application to adopt a child has, for the last quarter of a century, been required to appoint a guardian *ad litem*, whose duty it is to make confidential investigations and submit a report to the court, before a decision is made on the application. The use of a guardian *ad litem* is familiar to the High Court, the county courts and the magistrates' courts, all of whom have jurisdiction in adoption. The mode of employing guardians *ad litem* has been worked out in practice over a long period and there is available a body of persons with the necessary experience and training.

Child life protection

4. Every child whose parents make application to the court should be granted some degree of protection and supervision by a welfare authority until the court itself determines the supervision. This, too, is not new. Since the Infant Life Protection Acts of the 19th century, children placed with foster-parents for reward have been under the protection of a welfare authority. The Adoption (Regulation) Act, 1939, extended this protection to children placed by third parties for adoption and the Adoption of Children Act, 1949, placed under protection all children in respect of whom an application had been made to the court. This last measure (now consolidated in the Adoption Act, 1950) applies supervision to all children for at least three months before the hearing of the application, and, if the application is not granted, until the child reaches eighteen. It is not limited to children living apart from their real parents. It applies, for example, to an illegitimate child living with his own mother who now wants to adopt him, either alone or jointly with the child's step-father. When there is a home-breaking application under the divorce laws the child may need as much protection as he does during a home-making application under the adoption laws. In many cases, of course, it will be found that the child is adequately protected by the parent with whom he is living and who will ultimately be granted sole custody. Similarly the majority of children placed for adoption are protected by the goodwill of the adoptive parents (one of whom is often the real mother). Nevertheless Parliament has decided that, in order to ascertain and protect the minority who would otherwise suffer, all must be subject to supervision until the court determines the application. The existing service is carried out by statutorily appointed child protection visitors, drawing on an experience of sixty years of this work, who are discreet and tactful and able to estimate the degree of supervision necessary in each case.

Power for the court to commit the child to care

5. When the court determines the application it should have power to commit the child to the care of the local authority or of some other fit person, as is done under Section 62 of the Children and Young Persons Act, 1933, when a child is in need of care or protection. The court is often in no doubt that one of the parents is unfit to have the care of the child and consequently it has no compunction in awarding the sole custody to the other. When, however, both parents are found to be unfit there is, at present, no third alternative, empowering the court to commit the child to some relative or friend

who is willing to look after him, or to the local authority which has a statutory service providing for children committed by the courts. This proposal is a corollary to the recommendation of the Care of Children Committee (Cmd. 6922) which stated at page 179:—

"Magistrates refusing an adoption order on the ground that the adoptive home is unsatisfactory should be empowered to make an immediate order committing the child to the local authority."

The common law equates children with chattels: he who holds has possession which is good against all except the real owner or parent. The modern conception of parenthood is that we are not owners but trustees of our children. The couple who so fail in their joint parental duty that their children become the subject of legal action thereby imperil their common law rights, and must expect that the court will act as a court of equity, having regard solely to the interests of the children. No partner in a broken marriage can be heard to disclaim all responsibility for the breach: at the very least he or she has selected for the children, in the person of the spouse, a mother or father who has proved unsuitable. It is the duty of each parent, when disharmony arises, to go much more than halfway to appease the other in order to preserve the home for the sake of the children. We do not see the parties in matrimonial actions as "guilty" or "innocent", but as persons who together brought into the world a life for which they are jointly responsible. If they fail in this responsibility they are jointly (not necessarily, equally) culpable, and they must expect that the court may set aside their parental rights if it decides that the child's interests are best served thereby.

EVIDENCE

6. We think it unnecessary to adduce evidence to demonstrate the need for the measures urged in paragraphs 3, 4 and 5. Every member of the Commission who has served in a judicial capacity must have been confronted with the difficulty of deciding what is best for the child on evidence which was presented, not with the primary intention of safeguarding the child's welfare, but to secure a verdict for one or other of the contending parties. It is an established practice of the courts, in their adoption, delinquency and child protection jurisdiction, to consider reports, based on informal investigation by trained social workers, before reaching a decision. Without such enquiries, which are conducted outside the atmosphere of the courts in the child's home surroundings, it would be impossible to comply with Section 44 (1) of the Children and Young Persons Act, 1933, which says:—

"Every court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person . . ."

7. Almost daily the Press publishes stories of the unhappiness of children whose separated parents are quarrelling over the possession of them. Some are enticed or abducted to get them from the possession of one party to another; others are kept shut off from the community to prevent such enticement; others run away from one parent to find the other and in so doing fall into physical or moral danger. For these reasons we urge the application to them of the child life protection provisions.

8. If necessary, the Association will produce true case-histories to support the above assertions.

MEANS

9. Our proposals could be brought about without the establishment of any new services or the creation of any new legal concepts. The Adoption Act, 1950, extends the duties of child protection visitors appointed by local authorities under the Public Health Act, 1936, to cover the protection of children in respect of whom an application is pending in the adoption court. Their duties could be similarly extended to protect the children of parties applying to the matrimonial courts.

10. The following are the relevant Sections of existing statutes. It would be a simple matter of draftsmanship to adapt the Sections to the needs of the children with whom this Royal Commission is concerned.

I. Provision for appointment of guardian ad litem for children in respect of whom an application is made to the court

Adoption Act, 1950

Section 5 (4) requires the court to appoint some person or body to act as guardian ad litem of the infant with the duty of safeguarding the interest of the infant before the court.

Section 8 (5) provides for the appointment of a local authority as guardian ad litem if the court sees fit. (The appointment of local authorities is common practice.)

The Adoption of Children Rules (S.R.O.s. 2396, 2397 etc.) are made by virtue of Section 8 (above) and provide, in the second schedule, for the enquiries to be made and the reports to be presented by the guardian ad litem.

II. Provision for application of child life protection to children in respect of whom an application is made to the court

Adoption Act, 1950

Section 2 (6) provides that no order shall be made by the court unless the applicant has, at least three months before the date of the order, notified the welfare authority of his intention to apply.

Section 28 (3) provides that Part III of the Act shall have effect where notice of intention to apply to the court has been given.

Part III of the Act provides, *inter alia*:—

Section 32. That the custodian of the child shall give seven days' notice of intention to change his address and shall inform the welfare authority and the coroner if the child dies.

Section 33. That where a child is being kept in an environment which is detrimental or by a person who is unfit, a summary court or a justice (acting *ex parte*, if necessary) may make an order for the removal of the child to a place of safety on the application of the welfare authority. The order can be enforced by a local authority's child protection visitor.

Section 34. That it shall be the duty of child protection visitors to visit and examine the child and the premises where he is kept, and provides for the grant of warrants to enter premises and makes it an offence to refuse to allow a visit or to obstruct a visitor acting in pursuance of a warrant.

Section 45 (1) defines a child protection visitor as a person appointed as such by a welfare authority for the purposes of Section 209 of the Public Health Act, 1936.

III. Provision for committal of children to the care of fit persons (including to local authorities)

Children and Young Persons Act, 1933

Section 62 (1) provides that if a juvenile court is satisfied that any child brought before it is in need of care or protection the court may commit him to the care of a fit person, whether a relative or not, who is willing to undertake the care of him.

(There are at present about fourteen thousand orders in force, committing children and young persons to the care of local authorities.)

Section 75 (4) provides that while the order is in force the person to whose care the child is committed shall have the same rights and powers as a parent and shall continue to care for the child, notwithstanding any claim by a parent or other person.

Section 84 makes general provision as to the care of children committed to the care of fit persons, which may be regulated by rules made by the Secretary of State.

Section 84 (6) provides for the variation or revocation of an order by the juvenile court.

Section 87 empowers the court to make an order requiring the parent to contribute to the child's maintenance whilst in the care of the fit person.

(Dated January, 1952.)

18 June, 1952]

Mr. E. AINSWORTH, Miss K. L. RUDDOCK and Mr. K. BRILL

EXAMINATION OF WITNESSES

(Mr. E. AINSWORTH, Miss K. L. RUDDOCK and Mr. K. BRILL, representing the Association of Children's Officers; called and examined.)

3144. (Chairman): We have before us three representatives of the Association of Children's Officers, namely, Mr. E. Ainsworth, Children's Officer, London County Council; Miss K. L. Ruddock, of Leicester County; and Mr. K. Brill, Honorary Secretary of the Association, from Devon. I see from the introduction to your memorandum that:—

"The Association of Children's Officers has a membership comprising ninety-seven per cent. of all persons holding the statutory appointment of children's officer to local authorities in England and Wales."

You point out, and this we can well appreciate, that your members:—

"... see, in their daily work, the acute unhappiness and waste of human potentialities which occur when children are deprived of normal home life with both parents."

Before we ask you any questions is there anything you would like to add to the memorandum by way of addition or explanation?—(Mr. Ainsworth): No, my Lord, except to say that our concern is with the welfare of the child both in its own home and outside its own home; that we are concerned about the position of children in broken homes; that our concern with the child sometimes begins at a much earlier date than the inception of divorce proceedings; and that our general aim is always to keep a child in its own home, provided that the conditions in the home are happy and secure.

3145. I see from the opening sentence of paragraph 2 that your Association gives:—

"... general support to those bodies whose evidence is directed towards the preservation of family life, even when this entails considerable hardship to adult members of the family, and it lays particular emphasis on the phrase in the Commission's terms of reference about the interests and well-being of the children of a marriage."

Many witnesses have laid great emphasis on the hardship entailed on adults who, for one reason and another, do not find their married life happy, but you are thinking primarily of the children and the family life as being of more importance?—Yes, my Lord.

3146. I am going to ask people more familiar with your work than I to take the leading part in questions to you, but there are one or two things I would like to ask. At the end of paragraph 3, where you deal with the appointment of a guardian *ad litem*, you say: "There is available a body of persons with the necessary experience and training." I think I know the body to which you refer, but would you specify it?—The children's departments nowadays have attached to them children's welfare officers, who are trained in social work generally; but at the same time, since the children's service is a fairly new service, there are within it many officers who were employed in a similar type of work prior to its inception, who have a very long experience of acting as guardians *ad litem*. The particular officers I have in mind were formerly in the education departments, and came over to the children's departments in 1948. They have as a body been exercising the duties of guardian *ad litem* since 1926, when the Adoption of Children Act came into operation. Officers of the children's service have in their work all kinds of opportunities and experiences which make them fully aware of the basic duties and qualities which are required of a guardian *ad litem*. Indeed, my own department deals with about 1,200 guardian *ad litem* duties per annum. Thus there is quite a substantial body of experience, and, as time goes on, that will be reinforced by the further experience which we are gaining generally through the working of the Children Act, 1948.

3147. I now turn to paragraph 4, where you say:—

"Every child whose parents make application to the court should be granted some degree of protection and supervision by a welfare authority until the court itself determines the supervision."

I wonder whether that was possibly stated too widely. What about a child who is living with an applicant who is also the mother of the child? Do you think that, even in that event, before an order is made there should be some protection and supervision?—I can only say that there is an analogy in the Adoption Act itself.

3148. I see that. But, of course, there is a little difference, is there not, between a child whose mother wishes it to be adopted and a child whose mother is seeking matrimonial relief? In the latter case, would it be right to subject the mother to supervision?—I would, if I may, suggest that it is not so much a question of subjecting to supervision as a question of having the assistance of a sympathetic and trained officer at a time when she most requires help. Under the Adoption Act, where application is made to the court for an adoption order, the procedure of appointing a guardian *ad litem* takes place even where a mother is applying for an adoption order in respect of her own child.

3149. I think that "to subject the mother to supervision" was the wrong phrase to use, but you know that some mothers might resent the appearance on the scene of some officer to exercise supervision?—I am assuming, my Lord, that the officer chosen for this delicate and difficult task would have a considerable degree of tact. I think that all of us in this work have encountered occasions when a person at the first blush has wondered at, and possibly even resented, the entry of an officer. But that state of affairs can be, and is, very quickly changed by the exercise of a little tact, particularly when the person to whom the approach is made is brought to realise that the officer's only motive is to help the mother and child.

3150. I quite appreciate your answer, which has dealt very clearly with the point that I was putting to you. For my part, I wish to raise only one further point. In paragraph 3, you very kindly offer to produce true case-histories to support your assertions. I am sure that the Commission would like to see some of these case-histories. Perhaps you could supply them in writing. They would, if you so desire, be regarded as confidential. I take it, my Lord, that they could be submitted in such a form that the identity of the child would not be disclosed. I am sure we should be very happy to supply those in writing as early as possible. (Chairman): Thank you very much.

3151. (Dr. Robertson): Would you confirm that your Association has available already a body of persons with special experience, who might be used more fully by the courts?—Yes, we have.

3152. Can you inform me as to a minor matter of administration? Are the child life protection visitors now almost entirely under the control of the children's officers, or do some local authorities still use a permissive power to link them up with the health and welfare department?—The responsibility rests with the children's committee. I think that as a rule the job is done by *ad hoc* officers of the children's department. In some authorities, indeed in my own authority, health visitors are at present acting as agents for the children's committee, particularly in regard to the very young child, where questions of physical health and well-being crop up—the child, say, under two years of age. The health visitor does that in our case—I do not know whether that is done generally. But my department feels that the health visitor, who would probably already be visiting the home where there is a very young child, can very well perform the duties of a child life protection visitor.

3153. And that avoids a certain amount of duplication?—Yes.

3154. Do the health visitors report direct to the children's officer or do they report through the medical officer of health?—They work under the direction of the medical officer of health, but they report to the children's officer.

18 June, 1932]

Mr. E. AINSWORTH, Miss K. L. RODDOCK and Mr. K. BRILL

[Continued]

3155. I think that the Scottish Children's Officers' Association is linked with your organisation. Have you reason to believe that in Scotland, the Sheriff Courts employ the services of children's officers more frequently than the corresponding courts in England?—I have no knowledge of that.

3156. In most children's departments there are after-care officers?—Yes.

3157. Do you feel that their work might be extended, that fuller power might be given to your staff to follow up boys and girls from broken homes after they go into employment?—If our suggestion were to have fruit, then it would be possible to continue this supervision, as indeed is the case at present in child life protection cases. At present a child, supervised under the child life protection provisions, who has attained school leaving age, may continue under supervision until he reaches the age of eighteen, provided that at school leaving age he is still in the care of a foster-mother.

3158. And in that supervision you deal almost entirely with the home and not with the place of employment? Have you any rule about that?—We consider it our duty to follow the child into the home, and as far as may be necessary in order to get the child settled. And in cases where there is any difficulty with the employer, it is quite common for our officers to go into the place of employment. Indeed, if I may be permitted to quote the practice in my own department, we have a system whereby a child who is placed as an apprentice in a particular trade, not only receives the guidance of the after-care officer, but a member of the engineering staff of the council goes about once a year and checks up on the boy's progress in his trade. This is rather valuable, as it assures that the boy's technical education and technical skills are watched over at the same time as his general social welfare. Our engineering department's representative and my own department's after-care officer work very closely together.

3159. That sounds admirable. You have encountered no difficulties in that scheme?—No.

3160. It has been suggested to us that the services of children's officers might be used more fully with regard to young persons placed in custody other than with one or other parent. Have you any experience of that so far?—We have a very wide experience. Local authority officers have since 1933 acted as a "fit person" in regard to a child removed from his own home under a court order. In such cases, the children's officer is virtually the parent of the child so long as that child remains in the care of the local authority, which might be until he attains the age of eighteen.

3161. And do you feel that that power might be extended by statute?—We think that it might be appropriate that a child whose parents were divorced, for example, could have this same sort of paternal care and interest, if he were committed to the care of a "fit person", and that might well be the local authority.

3162. You have indicated in your memorandum that you are often the people who get the first indication of serious difficulties in a home from your contact with the children?—Yes, we are, unfortunately. We do encounter these cases sometimes before they reach the stage of a divorce. In fact, we feel that very often the conflict has been registered in the child's mind, and he fears the impending breakdown, sometimes even before the parents themselves realise what is about to happen. Children are very sensitive, and that is all the more reason for them to be safeguarded, rather than to be allowed to live in a perpetual state of tension, which they are acutely aware of, and only they can see the clash coming. It is that class of child that we would like to protect, as well as the child in respect of whom an application has been made by the parent in the courts.

3163. Do you have complete co-operation throughout the country with probation officers? There is no difficulty there?—Yes, as far as I know, we co-operate very well indeed. We seek every method by which we can work in harmony with the probation officers and they with us. Here in London we have particularly happy relationships. If there is a point on which we think consultation between us is necessary then we arrange a meeting—we discuss the matter and sometimes we go to the Home Office and ask them to help us out. There is every degree

of co-operation. Sometimes, of course, you get local difficulties but under any system that happens. Generally speaking, however, there is the widest possible co-operation.

3164. (Mr. Young): Mr. Ainsworth, I was interested in your reply to Dr. Robertson that you would like to have custody cases placed in your care. Under the Children and Young Persons Act, 1933, as I understand it, you do not get a child committed to your care unless it is in need of care or protection. Under the Guardianship of Infants Act, 1925, which I take it applies in England, I think that the court is required to treat the interests of the child as the paramount consideration. Have you ever heard it argued in England that, under the Act of 1933, if the conditions which brought about the committal order are removed, then the court must recall the order irrespective of the interests of the child?—I think that the procedure is this, that a child is brought before the court as being in need of care or protection. The court goes into the case, and if it is satisfied that the case is established, then it is in its jurisdiction to prescribe a method of treatment. One of the possible methods is to commit the child to the care of a local authority. If, in course of time, there is reason to believe that the home has improved, then it is competent for either side, the local authority or the parent, to make an application to the court for the revocation of the order. Then the case is re-heard and the magistrates decide as to whether it is now fit and proper that the child should be restored to his own home. Quite frequently, applications for revocation are made by parents, and it sometimes happens that these applications are refused. It sometimes happens, too, that an application is made by the local authority. I can well remember a case, where a child had been committed to the care of the local authority, and I myself had taken the case. The child had been found in what was tantamount to a house of bad reputation. We kept in touch with the mother—she was quite a nice little girl, and on the face of it a respectable woman—but for some reason or other, had got into an unfortunate way of life. About eighteen months later she came to me and said, "Mr. Ainsworth, I am going to get married. I want to ask you whether if I get married and settle down again I can have my child back." I said, "That entirely depends on how things are with you and your husband." I went into the case very carefully and made the most careful enquiries about the prospective husband. In due course they were married, and on that occasion the local authority went to the court and I helped the mother to take out a summons against us. The magistrate, having reviewed the case, decided that the child should be returned to the mother, whose home had been rehabilitated. That happened some years ago, but, so far as I know, the arrangement has proved quite satisfactory.

3165. That was a case where you were quite satisfied that it was in the interests of the child that it should go back. But what I am putting to you is this: Have you ever heard it argued that if the conditions which necessitated the original order have been removed, then the order must be revoked irrespective of the interests of the child?—The magistrate would decide the case at the time, and I have not heard it argued that the order must be revoked.

3166. In Scotland that has been argued, and I am interested to know what your experience has been in England?—Our experience generally is that magistrates are exceedingly careful of the well-being of the child, and in the event of an attempt to revoke an order, they must be entirely satisfied that revocation is in the interests of the child before agreeing to such a course.

3167. Just take the case that you have put to me with slightly different facts. Assume that the child, instead of only being away eighteen months, had been away for eight years with foster-parents, and had settled down in its new home, and had forgotten all about its mother. Assume also that the parent has completely recovered in the interval—she is no longer a woman of ill fame, she is a perfectly good mother. In that case, which are the interests which you would allow to predominate in considering the revocation of the order, those of the parent or those of the child?—I should consider the child entirely.

3168. The Act does not specifically say so, does it?—No.

[8 June, 1952]

Mr. E. ANSCOW, Miss K. L. RUDDOCK and Mr. K. BAILEY

[Continued]

3169. (Mrs. Allen): Would you think that probation officers could exercise care of children equally as well as children's officers? I am thinking of what you said earlier. You said that, in some cases, when you were entrusted with the care of a child, you visited the factory where he was employed in order to find out if things were satisfactory. Do you think that probation officers could equally well visit the factories in similar circumstances where children were under their control?—I would suggest that it is competent for any well-meaning person who has the right of entry to a place of employment to make enquiries. But if the care of the children is from the outset in the hands of the children's department, then it would be the right thing for an officer of that department to continue to maintain contact, because in the child's interests it is as well to keep a measure of continuity of supervision. As regards the possibility of the probation officer visiting, I would assume that if that were the case, under the present system the boy would normally be on probation. Some of us have felt that if you can remove from a boy's mind any idea that he is still a marked man in the eyes of the court, then it is as well to do so. We think that the child having once been through the courts—and presumably that is where contact with the probation officer would begin—then he ought at least to have the opportunity of making a fresh start right away from the machinery of the court and all that it implies. In some neighbourhoods, if the probation officer was seen calling at a home, some slight suspicion might arise, whereas in the case of certain other officers, including children's officers, that would not be the case.

3170. (Dr. Bailey): You suggest that when a custody application comes before the court, first of all, a guardian *ad litem* should be appointed, and, in addition, you think that there should be a report on the family from an independent social worker?—Yes.

3171. Other bodies have suggested that the probation officer should be available to act as a conciliator before the petition is heard. Then, you suggest supervision later by child life protection officers after the order is made. I am rather concerned to know how in practice this is going to work out. Are we going to have an army of different kinds of social workers going in and out of the homes of people who may never have had any previous contact with local authority officers?—I should sincerely hope that that would not happen. As to the possibility of employing the services of the child life protection officer, and the question of appointing a guardian *ad litem*, and possibly the commitment to the care of the local authority, we consider that all those duties should in fact be carried out by the one person, a child welfare officer, who, in a properly conducted child care department, would tend to specialise in this sort of work, and would be working day in and day out on difficult matrimonial cases. You may have heard of the recent appointment of co-ordinating officers. That is an attempt to avoid the impasse that you foresee and so rightly dread of an army of officers visiting one home. That is an attempt to put all the various services concentrated upon a particular social problem. In that event it is highly likely that a case of this sort—where there are matrimonial difficulties—will have been picked up before the divorce proceedings come along. In that case, the person whom we contemplate as doing this job may already have been at work on the family, and could thus act as the guardian *ad litem*, could act as the child life protection visitor, and could act on behalf of the local authority if ever the child were committed to its care. In the children's department, our slogan as far as possible—though it does sometimes fail—is "one child, one officer".

3172. But you do suggest in your memorandum that one officer should carry through all these duties in each case. The vast proportion of these children would not have had any previous contact with the children's officer?—In that event we can assume that the case has been totally unknown to any child care workers. Again, if the first contact arises at the stage of divorce proceedings, then it would still be possible for one officer from the local authority to work on the case, on the basis that he was particularly fitted to supervise the welfare of the child.

3173. Would there be any difficulty in a children's officer giving a report to the court? We have had it suggested to us that the children's officer is responsible to the local authority, and might thus be in possession of confidential

information which he or she could not be required to give to the court—I can only refer to Section 35 of the Children and Young Persons Act, 1933, which lays a duty on the local authority to make available to the court information as to school record, health, character and home surroundings of a child brought before a juvenile court. And that phrase, "home surroundings" covers a great deal. Such a report can also be made by the probation officer. But it is the case that a statutory duty is laid on the local authority to make such information available to a juvenile court in respect of any child who appears before it. Thus, only a very slight further requirement need be made in order to make it compulsory for information of this kind about a child in a custody case to be made available to the court, not just as a matter of interest to the court, but as a statutory requirement.

3174. It would require an extension of power?—Very slight, I should say.

3175. Do you think then that the children's officer should act as the reconciliation officer also?—We are concerned with the welfare of the child. We do not pretend—and we are not, indeed, particularly interested in the question of patching up a matrimonial squabble, but if in the course of our work, either before or after an application has been made to the court, we had opportunities of conciliating a married couple who were in danger of going on the rocks, naturally we should do so with the object of helping the child. We do not want to invade any territory other than our own, which is the welfare of the child.

3176. But, of course, we have heard that probation officers are at present acting as conciliation officers. You would agree that for the sake of the children early conciliation attempts are of very great importance?—Entirely.

3177. In order to reduce the number of officers dealing with the family, do you think that children's officers could be equipped to carry out reconciliation also?—I see nothing to prevent it. But I am definitely not laying claim to wanting to do conciliation work, except on the general principle that in our work already—in the case of my own local authority, at any rate—we have conceived the possibility of using all its resources to deal with such problems, for example, by using health visitors to supervise very young children. As a result of all-round co-operation you could devise a means whereby you would avoid having a host of officers visiting a particular home.

3178. (Mr. Selow): The point is, is it not, that the probation officer works under the authority of the court, whereas the children's officer, the health visitor, and so on, work under the authority of the county council or the county borough council?—That is right.

3179. And that is where the difficulty in co-ordination comes, does it not?—Given goodwill on both sides, Sir, even differences of that kind have been overcome. Provided that the people concerned are really interested in the welfare of the child, they will find a means of working together. It does happen with other departments, as we all know. It happens between the children's department and the education department. Here you get two different services who on occasion combine for the welfare of a particular child. And there is co-operation in the day-to-day work of the probation officers and the children's officers. But there is this distinct difference between the two services, that the probation officers are the officers of the court, and the children's officers are the officers of the elected local government authority.

3180. If the children's officers were clothed with the duty of reconciliation, that would be an entirely new duty for a local authority?—For the children's officers as such.

3181. Do you think that officers primarily concerned with the children in divorce cases might possibly not see everything that was required in regard to reconciliation? There is also the point, that some people might prefer to go to a voluntary organisation for reconciliation rather than to a public officer?—I do not think that there is a great deal in the point that a person would prefer to go to a voluntary organisation rather than to a public authority. It all depends, in my view, on the way in which the public authority does its job. Some people have got the impression that public authorities are a soulless kind of people. I can assure them that our children's departments are not, that we are all imbued with one idea. As to

18 June, 1952]

Mr. E. AINSWORTH, Miss K. L. RUNDLOCK and Mr. K. BULL.

[Continued]

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3158. And in that supervision you deal almost entirely with the home and not with the place of employment? Have you any rule about that?—We consider it our duty to follow the child into the home, and as far as may be necessary in order to get the child settled. And in cases where there is any difficulty with the employer, it is quite common for our officers to go into the place of employment. Indeed, if I may be permitted to quote the practice in my own department, we have a system whereby a child who is placed as an apprentice in a particular trade, not only receives the guidance of the after-care officer, but a member of the engineering staff of the council goes about once a year and checks up on the boy's progress in his trade. This is rather valuable, as it ensures that the boy's technical education and technical skills are watched over at the same time as his general social welfare. Our engineering department's representative and my own department's after-care officer work very closely together.

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3165. That was a case where you were quite satisfied that it was in the interests of the child that it should go back. But what I am putting to you is this: Have you ever heard it argued that if the conditions which necessitated the original order have been removed, then the order must be revoked irrespective of the interests of the child?—The magistrate would decide the case at the time, and I have not heard it argued that the order must be revoked.

3166. In Scotland that has been argued, and I am interested to know what your experience has been in England?—Our experience generally is that magistrates are exceedingly careful of the well-being of the child, and in the event of an attempt to revoke an order, they must be entirely satisfied that revocation is in the interests of the child before agreeing to such a course.

3167. Just take the case that you have put to me with slightly different facts. Assume that the child, instead of only being away eighteen months, had been away for eight years with foster-parents, and had settled down in its new home, and had forgotten all about its mother. Assume also that the parent has completely recovered in the interval—she is no longer a woman of ill fame, she is a perfectly good mother. In that case, which are the interests which you would allow to predominate in considering the revocation of the order, those of the parent or those of the child?—I should consider the child entirely.

3168. The Act does not specifically say so, does it?—No.

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3169. (Mrs. Allen): Would you think that probation officers could exercise care of children equally as well as children's officers? I am thinking of what you said earlier. You said that, in some cases, when you were entrusted with the care of a child, you visited the factory where he was employed in order to find out if things were satisfactory. Do you think that probation officers could equally well visit the factories in similar circumstances where children were under their control?—I would suggest that it is competent for any well-meaning person who has the right of entry to a place of employment to make inquiries. But if the care of the children is from the outset in the hands of the children's department, then it would be the right thing for an officer of that department to continue to maintain contact, because in the child's interests it is as well to keep a measure of continuity of supervision. As regards the possibility of the probation officer visiting, I would assume that if that were the case, under the present system the boy would normally be on probation. Some of us have felt that if you can remove from a boy's mind any idea that he is still a marked man in the eyes of the court, then it is as well to do so. We think that the child having once been through the courts—and presumably that is where contact with the probation officer would begin—then he ought at least to have the opportunity of making a fresh start right away from the machinery of the court and all that it implies. In some neighbourhoods, if the probation officer was seen calling at a home, some slight suspicion might arise, whereas in the case of certain other officers, including children's officers, that would not be the case.

3170. (Dr. Baird): You suggest that when a custody application comes before the court, first of all, a guardian ad litem should be appointed, and, in addition, you think that there should be a report on the family from an independent social worker?—Yes.

3171. Other bodies have suggested that the probation officer should be available to act as a conciliator before the petition is heard. Then, you suggest supervision later by child life protection officers after the order is made. I am rather concerned to know how in practice this is going to work out. Are we going to have an army of different kinds of social workers going in and out of the homes of people who may never have had any previous contact with local authority officers?—I should sincerely hope that that would not happen. As to the possibility of employing the services of the child life protection officer, and the question of appointing a guardian ad litem, and possibly the commitment to the care of the local authority, we consider that all those duties should in fact be carried out by the one person, a child welfare officer, who, in a properly conducted child care department, would tend to specialise in this sort of work, and would be working day in and day out on difficult matrimonial cases. You may have heard of the recent appointment of co-ordinating officers. That is an attempt to avoid the impasse that you foresee and so rightly dread of an army of officers visiting one home. That is an attempt to get all the various services concentrated upon a particular social problem. In that event it is highly likely that a case of this sort—where there are matrimonial difficulties—will have been picked up before the divorce proceedings come along. In that case, the person whom we contemplate as doing this job may already have been at work on the family, and could thus act as the guardian ad litem, could act as the child life protection visitor, and could act on behalf of the local authority if ever the child were committed to its care. In the children's department, our slogan as far as possible—though it does sometimes fall—is "one child, one officer".

3172. But you do suggest in your memorandum that one officer should carry through all these duties in each case. The vast proportion of these children would not have had any previous contact with the children's officer?—In that event we can assume that the case has been totally unknown to any child care workers. Again, if the first contact arises at the stage of divorce proceedings, then it would still be possible for one officer from the local authority to work on the case, on the basis that he was particularly fitted to supervise the welfare of the child.

3173. Would there be any difficulty in a children's officer giving a report to the court? We have had it suggested to us that the children's officer is responsible to the local authority, and might thus be in possession of confidential

information which he or she could not be required to give to the court.—I can only refer to Section 35 of the Children and Young Persons Act, 1933, which lays a duty on the local authority to make available to the court information as to school record, health, character and home surroundings of a child brought before a juvenile court. And that phrase, "home surroundings" covers a great deal. Such a report can also be made by the probation officer. But it is the case that a statutory duty is laid on the local authority to make such information available to a juvenile court in respect of any child who appears before it. Thus, only a very slight further requirement need be made in order to make it compulsory for information of this kind about a child in a custody case to be made available to the court, not just as a matter of interest to the court, but as a statutory requirement.

3174. It would require an extension of power?—Very slight, I should say.

3175. Do you think then that the children's officer should act as the reconciliation officer also?—We are concerned with the welfare of the child. We do not pretend—and we are not, indeed, particularly interested in the question of patching up a matrimonial squabble, but if in the course of our work, either before or after an application has been made to the court, we had opportunities of conciliating a married couple who were in danger of going on the rocks, naturally we should do so with the object of helping the child. We do not want to invade any territory other than our own, which is the welfare of the child.

3176. But, of course, we have heard that probation officers are at present acting as conciliation officers. You would agree that for the sake of the children early conciliation attempts are of very great importance?—Entirely.

3177. In order to reduce the number of officers dealing with the family, do you think that children's officers could be equipped to carry out reconciliation also?—I see nothing to prevent it. But I am definitely not laying claim to wanting to do conciliation work, except on the general principle that in our work already—in the case of any own local authority, at any rate—we have conceived the possibility of using all its resources to deal with such problems, for example, by using health visitors to supervise very young children. As a result of all-round co-operation you could devise a means whereby you would avoid having a host of officers visiting a particular home.

3178. (Mr. Beloe): The point is, is it not, that the probation officer works under the authority of the court, whereas the children's officer, the health visitor, and so on, work under the authority of the county council or the county borough council?—That is right.

3179. And that is where the difficulty in co-ordination comes, does it not?—Given goodwill on both sides, Sir, even differences of that kind have been overcome. Provided that the people concerned are really interested in the welfare of the child, they will find a means of working together. It does happen with other departments, as we all know. It happens between the children's department and the education department. Here you get two different services who on occasion combine for the welfare of a particular child. And there is co-operation in the day-to-day work of the probation officers and the children's officers. But there is this distinct difference between the two services, that the probation officers are the officers of the court, and the children's officers are the officers of the elected local government authority.

3180. If the children's officers were clothed with the duty of reconciliation, that would be an entirely new duty for a local authority?—For the children's officers as such.

3181. Do you think that officers primarily concerned with the children in divorce cases might possibly not see everything that was required in regard to reconciliation? There is also this point, that some people might prefer to go to a voluntary organisation for reconciliation rather than to a public officer?—I do not think that there is a great deal in the point that a person would prefer to go to a voluntary organisation rather than to a public authority. It all depends, in my view, on the way in which the public authority does its job. Some people have got the impression that public authorities are a soulless kind of people. I can assure them that our children's departments are not, that we are all imbued with one idea. It so

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happens that we have to submit to certain rules and regulations, but we seriously believe in the value of child care. If anyone comes to us, or for that matter goes to a voluntary agency, sooner or later the question of the welfare of the child arises. What we have felt is that in the past there has been a tendency to regard the child as more or less a side-line to a matrimonial dispute—as a by-product of the problem which is thrown up. There has been a tendency to look at the matter solely in relation to the matrimonial application before the court. We are much more fundamentally concerned with the child, both before and at the time of the application.

3182. I fully recognise that. I was wondering whether possibly a slightly lesser rôle than you had contemplated might be found for children's officers. Assume that the court, whether it be a magistrate's court or the Divorce Court, should have particulars of the children in every case of separation or divorce, and that the court should be free to call both the children's officer and the schoolmaster or schoolmistress to give their views about what was best for the children?—We could not quarrel with that at all. We are available to help in any particular case. We do not consider that our opinion is the only opinion, that our help and advice are the only help and advice that can be brought to bear. We stand for all possible sources of help. For example, on the relationship between statutory and voluntary services, we are all of us engaged in an increasing degree of co-operation with the voluntary associations. We believe that a concerted effort is needed, and that it can and must result in help for the child, irrespective of from where it comes.

3183. Would it be possible for you to give me some idea of the sources from which children come into the care of local authorities? By that I mean how many cases are the result of divorce and separation, or cases in which one parent has deserted the home, or how many are orphans, and so on?—I can only say, Sir, that the question of statistics is one on which we are not very good. Our interest is in the individual child as a human being rather than as a mere number for statistical purposes. But we do have figures for the three months ending 29th March, 1952. In that period we had 375 applications for children to be received into care . . .

3184. That is in London?—That is in London—375 children under 2 years of age, of whom 21 were the children of married parents who were separated. That is, about 6 per cent of the applications were from married people who were separated. In respect of children aged 2 to 5, we had 447 applications, 32 of which came from the same source. We had from age 5 to 11—362, and 39 of those, roughly 10 per cent, came from the same source. Between the ages of 11 and 17 we had 87, and of those 9 resulted from marriage breakdowns.

3185. Would it be possible to say, very roughly, where the others came from?—The others come from all sorts of family crises. We get abandoned children, deserted children, etc. We get the short-term crises, such as those of children whose mothers have gone into hospital, maybe to have a baby. Today we are finding a preponderance of short-term rather than the long-term cases.

3186. The children's committee is also charged with the duty of providing information to the juvenile courts when a child is brought before it?—Yes.

3187. Have you any statistics there about the incidence of broken homes?—I can only say, Sir, that some time ago I was asked to give certain statistics regarding children of divorced parents who had been before the London juvenile courts. At that time we found that of such children who were coming before the court, about 2 per cent were from divorced parents. In the case of boys, about 8.6 per cent, and in the case of girls, about 13.6 per cent, were from separated parents. But when we came to look at the cases of boys who were constantly coming back to the courts, we found that the percentage of divorced parents was 2 per cent, as before, but that the percentage of separated parents was 12.2 per cent. In other words, it was noted that whereas the incidence of "separation" cases was 8.6 per cent in the case of first offenders, the figure rose to 12.2 per cent in the case of repeated offenders.

3188. (Chairman): With regard to the figures you gave for applications for children to be received into care, you were not dealing with the result of the applications, is that right?—No, my Lord. These were what we call

approved applications, that is, applications such that had we had sufficient accommodation available, all those children would have been received into care. In point of fact not all of them were received into care.

3189. They would all have gone to foster-parents if you had had the foster-parents available?—Not necessarily. The way of dealing with the children, as laid down by the Children Act, is to deal with the child according to his best interests, and in order to decide which method of treatment is to be adopted, in the case of a long-term case, the child is taken to a reception home. The reception home is specially equipped to decide whether a child should be boarded-out or, alternatively, should receive institutional care.

3190. (Mr. Beloe): It would not, I suppose, be possible to say that the fact that the child came from a broken home was the reason that he came before the court. There may have been other contributing factors?—Sir, I would hesitate to be dogmatic in any way concerning juvenile delinquency. But such research as has been made appears to support the view that there is a high incidence of juvenile delinquency from broken homes.

3191. Would the same figures probably be obtainable throughout the country? Do you think that other authorities have had such a check as London recently?—I think that there has been a check in two or three cases, but I do not think there has been a nation-wide check. The figures that I have given are taken from the Report of the London Committee on Juvenile Delinquency, of which, I think, a copy could be made available to the Commission.

3192. Through your Association it might be possible to find out whether other authorities have similar figures?—Yes, I am sure we could make enquiries from our colleagues and find out what information there is available.

3193. It has been suggested to us, Mr. Ainsworth, that difficulty occurs at the age of sixteen, when the parent who is responsible for the maintenance of the child cannot any longer be required to maintain him, if that child wants and ought to go on with education. Have you come across such cases?—No, Sir, because in our case the children we are dealing with are already in care at that age. If they are in care—and I think this is one of the advantages that would come from one of our suggestions—if the children of divorced parties, or indeed of any parents, are committed to the care of the local authority, it is possible for the authority and is indeed its duty to see that the child is seen through life until he becomes self-supporting.

3194. Suppose that a child is given into the custody of a mother, who dies. I understand that the father then gets the custody. Have you ever been called in any such case to take a child before the court as being in need of care or protection?—Not on those grounds. I do not know if my colleagues have. (Miss Ruddock): I have recently had a case where the mother died and shortly before her death we were called in in the interests of the three children. She had custody and the father had married somebody else. After her death the father stepped in and simply collected up the children and made his own arrangements. We were extremely worried. They moved out of the county and we took the liberty of writing to the children's department of the county where they had gone to, asking them to keep a friendly eye on them and do what they could. But it did worry us very much, because under the present law there was nothing we could do until something really went wrong.

3195. That was what I wanted to ascertain. There is a very great difference, is there not, between a court awarding custody of a child to somebody, and a court saying, "This child is in such a bad condition that he has got to be committed to the care of a local authority"?—The divorce had been on grounds of cruelty, which worried us even more, but there was nothing we could do until something happened.

3196. It has been suggested to us, rather on the lines of the fifth paragraph of your memorandum, that spouses who become parents must accept greater responsibility and not think so readily about divorce as those spouses who are not parents. Would you feel that any good would come from an alteration of the law to the effect that where there were children of a marriage, the judge must decide in the light of the welfare of the children whether

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there should be a divorce?—(Mr. Ainscow): I think, Sir, in answer to that, that if the judge were required to consider the welfare of the children he would have the problem before him of deciding whether the welfare of the children would be served by either granting a divorce or not granting a divorce. And that, I think, depends on the circumstances in the individual case. We feel in our work, having observed the unfortunate results in certain children of divorced parties, that in some cases it might be better, always providing that the parents are going to be stable and secure, and that the child is going to live in a stable environment, for the divorce not to take place. On the other hand, there are cases that we have come across where it was obvious that if that child were compelled to remain in that particular household, where there was no hope of the parents reforming the home, no promise of a home, that it would be far better that the divorce should go on, and that the child should be completely cut adrift from such a home.

3197. There is one rather different question I want to ask you. Can you envisage cases from your knowledge in which a divorce would be for the benefit of the children because they were children of an illegal union, that is, the parent who is already tied by marriage to someone else should obtain a divorce from that someone else?—Again, if it is a question of the welfare of the child, then the ethics of the situation, as between the parents, is not so frightfully important. It is a sad thing to have to say so in these days, but we do know of cases where children are living happily with parents who have formed an illicit union. In such a case, if the question of the child's welfare is to be considered, then it is surely better that the child shall be happy rather than that the child shall be living in a false state entered into merely because of, shall we say, national feelings of propriety.

3198. You would, I imagine, stipulate in the first place that the parents should be good parents and should be bringing the child up properly?—Precisely. I can imagine parents—in fact I have known of parents—who have formed an illicit union, and yet have made it their business to see that the child has had—apart from the immediate disability of living with parents of that sort—every opportunity of being brought up in a proper Christian way. It is a sad reflection on society, but there it is.

3199. I do not know if it is fair to ask you this, but no doubt you will tell me if you do not want to answer it. A number of people have suggested that the age of consent should be raised to seventeen. Do you in your work see a very large number of failures of marriages which were contracted before the age of seventeen?—I have no information about that.

3200. (Sir Russell Smith): In the light of your experience, do you think that if divorce were made considerably easier it would in general be in the interests of children?—I do not think so. I think that anything that reminds parents of their moral obligations to their children—and surely that means the avoidance of divorce—if everybody with children were really convinced of their duties to their children, then there would be fewer divorces, because, for the sake of the children, the parents would see to it that the marriage did not get on to wrong tracks. So I would suggest that it would be serious to loosen up the grounds of divorce—on the view that the moral stability of parenthood is something that really matters and that it must not be broken lightly.

3201. It has been argued that if divorce were easier it would enable certain people, who now cannot do so, to get married and set up a home. I wondered whether that was an inference which one was entitled to draw from the figures on the difference between children of divorced parents and separated parents, which you gave in answer to a question put by Mr. Belce?—No.

3202. You do not agree with that?—No.

3203. You emphasise the importance of reconciliation between parents, though I appreciate that reconciliation is not in itself within your province. Have you found, from experience, that by putting the claims of the children to parents who are having difficulty in their married life, they are often influenced by these considerations?—I can only say that in my personal experience I had some knowledge of a broken marriage, and the break persisted for some time. In the end, I think, the marriage was

really held together because the people concerned realised that they were wrecking the career of their own child, whom they had gone to some pains to put on a very satisfactory way of education. I think that they were brought back ultimately by reason of the claims of that youngster to a sound background. You cannot on the one hand produce the material conditions for a child's education, and then throw them away by breaking up his home.

3204. (Mr. Brown): Mr. Ainscow, in your introductory remarks you said that a large part of your work was concerned with children before the divorce takes place.—I may not have made that quite clear. I intended to say that we have knowledge of many cases where unhappiness is arising before ever there is a question of divorce. It is true that in many cases divorce never comes. But we do have cases of broken homes to deal with, and it is the broken home that we are really interested in, in putting that right.

3205. I take it that much damage may have been done to the child of a bad home before the divorce takes place?—Unfortunately, Sir, yes.

3206. You said that the child realises the home is going to break?—Yes.

3207. Would you say that that raises greater conflicts in the child than the fact of divorce?—Yes, I should think that it is more important to the child to live with happy parents, no matter what their labels are, than to live with unhappy parents.

3208. And vice versa, that the child takes more harm out of a bad home than out of the mere fact of divorce?—Yes.

3209. (Mr. Fletcher): Continuing from what Mr. Brown has just said, you would not agree, then, that "a bad home", unless a superlative is used for the word "bad", is better than a half home, no home, or the home with only one parent? A lot of people have taken that view—I think that we have to define what "a bad home" really means. We do not mean a place that is squalid; we do not mean a place that is deficient in furniture or amenities of any kind. We regard "a bad home" as a home where the fundamental conditions of happiness for the child, a sense of security, a sense that he belongs, are absent. That is what we look upon as "a bad home".

3210. When the parents are quarrelling fairly considerably—we will not say going to the extent of using violence—but where they are pretty rude to each other and the child can sense constant bickering, quarrelling and nagging, would you rather that the child earned on in a home like that, or that those parents separated for the child's sake?—I should really want to know the home, so live in it myself. Those of us who have families of our own will realise the nature of the problem—I have got three children of my own, and hickories have occasionally occurred with these three children and in the family circle—but these do not mean a thing. When we talk of "a bad home" we mean a home where there is an essentially evil outlook as between the one partner and the other, where there is no hope of reconciliation in anything like the true sense of the word. The fact that a man is unamiable and rude, particularly over the breakfast table, and the child happens to have breakfast at the same time, does not matter twopence. What does matter is if that man is persistently trying to score off the wife through the child, or the other way round. I think you know what I mean?

3211. Yes. You have helped us very much by describing it in that way. Of course, in the end it is impossible to have definitions of that sort of thing. One has got to feel that a thing has arrived at a certain pass, when it is no longer suitable for the child to be there. But that is quite a long way along the road?—Our thesis is that if there is a really evil home, then somebody should be there who is capable of recognising that fact and, even if it is not so bad, of assessing the real state of affairs. Somebody who is trained to observe and who knows what is best for the child.

3212. Throughout your memorandum you talk about "the court". Am I right in thinking that you have in mind the magistrates' court rather than the Divorce Court?—Not necessarily. We have used the word "court", in a general sense, as being appropriate to any of the classes of court which should be competent to deal with the situation.

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3213. Is it really the case, as you suggest in paragraph 5, that where, on an application by one parent for custody, both parents are found to be unfit, then there is at present no third alternative empowering the court to commit the child to anyone else? (Chairman): I was going to ask the question myself. It may be a confession of ignorance, but if there is no such power how does it ever happen that from the court there comes to you a child to look after? I thought that often happened, and I was wondering how it happened, if there is no power in the court to do so. (Mr. Justice Pearce): I do not think that there is any doubt that a judge has the power to make any order he thinks fit with regard to the custody of the child. I have known of such cases where another relative was brought on to the scene, largely I think, at the instigation of the welfare officer. Certainly I have ordered a child to go temporarily to some authority, and it has never been questioned that one has such a right. (Chairman): And certainly as a judge of the High Court, when I occupied that position, where one parent, for example, was dead, and I thought the other parent unsatisfactory, I never hesitated to commit the child to the care of an aunt or grandfather. Is the matter not too widely stated where you say:—

"When, however, both parents are found to be unfit there is, at present, no third alternative, empowering the court to commit the child to some relative or friend who is willing to look after him, or to the local authority which has a statutory service providing for children committed by the courts."

—Could we put it this way, my Lord—that we were under the impression that such is the case. If it is not the case, then we should be very happy to assist by being present in such cases. We should be most happy to see that power brought more into the open, if it is in fact the case that it can be used. We were under the impression, certainly as regards magistrates' courts, that there was no such power. (Chairman): It may be that the magistrates have not got that power. (Mr. Maddocks): A High Court judge can do it, my Lord. But Mr. Ainsworth is quite right; the magistrate cannot.

3214. (Chairman): It comes to this—when you say, "the courts", you have perhaps stated it too widely, but you do think still that the magistrates' courts ought to have that power—which they have not at present?—Exactly. (Mr. Bell): May I add another difficulty which might arise in the cases your Lordship has referred to? Presumably in those cases the aunt has been willing to maintain the child. I have on occasion been asked to attend before a judge in chambers—and I have agreed on behalf of the local authority to receive a child into care, and an order has then been made by the court saying that the child should come into the care of the authority. In that case, certain other conditions were satisfied, which made it possible to spend public money in maintaining him. I am not at all sure that in all cases in which the judges of the High Court might wish to ask the authority to maintain children, there would be any power for the local authority to spend money. (Chairman): It is certainly a matter that the Commission will look into and ought to consider.

3215. (Mr. Flecker): May I return to the question of whether every child whose parents make application to the court for divorce, separation or custody, should be granted some degree of protection? What process would you make available to ignorant people in a humble line of life? They would come along and, I suppose, the first person they would see might be either the probation officer or the clerk to the magistrates' court, or somebody of that sort. One parent comes along and says he wants a divorce. The first question would be "Have you any children? If so, you must go and see so and so, before you can do this." Is that what you have in mind?—(Mr. Ainsworth): Not quite. We do not want parents to have to go from one office to another. We have seen too much of that in the old days. All that would be necessary would be this. Immediately an application came before the court, a *pro forma* notification would be sent by post to the person charged with this duty of child life protection. I take it that it is that aspect of the problem which you have in mind?

3216. Yes.—And the welfare authority would pick it up, just as at present it is the law that the authority should be notified, if a mother wants to place a child with another woman to nurse for reward. In the case of

divorce, it would arise on an application to the court. It would be the easiest possible thing for the court itself, or the parent, there and then to fill in a form and have it posted off to the authority, who would then link up with the case. From that moment it would be their job to endeavour to secure the welfare of the child.

3217. You have certain things to say on the one hand about the attitude of the courts towards the parents who are bringing a case—it may be divorce or separation—and the children on the other. You feel on the whole that too much attention is paid to the adults and too little to the children?—We are really wondering, Sir, whether we have yet arrived at a stage when the child has ceased to be regarded as a chattel. We started on the long road from that—

3218. May I interrupt? By whom so regarded, by the magistrate or the officials or the parents, or all three?—Originally, Sir, everybody thought that the child was a chattel. Today, by a series of statutes, very wise and humane statutes, the child is at last coming into his own. We think that in this matter of divorce there is still an element of property attaching to the child, that he is something to be bartered about as between the parents, and it may be that if one parent is not guilty of a matrimonial offence that parent tends to be favoured when custody questions are being considered. We would prefer to look at the question from the point of view of the individual child. The child is an entity, a personality in his own right, and not something to be made the subject of a bargain. We wonder sometimes whether our very beneficent legislation has gone quite far enough in this conception of the child from the idea of being a mere chattel.

3219. It has been suggested that in some cases it might appear to be in the interests of the child that the parent who has not been given the custody, should be denied access entirely. But it is also said that the courts are rather unwilling to do that because it seems unduly hard on that parent. Do you think that complete denial of access might sometimes be justified?—I think that the real clue is to be looked for in the child's own affections. Where does he feel he belongs? Never mind who is guilty. If the child loves his mother, and she is the worst woman alive, nothing will alter the fact that he loves his mother. It is to her that he should go.

3220. Would you ask the child, or would you ask some trusted person, such as one of your own officers, to get that information for the court?—I think, Sir, that one would require the services of somebody who could really ascertain what is in the child's mind. We all know that sometimes children give the answers that they think are expected of them, but it is a matter of some skill getting to know what is in a child's mind. All we are asking for is that somebody who would act as the protector of the child for the moment should really find out what the child wants and thus be able to advise the court as to what is in the child's best interests.

3221. (Lord Reid): Mr. Ainsworth, I understand that children who are in need of care or protection, and children who are beyond control, can be put under the local authority's care, and so come under the control of the children's officers. Is that right?—It is, my Lord.

3222. Are there any other circumstances in which the children's officers are brought into contact with children?—Yes, my Lord. The whole object of the Children Act is that if the parents of a child are unable for any reason, either temporarily or permanently, to provide for his proper upbringing and maintenance, then that parent can go along to the authority and ask for his child to be received into care, and it is the authority's duty to receive the child.

3223. That is really just another aspect of a child requiring care or protection, but with the initiative coming from the parent?—The initiative may not always come from the parent. It may arise through someone else informing the local authority about the case. Under the Children Act the child is received into care. It is not taken into, or committed into, care. There is that difference between Children Act cases and committed cases.

3224. Then all the powers by which you are brought into charge of a child are under the Children Act. Is that right?—Broadly speaking, yes, Sir.

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[Continued]

3225. Then, when you have charge of a child you may either place the child with a foster-parent or you may give it some form of treatment in a special home or institution, where the child can be brought up in a family atmosphere, as it were?—Yes.

3226. If in these circumstances a child commits some offence which brings him to the notice of the courts, the probation officer would come in then, would he not?—He would come in as the court officer.

3227. I suppose that in such a case the child might be put on probation and come under the control or supervision of the probation officer?—It could happen, Sir, but it is normal not to have two officers supervising the one child.

3228. In such a case, how would the local authority treat the matter? If the child was a delinquent and required some measure of recognition of his offence by the court, if the court does not put him under a probation officer, what could the court do, apart from punishing him in some other way? Would the court merely leave him under your charge, with an admonition to you to be more careful and to look after him better?—The court treats us as the normal parent. If it were of opinion that we were failing in our duty, or, alternatively, that the circumstances under which the child was living should be changed, it would probably make an order. It might be that the child was in need of approved-school training, and in that event the court would commit him to an approved school. If, on the other hand, the court did not consider residential treatment suitable, it might make a probation order. In other words, the child is treated in exactly the same way as a normal child living with the normal parent.

3229. Or the court could leave him in your control, but under the supervision of a probation officer?—No, that is not regarded as very good. It can happen, but generally speaking, it should not and does not.

3230. I can appreciate the difficulties. I am not suggesting for a moment that the local authority or the children's officer is neglectful. All I am suggesting in the example which I have cited is that the child is such a child that nobody apparently can control him properly, not even a children's officer?—It all harks back to our thesis that these cases very often arise from broken homes or from the child having been posted around in all sorts of homes and places.

3231. They may arise from hereditary tendencies?—Well, I think that is a very wide subject.

3232. In paragraph 3 of your memorandum you make the suggestion that in every case where an application is made for divorce, and where there are children, the court should appoint a guardian ad litem even if custody of the children is not asked for?—Yes, Sir. We suggest that that should be automatic.

3233. If no application were made for custody, would it be the duty of the guardian ad litem to bring the question of the child's custody to the notice of the court?—As I see it, it would be the duty of the guardian ad litem to bring to the court a picture of the child *vis-à-vis* the application, so that the magistrate or the judge would be able to have information on which to make up his mind as to the appropriate method of dealing with the child.

3234. That means that in every application for divorce the court must, either on application made for custody, or on its own initiative, deal with the question of the custody of the child?—Yes.

3235. (Chairman): I want to try and clear up one point. When you answered Mr. Brown I thought that your views were directly contrary to the next body that is coming before us. But when Mr. Flecker pursued the subject, I came to the conclusion that possibly the differences simply arise in regard to the definition of "a bad home". I would like to read to you what is said by the next body that comes before us and see if there is really any difference between you. The next body to be heard is the National Union of Teachers. For the purpose of presenting their memorandum, the executive of the Union asked their local and county associations to reply to certain questions. They were asked:—

"Do you think that the children's future rather than the relief of one or other parent ought to receive more consideration in divorce cases?"

"Do you think enough attention is given to the future of the children mentally and spiritually as well as physically?"

I think you would probably agree with the Union in answering both these questions—you think that more attention should be given to the child's welfare?—Absolutely.

3236. Then we come to this point:—

"How bad must a home be before, for the children's sake, it ought to be broken up?"

The answer given in their memorandum is:—

"A child cannot develop normally in a home environment where there is no love, affection and sympathy."

That you would agree with?—Entirely, yes.

3237. The Union's memorandum continues:—

"It is, however, important that the home should be kept together until the last possible moment. Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken. . . ."

So far I think you would agree?—Yes, Sir.

3238.

"... See children appear to accept their homes and the standards set therein with very little question, and provided there is a modicum of affection. . . ."

which, I apprehend, means as between the parents and the children?—

"... they suffer less from what is termed a bad home than from the breaking up of such a home."

It appears to me, and please correct me if I am wrong, that if there is any difference between you and that body it simply rests upon what meaning you attach to a "bad home". Is that not right?—Yes, Sir. I think, too, that the body concerned is not as intimately connected with the results of bad homes as we are. We are dealing with and large with children deprived of a normal home life, a majority of whom come from bad homes. We see the effects every day—far more frequently than persons who are dealing with children generally.

3239. That I quite appreciate, but what I am suggesting is that if one can find out, as we shall shortly, exactly what that body means by "a bad home", it may turn out that there is no difference between you?—We do subscribe to the idea that if a home is at all endurable then from the point of view of the child it is infinitely preferable not to take that child away. But we must be sure of the home, and the question cannot be settled merely on outward appearances. You really have to get down to it with the child and find out what he is thinking.

3240. (Mr. Justice Pearce): I suppose that if you rather over-simplify the matter, there are three problems about children in connection with the break-up of the home. There is the class of too little wanted children, by which I mean children whose parents are not prepared to exert themselves to any extent in order to behave properly towards them or to look after them. Secondly, there are the too much wanted children, whose parents are individually quite reasonable people but who must fight about the child to get it entirely for themselves. Then there are the parents whose attitude to the child is reasonable but who make bad arrangements over custody. Roughly speaking, those three classes cover all the cases where children suffer on a divorce?—I should think it is likely, Sir, that there will be people. . . .

3241. I only wanted to know if you roughly agreed with those three categories?—Yes.

3242. If you find there are other categories or that that is wrong you can retract your steps. Now, assuming that is so, it is the case that the too little wanted child is the problem which has called your service into existence?—Not exactly, Sir, no.

3243. Then which of the other two classes has called your service into existence?—Our service is in existence to meet the needs of a class of child by and large whose parents may never come. . . .

3244. We are at cross-purposes. What I meant was that your service started by looking after the too little wanted children whose parents have not enough interest or self-control to look after them properly?—That is not

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quite true, Sir. If you are regarding us as a product of the Children Act, we exist to look after children whose parents cannot—not will not but cannot—for any reason . . .

3243. Yes, I will include them. My definition was not wide enough—it ought to include parents who will not or cannot properly look after the child?—Yes.

3246. That is the type of case with which you are chiefly, though not solely, concerned. But the type of case with which a judge is chiefly concerned is the too much wanted child, that is to say, who has, as a rule, parents who are reasonable in all respects except that they quarrel about the child. It seems that the difficulty at the moment is that the child who is not wanted for is the child who has reasonable parents who make bad arrangements. Do you follow what I am getting at?—Yes, I do, Sir.

3247. The question is whether there are so many of those cases that something ought to be done, and whether there is anything that one can do which will prove better than the existing bad arrangements?—Yes.

3248. Supposing that in the many divorces where the parents agree about the custody of their children one investigates every case, of course that is going to put a large additional burden on someone?—Yes, I agree.

3249. Of course, in some cases undoubtedly such an investigation might improve the position?—Yes.

3250. On the other hand, in some cases, against the possible advantage of improving the existing arrangements you have got to weigh the possibility that the court and the welfare officer, whoever it is on whose recommendation the court acts, may not be such a good judge as the parents. Would you agree that that is a probability, or not?—I should say that because of the facts of the situation it is more likely that the same judgement would come from the impartial observer rather than from one of the parties to the application.

3251. Another consideration is this—that in these cases almost the worst thing one can do for a child is to make it a storm centre, when it was not before. Do you agree?—Yes, Sir.

3252. And if investigation shows that the parents, who normally appear to be reasonable-minded people, have made an arrangement which you nevertheless think is unsatisfactory, is it going to be a case of the court, plus the court's officer, as against the parents?—Yes.

3253. And that is, of course a bad start if you are trying to improve the custody arrangements in the interests of the child. You agree, do you not?—It is a matter of judgment again, is it not? The ultimate thing is the welfare of the child. It is a question as to which shall prevail, the considered judgment or the somewhat hurried and, shall we say, impassioned arrangements of the parents.

3254. What worries me is whether the resulting improvement would confer benefit in enough cases to justify investigating all cases in which custody had been agreed between the parents—I feel that it would be worth while. If the investigation were not universal, then there is always the chance that what on the face of it seemed reasonable, might turn out to be a bad arrangement. If there were a common practice, people who were doing the job from day to day would acquire the facility of knowing whether a given set of suggested arrangements was satisfactory and would report to the court accordingly. Probably these officers would not find any reason to quarrel with what was generally a reasonable arrangement, but only with an unreasonable one.

3255. Yes. Your recommendation about a guardian ad litem would of course be met by having a responsible officer who would put a point of view to the judge. That is to say, the investigation need not incur a lot of expense?—No.

3256. Because the case is heard in chambers and all you want really is an officer who is entitled to say his say on behalf of the child to the judge?—That is precisely what happens now in adoption cases. There are 1,200 cases a year where a report is made to the court.

3257. There has been some discussion about who are the right people to investigate these matters, but it seems to me that the person you want is an all-rounder, somebody who has a human interest in children and in

parents, because the two things cannot be separated?—I agree. And I think that some degree of training is essential; some degree of facility in finding out what really does lie behind a child's mind.

3258. Speaking for myself, I should assume that your officers or probation officers, other things being equal, if they extended their purview a little further, would both be admirable, but not both at the same time. Is that fair?—I think that is very fair.

3259. You have talked about children being handled about and so on. Are you expressing a definite view that one parent ought to be cut off from the children—because it is the case that it is now common practice to let each of the parents see the children?—I should hate to be misunderstood on that. I think it is faithful to contemplate the necessity of separating the child completely from one or other of its parents. Even the worst parents after all are parents, and children have a habit of having regard for parents as they never so bad.

3260. Complete denial of access to one parent is easier talked about than done, because it is very rare to find that a child has not got some affection for the parent proposed to be cut off. And of course it is not necessarily good for the child if an impression is created in the outside world that an innocent mother or father is cut off from the child. In other words, it is not solely the child's immediate interests you have got to study. If you create an unjust position that surrounds the family, the child gets the backwash from it in the end?—We feel that our proposal would enable that sort of situation to be avoided.

3261. You were asked about bad homes and broken homes. But at that stage the problem may not have reached final fruition. Do you find that often the child's sense of security is more impaired—not when the home is broken, not when there is a divorce—but when the mother to whom the child was all in all in the home marries somebody else, and thereafter a step-father becomes master of the home that the child formerly regarded rather as her personal property?—I think we have all heard of cases where step-fathers or mothers have been suspect in the eyes of the child, but I think it would be quite wrong to generalise on the subject.

3262. Some are successses and some are not, I suppose; that is the only way you can leave it?—Yes, like parents.

3263. (Mr. JONES-ROBERTS: Mr. Ainsworth, you raised a very big issue today when you made the suggestion of appointing a guardian ad litem and, following from that, that the children's officer might be a very suitable person to perform those duties. I am right up to that point?—Yes, we are not claiming them . . .

3264. It does follow, does it not? There are two separate propositions but the second follows on the first?—Yes.

3265. I would like to put another aspect of the question to you. There is a feeling in some quarters that it would be better for the children's officer, to use a common phrase, "not to be too much mixed up in the courts". Do you know what I mean?—Yes.

3266. Some people may think that children's officers are already too much involved in the courts—bringing reports and so on. We know very well that one of the chief duties of the children's officer is to find foster-homes for children deprived of normal home life and there is often a question asked "Are you quite sure that this child is not a bad child? He has not been in the courts?" It is very useful for the children's officer to be able to say "I have nothing at all to do with the courts". It might be better, from the children's officer's point of view, for his or her duties to begin only when a child comes into care. May you not be in danger of imperilling the vital service you are performing by extending it too much in the direction of court proceedings?—That is a painful question for me to answer, because since 1933 the work of caring for deprived children—formerly carried out by the education department, and now by the children's department—has been dovetailed with the work of the courts. Indeed, the Children Act itself requires a local authority to receive any child whom a court desires to commit to its care, and it is wrong for us to say that we can avoid it. It is part of the very roots of our job. It is part of the responsibility of the children's department to carry out Parts III and IV of the Act of 1933 which deal

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with all juveniles before the juvenile court. I think that the answer in a case of that sort is, if we are asked whether a child has been before the court, to say either yes or no. If a foster-parent whom we are approaching is not prepared to take a child who has been before the court, then far be it from us to force such a child on such a parent, who is obviously unsuitable. It is the parent who is prepared to tackle the child from the courts whom we want to see for that class of case. Our biggest job is matching the child to the home, and in so far as the magistrates can commit children to our care from the courts—speaking for myself we get 500 a year—then I should have to tell a lot of stories if I wanted to board out any of those 500 and pretend they had not been through the courts. It is inseparable from the job.

3267. (Chairman): Would you say that a child "has been through the courts" in the meaning in which you use the phrase if there has merely been some contest about custody? The child has nothing to do with that at all. Is there not a gulf between that case and the case in which you have an unsatisfactory child committed to you by the magistrates?—I was only answering the argument that the foster-mother makes a distinction and is afraid to take a child who has been before the courts in delinquency. (Mrs. Jones-Roberts): There are people who boast in my part of the country that they have never been inside a court. If you have been for any purpose whatsoever you are slightly suspect. That is the type of case I had in mind.

3268. (Mr. Mace): Would you help me with regard to reconciliation in so far as it concerns you. I was very interested to hear you say that you had knowledge of a broken home very early, before any divorce is thought of. Please do not misunderstand me, I am not orbiting in the slightest. What do you do about it if you do hear that a home is breaking up?—Have I been guilty of a misstatement? What I intended to convey earlier was this: that we have evidence of children who have become disturbed long before the question of divorce arises. We obviously cannot know unless a child develops symptoms of maladjustment that anything is happening in the home. Something has got to give rise to the trail of gunpowder, if you like. A child may be showing symptoms of distress in school and he is referred to a clinic and the clinic find that it is unhappiness at home that is causing the trouble. That is one of the few ways in which such a case could come to our notice. I am afraid I was speaking in retrospect and looking at children in our care whose records show that the trouble began long before anybody was aware of it. But it is the case that the children themselves are aware very often of what is coming long before anybody outside the home can have any knowledge.

3269. Would it be right that the education officer might also have the first hint of trouble in the home showing itself through the children, when he deals with their non-attendance at school?—He might get it that way, he might get it through a disability. The teacher in the class might suddenly see that a boy hitherto working on a high level of competence falls away. He would naturally want to know why, and that would prompt him to refer the case to a child guidance clinic. That is another way in which it might appear.

3270. Would you agree that when the parents do start to talk about divorce it might be preferable if your officers acted solely in the interest of the children without entering into reconciliation negotiations between the parents?—I am inclined to think, Sir, that that might be right, though anybody having anything to do with children would naturally try to improve conditions if they were capable of improvement in the ordinary way of events. I think that we all tend to do that sort of thing. If any of our friends have troubles, we tend to act as conciliators in spite, almost, of our better judgment sometimes. I think that might happen with a child guardian, but I think there is something to be said for separating the question of the care of the child from the question of mending the marriage as between the two parents.

3271. Therefore, if as soon as a rift occurred between husband and wife, it could be suggested to them—on a voluntary basis—that they should see some reconciliation officer, you would support the view that that should be somebody other than the children's officer?—I would put it that the reconciliation officer need not be, and probably should not be, the person primarily concerned with the child, because the question might arise of trying to

approximate two conflicting points of view—that of the parents and that of the interests of the child.

3272. Your officers have a course of training before their statutory appointment?—By and large, yes, particularly the new officers. Of course, being a new service which has inherited from the past, we are still in a state of transition.

3273. At the present time does the training course include any subjects dealing with the reconciliation of husband and wife or the divorce law or matrimonial law?—No, it is a course dealing with the social sciences generally and with some degree of psychology. Its emphasis is on the child in his social environment.

3274. The child, of course, is the main object of the course?—Yes.

3275. (Mr. Mendicks): I want to return to your recommendation in paragraph 4, that every child whose parents make application to the court for divorce, separation, or custody, should be granted some degree of protection and supervision. As you may know, I am a metropolitan magistrate. What I want to know is—how is this going to work in practice? Let us take the stages one by one. Mrs. Smith comes to court; she walks into the box and tells a story about persistent cruelty of her husband and applies for a summons. In the ordinary way I listen to it and if it sounds like a bona fide case I grant a summons. The summons is served by the warrant officer and in due time—usually about a fortnight or three weeks—the parties appear before me. What is going to happen in between about supervision of the child? Mrs. Smith comes in, take it on from there, will you?—Mrs. Smith comes in and, by an adjustment of the present machine, notification would be made to us, if the child protection service were to operate in such cases.

3276. That means I have to say to Mrs. Smith "Have you any children?" and she says "Yes, two". As soon as I know that she has children my clerk or deputy chief clerk, when the summons is granted, would have to notify the case to the L.C.C.—I am afraid so, Sir.

3277. We work very well together, do we not? The L.C.C. get the notification. What happens then?—The officer would go round and see Mrs. Smith and see the children.

3278. Notification goes to one of your officials; he goes to Mrs. Smith, bumps on the door. Mrs. Smith comes to the door and says "Who are you?" He replies, "I have come from the Children's Department of the L.C.C. You made an application to the magistrate for a summons and I have come to supervise your child". Mrs. Smith bangs the door in his face—probably says something. Are you suggesting that your official would have any power of entry, any power of protecting her child against her or her husband?—No, I am suggesting that our officer's job would be to safeguard the interests of the children where there were any. They would, I hope . . . we are talking about L.C.C. officials?

3279. Yes . . . be sufficiently endowed with a degree of tact to get the job done without the dire consequences that have been depicted.

3280. Please do not think I have got anything but the greatest admiration—indeed, every metropolitan magistrate has—for the L.C.C.—but you know the awkward people that we have to deal with. This is the point—are you suggesting that this Commission should recommend legislation which would empower the children's officers, once they received a notification from a magistrate's court that an application had been made in which children were involved, to get entry into a house or give them any power whatever over the children in that house?—That happens at present in child life protection; it also happens in the question of adoption.

3281. I think you will agree with me there is just no analogy between adoption and matrimonial disputes. Let us keep to the husband and wife dispute. I want to know whether you are suggesting that we should recommend legislation giving your officers power over the children in homes in respect of which an application has been made?—Yes, Sir, I am.

3282. What power are you asking for?—I am asking, as suggested in our memorandum, that the child should be placed in the same position as the child in child life protection. We are agreed that there is difficulty about the question of entry. There is difficulty about the ultimate powers of removal under child life protection.

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Removal can be carried out legally, but as a matter of practice it is difficult. We are saying in effect that despite its difficulties it would be very useful and very proper that a child whose parents had sent it to apply to the court for divorce should have the same degree of protection as child life protection cases have at present. We are asking for no more than to put the child in the position of a child who is put out to nurse for reward.

3283. (Chairman): When you say parents who have applied for divorce you would include also parents who have applied for a separation order?—Yes.

3284. (Mr. Madocks): I am afraid you are driving me into the unenviable position of having to admit that I do not know anything about the Child Life Protection Act—It is the Public Health Act, 1936, which enables a local authority to supervise a child placed out to nurse by its parent to another woman for reward. It gives us the right of visitation and the right to apply to the court if in the opinion of the visitor the child is being kept on premises to its detriment. It then becomes a matter for a court or a magistrate to make an order, which the child life protection visitor has the power of carrying out, to remove that child.

3285. I suspected that. That is where the child is in some place other than its normal home, where it has been placed out. As far as I know that is the only time when you have any kind of power at all?—No, Sir, if a child is placed for reward at all.

3286. For reward, yes, but the child must be out of its home!—That is under child life protection. Under adoption, which is a model we are suggesting might be followed, we have the right to supervise it even where the application is by the child's own mother.

3287. That is the adoption procedure?—It is that, Sir, we are suggesting might be the model regarding guardianship of them in matrimonial cases. (Chairman): Of course, in that case the mother has at least taken the step of seeking to have her child adopted. She has invited intervention of a kind.

3288. (Mr. Madocks): That is the whole point. In adoption you have the woman coming along saying "I want to have the child adopted". For the protection of the child your excellent officers make quite sure that the child is looked after, but you have willing parties on both sides, you have the mother and the adopter?—May I say, my Lord, that in adoption cases we have got a state of affairs where there is a "home-making" application, where the parties are adopting and increasing a family, and the law and public opinion say "Right, in these circumstances we will have jurisdiction over the child. We will have some degree of supervision". In matrimonial cases, the court is considering a "home-breaking" application, and yet on the face of it if one is to follow the suggestion which has been advanced, we are not to afford to those children, who are the subject of detrimental action on the part of their nearest and dearest, we are not to afford them the same protection as is afforded in the case of a "home-making" application by parties who are willing that that should be done. I am suggesting that that only gives point to the suggestion that the child who is going to be affected by divorce proceedings needs somebody to look after him, and unless something of that sort happens then he is going to be left to his own devices.

3289. You want all the powers to enter the house, to take the child, and to look after the child before any decision has even been made to about the case?—My colleague reminds me, and it is obvious, is it not, that we are not asking for any more power in this case than we have now in child life protection cases. It does not include the right of entry unless we get a warrant. In other words, supervision is all done through tact and kindness. Only if there is a real dispute can we go to the magistrate and get a warrant. That is a good old English way of doing it.

3290. Your proposal would mean legislation. At the moment you cannot get a warrant out of me to go and see a child?—We can get a warrant out of you, my Lord, if we have a case where a child is being neglected and we know that, and we want to get into the home and have a look at it; and you grant the warrant hands down.

3291. What you have to do is to come into my court and swear written information to the effect that honestly and verily you believe that the child is in a condition

which needs protection. You could not do that where you have never seen the child, not been into the home, did not know the people?—All we are asking for is the opportunity to befriend this child. Leave it to us to do the rest, except in the really hard cases where we come back to you and ask for help. It is a matter of working the machine. It is a matter of officers who know the job, working for the benefit of the child within the law and with not too much of the "stand and deliver" attitude. We do not want that but co-operation. (Mr. Madocks): Nobody who knows your department will say otherwise—you always try to help—but what I am afraid of is how it would work out in practice.

3292. (Mr. Young): Mr. Ainsworth, I want to put, as I see it, the position right, because I do not think in fairness to yourself you have done so to Lord Keith in connection with the Children's Acts. I am familiar with them in Scotland, and they appear to be much the same as in England. Under the Act of 1933 a child may be committed to your care by a court. You do not take it, it is committed to you by a court if it is in need of care or protection?—Yes.

3293. Care or protection is defined in that Act?—Yes.

3294. And a child needs to come into one of two categories before it comes within that definition. In the first place, it needs to have no parent or a parent who is not exercising fit guardianship or is not a fit guardian. Secondly, it needs to be either falling into bad associations, exposed to moral danger or beyond control. So that you do not get a child committed to you under that Act unless it comes within these two definitions. Is that right?—Under that Section of the Act.

3295. There is no other Section as far as care or protection is concerned?—May I put that right. If a child is persistently a truant and his father has been before the adult court and fails to make any progress and the child is deemed to be the miscreant himself, then the magistrates can make an order which directs the education authority to bring the child before the juvenile court under Section 49 of the Education Act of 1944. Having done so, the magistrate then deals with him exactly as if he had been brought before the court as being in need of care or protection and he is so deemed. Thus, you could find a truant who, at the end of the line, would come to us as being deemed to be in need of care or protection, and yet in fact the genesis of the case was truancy.

3296. You still have to have, under the Act of 1933, a quasi-criminal proceeding before you get a child committed to your care?—No, Sir, I would suggest that if a parent appears before the court on the ground that his child is not attending school, and the court refers the case to the juvenile court on the ground that the child is beyond control, that is not really a criminal business. (Chairman): I am reluctant to intervene, but this is a question of interpretation of a statute, is it not? (Mr. Young): I just want to get it on to the record, because I do not think the position has been properly put. (Chairman): I was not questioning the propriety of the question in the least, but I thought it really was a question of the wisest interpretation of an Act of Parliament.

3297. (Mr. Young): Can I put this to you? The distinction between the 1933 Act and the 1948 Act is that under the 1948 Act you do not take a child, but you receive a child?—If you will permit me, Sir, for one moment, the 1948 Act includes within its scope child life protection, adoption of children, and children committed under the provisions of the 1933 Act. Section 1 of the 1948 Act deals with the receiving of children into care. In Section 2, there is the opportunity for assuming parental control in exactly the same way as if the child were committed by a court. If a child is received into care because its parents are unfit to exercise proper care the authority can pass a resolution—as they could even before the Act of 1948—assuming parental rights. Not only do we get children who are purely in need of care or protection, but we get a whole host of children who for various reasons come into the net of the children's department and who are looked after according to their needs.

(Chairman): Thank you very much for coming here and helping us and for your memorandum. You have been most helpful to us.

(The witnesses withdrew.)

PAPER No. 40

MEMORANDUM SUBMITTED BY THE EXECUTIVE OF THE NATIONAL UNION OF TEACHERS

1. Convinced that the country's future depends on its individual members whose personalities are largely the result of influences and environment experienced during childhood, the National Union of Teachers has always based its policy on the needs and aspirations of children.

2. Because the problems which the Royal Commission are considering must be inextricably linked with the life and welfare of many children the Union's Executive have prepared the following statement for the Commission's consideration. For the purpose of preparing the statement the Executive asked their local and county associations to reply to questions, the answers to which, in the opinion of the Executive, might be of assistance to the Commission. Those questions and answers (which relate only to children or adolescents) are appended.

QUESTION 1. *What is the effect of divorce, separation, or desertion on children? Do children of divorced or separated parents feel that they are different from other children? If so, in what way?*

3. Children who are deprived of a parent on account of divorce, separation, or desertion usually lack the sense of security necessary to their well-being and development. They feel different from other children and often suffer a sense of shame when they are asked, particularly by other children, why they have either no father or mother. Frequently they answer evasively or by half truths and they feel resentful, inferior and at a disadvantage and consequently lack confidence in themselves. This gives rise to emotional instability, which varies according to the type and comparative violence of emotional stress leading to the separation of the parents, the consequent domestic environment after separation, and the age and temperament of the individual child.

4. In some cases a child may become reserved and secretive, seeking satisfaction in keeping to himself and not mixing with other children, or may get beyond the control of his father or mother and show signs of gloating in his position and wanting to bully other children. Of course many children through the love, affection and understanding of the father or mother are able to overcome these strains and stresses.

5. Nevertheless, behaviour difficulties arise both at home and at school. Sometimes at school the standard of work deteriorates, and it is not uncommon for home disturbance to affect the child's opportunities for educational advancement by failure in examinations normally within his ability. None more than teachers know how children crave affection.

6. While there are many instances where, after separation, there has been an improvement in the child's position the opposite often appears, for the love of the parent may be so lavished as to spoil the child, which in turn creates further difficulties.

7. Many children in residential schools or homes for maladjusted children are there as a result of broken homes. The following incident reported by a teacher in one of these homes is an illustration. Three fifteen-year old girls coming to say good night saw a photograph of a wedding in a newspaper. One of them remarked, "Don't you ever get married yet?" When asked "Why?" the second replied "Because your husband may be unfaithful to you". The third girl added "Men are all the same—never treat them". The teacher remembered that the three were children of divorced parents.

QUESTION 2. *Should boarding education be provided as a palliative or as a means of restoring morale of a child who loses one or other parent in this way?*

8. Boarding education cannot restore the sense of deprivation that a child who has lost his parent may feel. While it may sometimes provide a temporary relief, there is a danger that he may feel that he is being removed from his home for other reasons than his own immediate welfare. If the parent is suitable and can provide a reasonable home and environment the child under eleven years of age should not be placed in a boarding school, but

where neither father nor mother or close relative can provide a good home, boarding education should be made available. The financial insecurity of the parent or the need to be away from home may make it impossible to provide an adequate home environment. Then boarding education may become a necessity and it is to be noted the local education authority is empowered to give financial aid. Boarding schools cannot replace the home as a stabilising factor in a child's life, they can, however, provide valuable help where neither parent is of the right type to be responsible for the child's upbringing. It is important that after separation or divorce there should be some "follow-up" of the children by a social worker so that the child may be kept under observation.

QUESTION 3. *Do you think that the children's future rather than the relief of one or other parent ought to receive more consideration in divorce cases? Do you think enough attention is given to the future of the children mentally and spiritually as well as physically? How bad must a home be before, for the children's sake, it ought to be broken up?*

9. A child cannot develop normally in a home environment where there is no love, affection and sympathy. It is, however, important that the home should be kept together until the last possible moment. Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken, for children appear to accept their homes and the standards set therein with very little question, and provided there is a medium of affection, they suffer less from what is termed a bad home than from the breaking up of such a home.

10. If both parents could be made to realise the effect of broken homes on children it might, in some cases, prove to be a means of reconciliation, but it is difficult to see how the position of the children can affect the decision of a court in favour of, or against, granting a divorce, as the law stands at present. Nevertheless, consideration might be given whether through some change in the law, more attention could be given to the position of children before the granting of a divorce.

11. At present the custody of the children is a matter for consideration or decision when the divorce or separation has been granted, but the reasons for the decision are not always clear. It is important that guidance should be given to those who are to have the custody of the children, for many mothers, fathers, or other relatives, while conscious of the physical wants of children are unaware of their psychological and mental reactions and consequent needs.

QUESTION 4. *Do you think that divorce being available to innocent or guilty party after, say, seven years' separation would be generally good or bad for the children?*

12. Divorce after seven years' separation will not usually be more harmful than separation, since the child has already suffered from a broken home for so long. A divorce gives the parent the opportunity to make a fresh start in the setting up of a new home atmosphere in which the child might be happy, but in this there is an element of risk to the child on the re-marriage of the parent. The introduction of a substitute for the defaulting parent is not always a success for this depends on a number of factors including the attitude of the step-parent to the child.

QUESTION 5. *If the parties have to separate, on what principle should the judge allot care of the children, bearing in mind that at present the court takes as the criterion the welfare of the children and no other?*

13. If the parents have to separate, the following should be taken into account:—

(a) The physical and moral welfare of the children.

(b) The amount of affection felt by the child for either party.

(c) The spiritual and mental calibre of each parent.

PAPER NO. 40—MEMORANDUM SUBMITTED BY THE EXECUTIVE OF THE NATIONAL UNION OF TEACHERS

18 June, 1952]

MR. O. BARNETT, B.E.M., B.A., MR. E. L. BRITTON, M.A., MISS A. M. EDWARDS
and MR. W. GRIFFITH

(d) The security and steadfastness of the home, including material conditions.

14. It is difficult to state categorically as to which should have the greatest weight, but great weight, especially in the case of younger children, should be given to the desirability of a child being with its mother.

15. Whether it is wise for the child to maintain contact with both parents is a moot point. Consequent division of affection sometimes causes more harm than good and experience seems to suggest that a complete break may be the lesser of two evils.

16. It should be stated that many teachers are of the opinion that great care is at present taken in deciding who shall have the custody of the children.

QUESTION 6. *Are the arrangements for (a) assessing (b) securing payment of separation allowance or alimony and maintenance (in the case of divorce) satisfactory from the point of view of the children?*

17. Teachers agree that the assessing of the maintenance allowances in respect of the children should be on the most generous scale possible. It is pointed out, however, that there is much evasion of payment and that accumulated debt can be eliminated by imprisonment—with further adverse effects on the children. Apparently the parent or guardian has to take the initiative in recovering any money not paid. It is suggested that some improvement would be effected if there were machinery whereby action to recover payments could be taken by the court in the absence of an application by the parent (usually the mother), thus avoiding the accumulation of large amounts unpaid.

18. In respect of some orders made by local courts it is possible to make adequate arrangements, which in some areas ensure that payments are made regularly.

QUESTION 7. *At what stage ought preparation for marriage (not merely biological) to be given? Should it be provided within the educational system? Should it be compulsory?*

19. Preparation for marriage is desirable, but it can be argued that the general education of the child in school, at home and in the church, is a preparation for life of which marriage is one phase. However, there is a need for special preparation to help young persons to make a success of marriage, and to enable them to overcome some of the obstacles or difficulties which lead to unsuccessful or unhappy marriages. For instance, inefficient home

management of income often leads to unhappy married life, and it is suggested that courses for engaged couples should be made available where this and other problems could be tackled. In these days, when there is a tendency even in schools for many pupils to specialise in a few subjects, and, subsequent to leaving school, to follow a specialist career, often away from home, opportunities should be available for them to attend courses in housecraft.

20. As far as the psychological and biological aspects of marriage and married life are concerned, it would be advantageous if these could be dealt with immediately before marriage—during the period of engagement. It would be difficult to make attendance compulsory but nevertheless the local education authorities at institutions of further education should provide courses under the supervision of suitably trained and experienced staff. Churches, marriage councils and other voluntary bodies are already taking steps to provide these. It is probable that many young persons who need most guidance would not attend, but that should not prevent an extension of this important work. If county colleges were in being as envisaged in the Education Act, 1944, for young persons of sixteen to eighteen years, opportunities could be provided, especially during the last few months of their attendance.

QUESTION 8. *Is sixteen too old or too young an age for marriage?*

21. The general opinion of teachers is that sixteen years is too young an age for marriage. It may be true that judged solely from a biological point of view sixteen years may not be too young, but the complex social and economic factors of modern society call for a long preparation before the individual has reached a stage of sufficient maturity to enable him or her to carry the responsibilities of citizenship, including those of family life.

22. To advocate marriage as a means of "making an honest woman" of a pregnant girl of tender years is to be deprecated. The resultant marriage starts in the wrong way, and is less likely to stand up to the wear and tear of life than a marriage based on genuine affection.

23. While nearly all express the view that the minimum age for marriage should be raised, and some express the view that the age should be raised to twenty-one years, the majority express the opinion that the age should be raised to eighteen years.

(Dated 2nd February, 1952.)

EXAMINATION OF WITNESSES

(MR. O. BARNETT, B.E.M., B.A., MR. E. L. BRITTON, M.A., MISS A. M. EDWARDS and MR. W. GRIFFITH, representing the National Union of Teachers; called and examined.)

3298. (Chairman): We have here Mr. Barnett who is the Vice-President of the Union, Mr. Britton, the Chairman of the Education Committee, Miss Edwards, the Vice-Chairman of the Education Committee, and Mr. Griffith, the Secretary of the Education Committee. To whom should I address my questions in the first instance?—(Mr. Barnett): To me.

3299. As I understand it, the National Union of Teachers covers the whole of the United Kingdom?—Only England and Wales.

3300. Of the teachers in England and Wales, about what proportion do you suppose are members of your Union?—I should say a very great proportion, ninety per cent. or something like that; we have 200,000 members.

3301. We had yesterday the Headmasters' Conference and the Association of Head Mistresses. Would I be right in thinking that all, or nearly all, of the headmasters and headmistresses who do not belong to those two bodies are members of your Union?—Yes, I think that would be a fair assumption, Sir; some who belong to those two bodies would also be members. (Mr. Griffith): Those two bodies consist of a very small proportion of the schools in the country. There are over 30,000 schools

in the country and I suppose the Headmasters' Conference would be able to speak for about 200. We claim to be able to speak on behalf of the overwhelming majority of the 30,000 schools.

3302. I understood that was so. Do you know for how many schools the Association of Head Mistresses speaks?—I am not quite sure, they consist not only of the independent schools but also of a number of grammar schools; there is a considerable overlapping of membership, dual membership.

3303. Then you of course have to deal with children from a very early age, I suppose?—(Mr. Barnett): The whole school range.

3304. What is the constitution of your Union, of what does the governing body consist?—The executive, which is freely elected by the constituent local associations.

3305. That is by the local and county associations?—Yes, the country is divided into districts and each district sends up members to the executive, who are all serving teachers.

3306. Before I ask you questions is there anything you would like to add to your memorandum or to explain in it?—Only this, my Lord Chairman, that we welcome the opportunity to give evidence before the Commission.

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[Continued]

I was struck this morning, listening to the evidence given by the Association of Children's Officers, how much we have in common with their point of view. While as a Union, which has a membership of very widely varying individual opinions, we could not give you a view on divorce where there are no children, we are vitally interested in questions where children are concerned, and we feel that no time is too early for consideration of the children's point of view.

3307. This is just a broad general question, would your Union be in favour of or against extension of the grounds of divorce, or do you not wish to express any view on that?—I think we would find it difficult as an organisation to give you a view on that.

3308. I thought you might; I shall not press the matter. Would you turn to the answer to Question 3 in your memorandum. You say this:—

"Every attempt should be made to improve unsatisfactory homes before divorce or separation proceedings are taken, for children appear to accept their homes and the standards set therein with very little question, and provided there is a modicum of affection, they suffer less from what is termed a bad home than from the breaking up of such a home."

First of all, when you speak of a modicum of affection, you mean a modicum of affection passing from the parents to the children?—Yes, Sir.

3309. You are not speaking of affection as between the husband and the wife, as I understand it?—No, the affection of the parents for the child.

3310. Then I want to know what you had in mind when you spoke of "what is termed a bad home". Could you give us a definition of what in your view is a bad home, and what you would describe as an indifferent home, and what you would describe as a good home? What is it that renders a home a bad home in your opinion, from this point of view only?—Where it is bad for the child I think is the answer. We in the schools see unhappy children, children whose personalities are spoilt by the environment in which they live; there, I think, is our definition of a bad home. Children vary and homes vary and to make a broad generalisation is very difficult in this respect, but where there is a real affection for the child on the part of the parents we would regard that as being the kind of home which, whatever the other considerations, should not easily be broken up.

3311. In other words, you do contemplate, as I understand it, that there may be what you would term a bad home but if the parents, even in that bad home, have affection for the children, you prefer that to the breaking-up?—Yes, I think so, Sir.

3312. (Mr. Brown): I would like to go back to Question 3. At the beginning you say:—

"A child cannot develop normally in a home environment where there is no love, affection and sympathy."

Would you agree that the greater the friction between the parents the greater the chances of abnormality, and the greater the chances of creating a problem child?—(Mr. Britton): I think that it depends to some extent upon the nature of the friction. The child does require of the home a degree of affection and a degree of feeling of security. I think that if the friction between the parents gets as far as blows or physical violence that does upset the child very considerably. I think also that if the friction between the parents results in tears on the part of one parent, that upsets the child very considerably, because, in the eyes of a young child at least, it is completely and utterly wrong that an adult should cry. But if, on the other hand, the friction between the parents is bickering, argument in words, then I think a great deal of that passes over the children's heads without their realising that anything very much is unkind. I would point out that a child of three, four, five or six years is a very different being from a child of thirteen, fourteen or fifteen years. I think that whereas with the young child words and, shall I say, actions of infidelity have very little effect, possibly that may not be quite so true with the older child who does understand the implications far more. On the other hand, it is probably the

younger child who is far more in need of parental affection and is going to be far more upset psychologically if it does not get it.—(Mr. Bennett): I would add to that, that in my view the worst kind of friction is where the parents have grown to hate each other and each wishes to enlist the support of the child against the other and the child is torn between the two and often does not know what to make of the situation.

3313. At the end of the paragraph you say:—

"... and provided there is a modicum of affection, they suffer less from what is termed a bad home than from the breaking up of such a home."

I would suggest that a bad home may be defined as a home where there is quarrelling and friction, the mother crying, the very things that you have mentioned, to the extent that strong emotional reactions and tensions develop in the child. Do you think that is a fair definition of a bad home?—Yes, particularly the last point. There are some children who can live in homes of that kind without being seriously affected because of their own particular temperament, and there are other children who cannot.

3314. And now a broken home. By that I would say is meant one where the parents are separated by divorce, legal separation or desertion—your definition under Question 1. That is the situation where one child can turn to another and say: "Where is your Daddy?"?—Yes.

3315. Do you think that the act of divorce itself may create emotional tensions in the child? May the mere fact that the mother is divorced have some reaction on the child?—I think it depends entirely on the age of the child. I think Mr. Britton has already made this point. It has not that effect on the younger children, the children of primary school age. (Mr. Bennett): I would say that the really significant thing in the eyes of the younger child is the separation. How the separation happens is quite immaterial. It is not the relevant point in the eyes of the younger child.

3316. Would you agree that before the marriage was dissolved by divorce there must have been considerable friction between the parents?—(Mr. Bennett): Yes, I think we could assume that.

3317. Therefore, as far as the children are concerned, it was a bad home; it was a bad home where there was considerable friction, friction to the extent that the parents decided they would have to be divorced?—I would still return to what I said earlier on, that the temperament of the child is a very important point. All sorts of friction can be taken by some children without apparently serious harm, whereas in other cases it is very serious.

3318. Would you agree that the normal sequence is a bad home, a divorce and then a broken home?—Yes, I think so. (Miss Edwards): There is a broken home sometimes before divorce, is there not?

3319. I am talking of the case where there is a divorce first. Would you agree that each stage there, the bad home, the divorce and the broken home, might have the degree of friction to the extent that the child sufficient to make it possibly cause tensions in the child sufficient to make it maladjusted?—(Mr. Bennett): In some cases, yes.—(Mr. Griffith): Does it not depend on the definition of maladjustment? It has been said that we all suffer at one time or another from some form of maladjustment.

3320. In assessing the damage done by a broken home, would you agree that one would have to take into account the damage that had been done by the fact that before there was a broken home there had been a bad home?—(Mr. Bennett): Yes, I think one would have to take that into consideration.

3321. Would you agree that a broken home is the end of a sequence where damage has been done all the way along, or may possibly have been done all the way along, from the bad home, the divorce and then the broken home?—I should think that it, in general, a fair assumption.

3322. Do you think that it is possible to evaluate accurately the amount of damage that is done at each stage?—(Miss Edwards): I would think not. I think the amount of damage done at each stage would vary considerably, according to the age of the child and its temperament.

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[Continued]

3323. You would find it very difficult to evaluate the amount of damage done at each stage? You would not like to say that most damage is done from the bad home or from the act of divorce or from the broken home?—I would not like to make any decision on that.

3324. Would you say that it follows from that that it is dangerous to argue that broken homes are necessarily more harmful than bad homes, because most broken homes were some time previously bad homes, and the major part of the damage may have been done to the child when it was a bad home?—(Mr. Bryton): Where the child is not fitting normally into the school environment we find in the overwhelming majority of cases a back history of a broken home. It is much more usual to find this than parental disagreement and the home still whole. I believe we would say that the fact of separation is a very relevant turning point in the damage that is done to the child in robbing it of the affection and security that it requires from the home environment. I think we would find it very difficult to assess how much of that damage might have been done before the actual separation and how much of it was subsequent to the separation.

3325. Let us take the case of a really bad home, one where there is frequent cruelty on the part of the father to the mother and the child is a witness of that cruelty, perhaps there is drunkenness and gambling, and the wife bears it for a year just, shall we say, for the sake of the children. If it is an intolerable home like that, would you think that at the end of a year that would probably result in a case of a maladjusted child?—(Mr. Barnett): My own experience of that is this: that very frequently when we talk about a maladjusted child it is the parents themselves who are maladjusted. I have had one or two examples of that in my own personal experience, where a child appeared to be, so far as I could see at school, quite a reasonable individual. In one case the child was sent away to a home for maladjusted children. When I examined that particular case it did appear that really it was the parents who were maladjusted rather than the child, the child could actually do well in different circumstances.

3326. Supposing the parents are so maladjusted that they are doing harm to the children and that the marriage is brought to an end by a divorce. From the point of view of the child, speaking as a teacher, what do you think the effect of the legal dissolution of the marriage is on the child? Do you think it has a big effect or a little effect?—(Mr. Bryton): I should say that it has this effect: that it makes quite obvious and public the fact that there has been this difference of opinion between the parents concerning quarrelling and actual separation. There is a mark of finality about it in the eyes of the child, more particularly in his relationship with his fellow children at the school. It rather underlines the fact that "My mummy and my daddy do not live together like everybody else's mummy and daddy".

3327. Would you say that in certain cases the bringing to an end of a marriage might be beneficial to the child if the conditions were almost intolerable?—I do not think any of us would want to maintain a home where the child was a witness of constant cruelty which it could understand as cruelty, particularly in the form of physical violence.

3328. And you would say that in certain cases the actual act of divorce itself might be of benefit to that child?—(Mr. Barnett): If I may go back to my earlier case where I thought it was the parents who were maladjusted, then I would prefer to see them split and the child with one of those parents, rather than that the child himself should be sent away.—(Miss Edwards): In no case would I say that a divorce was of benefit to a child; it is probably the lesser of two evils.

3329. Would you turn to Question 5 on custody? Would you like to say anything more on this?—(Mr. Barnett): I would only like to say that we think the process of deciding all the issues should start as soon as possible. We are quite sure the courts do their best with the evidence that is before them, but we do feel that if the collation of that evidence started at the earliest possible time then some of the few mistakes that are made now could possibly be avoided.

3330. (Chairman): Arising out of that, might I say that of course the court is in a difficulty in taking any steps until it has decided whether or not there is to be a divorce or a separation?—If I may follow up that point, what we mean is that as soon as a petition for divorce is brought, then we feel, like the body which gave evidence before us, that some machinery should be set in motion immediately to look after the interests of the child and collect the best possible evidence.—(Mr. Griffiths): We make the point in paragraph 10. We realise the difficulty there is as to the way in which the interests of the children should be taken into account, but we think that the court itself should have the welfare of the children in mind, even before the case is heard.

3331. (Mr. Brown): In paragraph 10 you say:—

"Nevertheless, consideration might be given whether through some change in the law, more attention could be given to the position of children before the granting of a divorce."

Apart from what you have said, have you anything in mind?—(Mr. Barnett): We have thought of the various avenues through which this might be done, immediate contact with the children's committee, for instance, but what we are most anxious to see is that something should be done. (Mr. Griffiths): We were wondering whether perhaps there should be somebody connected with the court whose duty it would be to investigate the position of the children, so that it would be quite certain that the interests of the children had been looked into before the case came on. It might not be sufficient to leave it to some outside person to do this, it might be better that the court should have some person responsible for this investigation.

3332. In paragraph 11 you say:—

"It is important that guidance should be given to those who are to have the custody of the children . . ."

Who, in your opinion, should give the guidance?—There are some bodies at present in existence which do give guidance.

3333. I was wondering if you had some special new body in mind?—No.

3334. (Mr. Flecker): In paragraph 3 you say:—

"Frequently they answer evasively or by half truths and they feel resentful, inferior and at a disadvantage and consequently lack confidence in themselves. This gives rise to emotional instability, which varies according to the type and comparative violence of emotional stress leading to the separation of the parents . . ."

I wonder if you would make it a little clearer just what you mean there? Is the emotional instability in the children?—Yes.

3335. And that emotional instability in the children varies according to the comparative violence of emotional stress in themselves, or in the parents?—I am afraid that is badly worded. It is the parents who have the emotional stress.

3336. One of the instances that you give in which a boarding school may be useful is when the one parent who is left is unavoidably away from home at a time when the child will be at home. Is that in your experience one of the greatest and most widespread difficulties?—(Mr. Barnett): Yes.

3337. One answer to it would be more part-time work for these mothers?—It would depend on the economic position of the parent.

3338. It has been said that the employer dislikes having to pay the national insurance contribution at the full-time rate and that consequently part-time jobs are not easy to get? Is that your experience?—I think there are areas in this country where you can get part-timers very easily. I do not think the scarcity is general. It is quite easy to get people for part-time work in my own city.—(Mr. Griffiths): May I add that the local education authorities have the power to give help to the parents in cases of this kind to pay for boarding school education, but I think there is quite understandably a certain reluctance among the heads of boarding schools to take many of these cases, on the ground that they already have a proportion of children whose parents are disturbed. I am also not quite sure whether all local education authorities are using all the power they have to help people who need boarding

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[Continued]

school education for their children for reasons such as have been mentioned. There are 146 local education authorities and there is a variety of treatment among them—indeed we take some pleasure sometimes in the variety of British education—but it does mean that in some cases there is a reluctance on the part of the local education authority to spend the money and also to find a suitable boarding school for the children. Sometimes there is a reluctance on the part of the parent to apply.—(Mr. Barnett): Could I develop that. The provision for boarding school education for the brighter children is relatively better than it is for those, say, from the modern school. Most of the boarding schools would be regarded as grammar school type, and many local authorities will only send boys or girls to boarding schools, whatever their circumstances, if they think they have already shown by their ability and aptitude that they are of grammar school type. So it is at the moment easier for the child coming from the broken home who is intelligent to be catered for in this way than it is for the child coming from a modern school. I am sure that is a fair statement of the position.

3339. You say that boarding schools cannot replace the home. Would you agree that nothing can replace a good home; and that the people who say, send a child to a boarding school and the problem is solved, are living in a fool's paradise? The child may get more chance in a boarding school than a day school and a good teacher can help to build up some security for the child, and may help the lone parent who is trying to do the job of two parents. Would you agree that both those are good things to be attempted?—(Mr. Britton): I think we should be in general agreement.

3340. The third thing which a boarding school can sometimes do is to give the child from a home where the parents are constantly fighting a respite from the tension, so that the child is then better able to face the difficulties in the home on its return. Do you think that is so?—I think it might be, but there is the other side of the picture as well. I think that the child who responds best to boarding school education, or to going away from home at all, is the child who has got a very stable home behind him. No child who has got a stable home runs going away because he knows the home is going to be there when he comes back. On the other hand, if the home is broken, children often react very unfavourably to going away from what little home they have got because they are afraid it will not be there when they come back. To some extent I think the danger of the boarding school is that the child who has lost one parent may feel that the other one is being taken away as well.

3341. Would you turn again to paragraph 11? In replying to Mr. Brown's question you did not say who you thought should give guidance to those who are to have the custody of the children. It has been suggested to us that insufficient use is made for this sort of work of retired teachers whose experience might be very valuable and who might be glad to undertake this work when they reach pensionable age. Would you care to comment on that suggestion?—(Mr. Barnett): It is the first time I have had the question posed to me. My first reaction would be against the suggestion. I find that the older people get the less tolerant they become. The type of person I had in mind would be somebody not so old as that and full of human understanding. I should doubt very much whether it would, in general, be a good idea to appoint retired teachers for that type of work, on the ground of their age alone. (Mr. Britton): My immediate reactions are exactly the same as Mr. Barnett's. I think we would say that that does not mean there are not some retired teachers who have got that understanding and flexibility of outlook which would make them satisfactory.

3342. With regard to paragraph 15, do you think that there is too great reluctance to refuse access to the parent who is not being given custody of the child, and that access is allowed in many cases where it might be better for the child to be entirely separated from the one parent? Do you think that, because it seems hard to deprive a parent of access, perhaps too little regard may be paid to the real interests of the child?—(Mr. Barnett): I rather think that is true. If I were a judge I would probably do the same. This right of access has caused some of the worst problems. I find that often the parent who has the right of access uses the access to sow dissension in the child's mind against the other parent. It would not happen in

every case and these cases have to be judged individually. It depends on the attitude of the parent to the divorce itself, but where the feelings are extremely bitter when the divorce takes place, that kind of thing is likely to arise and to cause very grave difficulties in the minds of the children concerned. (Mr. Britton): I think that is particularly true when the parent who has not got the custody sees the child for a short time on fairly frequent occasions. That sometimes happens. Then you have the situation where the parent who has got the custody has to do the general disciplining of the child and where the other parent tends to give sweets and outings and become a competitor for the child's affections. (Mr. Barnett): I had myself one case where the parent was given access to the child only at school in the presence of the headmaster. I think that must be very unusual, it is the only case in my experience. In that very short interval when the child came in to see the parent that parent did everything possible to sow dissension against the other parent, by saying that the child was not too close and its clothes were not very good, and attempting to give money, and so on. (Mr. Griffith): May I say this; since our memorandum was submitted, I have been approached by a person who is not connected with the National Union of Teachers to ask whether I would put forward a case. I would like to do this, because it is a difficult case to understand. It is a case, an account of which appeared in the Press about two years ago, of a husband who was granted a divorce because the wife was misconducting herself with her step-son, and yet I understand that she is still allowed to see and have the young children with her.

3343. (Chairman): I think perhaps if you would send the case in to the Commission you could do so without going into details here and now.—I would like to do that, but I want to point out that it is not connected with our evidence at all. (Chairman): By all means send it in.

3344. (Mr. Fletcher): In cases where teachers are worried about the conduct of a child or its reactions, and feel that the home circumstances, for instance separation of the parents, are at the root of the trouble, would you say that there are services available to teachers, from which they can get all the support and help that they desire? I have in mind people like the children's officer or the probation officer.—(Mr. Barnett): I think the present services in that respect are adequate, provided there is someone to see they are utilised for each particular case. There is no need, in my view, to appoint new people to make these enquiries and to do these jobs, the people are there already in various organisations. What probably is lacking is someone to start the machinery working and to ask these people to do these jobs.

3345. Can you not do that yourselves as teachers?—We could not in a case of divorce, because we would not know anything about it.

3346. If a child is showing signs of being unsettled you can be responsible. . . .—That is normally part of the head teacher's duty, but on this special issue of divorce we probably do not get to know of it until the divorce has taken place. (Mr. Griffith): There is also this, that the teacher is not always aware as to whose function it is. We had hoped at one time that the children's service would be a part of the educational system of the country, but that has not happened. In the schools we generally get in touch with the chief education officer, or his representative, and let him sort out the responsibility.

3347. (Mrs. Brace): Do I gather from what you have said, Mr. Griffith, that the fact that the children's officers come under another local government department would rather deter the teachers from enlisting the help of a children's officer?—(Mr. Griffith): Not at all, but we would rather do it through the education department.

3348. (Lord Keith): Does your Union cover teachers in boarding schools, or only in day schools?—No, teachers in all types of schools, colleges and universities, also teachers in approved schools and all kinds of special schools. You cannot mention a type of school our members are not in.

3349. How exactly do you amass the information that enables you to answer the various questions that are put in this memorandum? If I might put it in this way; is it

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information you derive from the children?—No, we have more than 600 branches and we circulate each one of our branches. The branches will sometimes consider a matter themselves; at other times they will put it to the people in the branch who are interested in the particular problem. These answers have therefore been obtained in a variety of ways, from the experience of individuals, of committees, of teachers who are magistrates, of teachers in approved schools, and so forth.

3350. What I am getting at is this, is the source of your information in all cases teachers?—Yes.

3351. How do the individual teachers go about getting the information that we find in this memorandum? Is it the result of their experience that enables them to answer these questions?—(Miss Edwards): If there is the right atmosphere between a child and its teacher, the teacher soon comes to know when there is anything wrong with the child—the child comes and talks to the teacher or the teacher will find a child sitting in an unusual way and makes enquiries to find out what is causing the trouble.

3352. That is what I asked before, do you get the information from the child?—(Mr. Barnett): Can I put it in this way? I do not think the teachers questioned any of the children but they answered the questions from their long experience and contact with children.

3353. So the real source of their experience is their acquaintanceship with children and the enquiries made of children?—Yes.

3354. In other words, it is not based upon experience inside the home or experience of parents, is it?—(Mr. Griffith): Many of our teachers are parents, they know the homes of the children and they know the fathers and mothers. Nobody could say they did not know what was going on in the homes in their own villages and their own towns.—(Mr. Britton): If I might add to that. The experience also comes from contact with parents, because if you find a child is not reacting favourably to the school circumstances one of the first things the majority of head teachers and class teachers do is to try and make some sort of contact with the parent, drop a line to the parent and get him or her to come along and talk. Sometimes you meet with a blank refusal, the parent will not come; at other times the parent comes and discusses, often quite intimately, with the teacher the details of the home life. You also get direct approaches from the parents, because some parents who are having difficulties at home will try to enlist the co-operation of the school on their side of the argument. It is not unknown for both parents to come along and try and enlist the co-operation of the school, each on his own side.—(Mr. Barnett): If I might follow up what Mr. Britton has said. We tend to meet a bigger proportion of parents of the type than of the normal parents. As Mr. Britton said, parents frequently come to us. A school is a very complex organisation nowadays. One of the first signs if father goes off in poverty in the home. Through the schools parents can obtain free meals for the children and often there will be a visit from a parent in this situation to try and get free meals or help in that way to meet the temporary financial difficulty. One does get the impression as head of a school that a far bigger part of the population comes from broken homes than is actually the case. One would imagine it was a high percentage, something like thirty per cent., if one did not realise that was not the case. So we really do get first-hand evidence from the parents. Then, we have in our membership many teachers who are magistrates, and because they are teachers, they serve in the juvenile courts. Many of those send evidence in to our education department when an inquiry of this kind is made. So we are giving evidence based on real experience.

3355. I might as a last word indicate what was in my mind, whether people like probation officers were more in direct touch with the homes that we are concerned with, and with the problems arising in those homes, than, say, teachers, who perhaps see things from outside the homes?—I think the answer to that is this, a probation officer goes inside the home more than the teacher does. It is not true to say that teachers do not visit homes, because they do, but the probation officers visit the homes far more. What the teachers do get very often is the report of the probation officer on his visit to the home.

3356. And that will be part of the source of your information embodied in this memorandum?—Yes.

3357. (Mr. Justice Pearce): Mr. Brown put to you the sequence of the bad home, the divorce and then the broken home, and suggested that the damage to the child might have been done by the bad home, before the divorce occurred. The example was given of a divorce on the ground of cruelty where obviously serious damage might be done to the child by its witnessing the acts of cruelty. Would you agree that where the break-up of the home arises from desertion or adultery or separation by mutual consent, in these days the parents do not as a rule have rows and scenes in the presence of the child, of so serious a nature as to do harm to the child?—I think that is often very true. I have in mind one particular case, a boy in my own school, where until the mother left the child was happy, worked hard and was doing well. When the mother went off with someone else, that immediately caused a serious change in that child in school, which still persists after two years. There was, as far as I could see, nothing before that; the child was happy, worked hard and was a perfectly normal child.

3358. If it is true that there are more breaks of that kind, that is to say without serious rows, it would look as if the damage to the child had not as a rule been done before the break in the home?—I think that in many cases it has not been done before the break. (Mr. Britton): I think our experience very largely would be that the break is the really damaging factor in the majority of cases. Obviously, if there is a break the home cannot have been entirely happy beforehand, but as a general rule we find that no serious damage has been done until that break comes and then that is a very serious damaging factor.

3359. (Mr. Jones-Roberts): From what you have said, I understand that the National Union of Teachers has members in schools in every village and every town throughout England and Wales so that you are in a very favourable position to discuss some of these matters with us. I would like to know whether you were able to localise the incidence of divorce in scrutinising the answers you received to your questionnaire. Evidence from some organisations suggests that the problem is formidable. We were told the other day that one in twenty of the children of this country would come from some kind of broken home. Now I put it to you, because you would know conditions in rural and urban areas, do you find that the problem is different in the villages from what it is in the large towns? If the problem could be localised to some extent that might throw light on some of the basic causes of divorce.—(Mr. Griffith): We can only give an impression, and my impression is that we did not have as many replies from the countryside as from the towns.

3360. That means that your organisations in the country would not have taken it as quite such a serious matter and would not have devoted the same amount of attention and time to answering your questionnaire?—The circular was sent around to each local and county association, some of which are in towns and some in the countryside. These associations meet frequently and the circular would be brought to their notice. My impression, I must say it is only an impression, is that we had more replies from the urban areas than from the rural areas. (Mr. Britton): I think that is bound to be true in any case on numbers of population alone, apart from the other factors of village life. There would be very few cases in the villages. Our members would probably feel that on the few cases that came to their knowledge they were not prepared to offer evidence. On the other hand, teachers working in the large cities deal with much bigger numbers and would therefore come across more cases and would feel they could give some guidance in a matter of this kind.

3361. I realise that it is very difficult to get the exact information one is seeking. I wonder, for instance, if your members are able to tell you to what extent they have to refer children to child guidance clinics, because of maladjustment? That might give you some kind of precise information?—(Miss Edwards): Quite often the children who have to be referred to child guidance clinics are found to come from homes where there is disturbance but I could not say that all maladjusted children come

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from such homes. Quite a number I have had to deal with during the last few years have been cases of children where there has been this kind of disturbance in the home, and they have had to seek satisfaction in some way or other and that is how they have sought it.

3362. That again would not help us very much?—I do not think it would.

3363. There is one other point. In paragraph 10 you suggest that more attention should be given to the position of children before the granting of a divorce, and in paragraph 8 you say that after separation or divorce there should be some "follow-up" of the children by a social worker. I wonder if you have thought this matter out and what your recommendations are. Can we take first of all the position of the children before the granting of the divorce? What exactly have you in mind there?—(Mr. Barnett): We did not feel that anything could happen until the point where one of the parents filed a petition for a divorce, but we did feel that when that point was reached there were serious implications for the children concerned and that therefore the State had some say in the matter then and would ultimately have to make a decision on the children. We felt that the best decision would be made if at that point, which we felt was the earliest opportunity, some investigation could be made as to the best that could be done for the children if the divorce were granted.

3364. You mean in regard to questions of custody that would have to be decided?—Yes.

3365. Had you in mind, for instance, that where there were children of the marriage, there should be a longer period between the decree nisi and the decree absolute, in order to enable these enquiries to be made?—I do not think we have gone into that question, though my own personal sympathies would be in that direction. It matters much less if a home where there are no children is broken up, and the break-up of a home where there are children should be the last resort.

3366. (Mrs. Jones-Roberts): I wonder if Mr. Justice Pearce could say what happens now?—(Mr. Justice Pearce): The position now is that either parent can make an application to the court for custody immediately a petition is filed, but no steps, such as those you are envisaging, are taken by the court in order to ascertain the position of the children at that stage.—That is where we think we can offer some concrete suggestion. (Mr. Griffith): We thought that if it was somebody's business to look into the position of the children, there might not be a divorce. At the present time it seems to me that there is no way of trying to reconcile the parents in the interests of the children. Even if only a few families were reconciled in that way it would be worth while.

3367. (Mrs. Jones-Roberts): Some of the bodies who have given evidence have suggested the appointment of a child welfare officer, who would be attached to the Divorce Court. You heard the suggestion made this morning by the Association of Children's Officers. You would also know that in the magistrates' courts use is made of probation officers. What are your views?—I can only give a personal view. My view is that the interests of the children should be taken into account during the divorce proceedings and that the court dealing with those should have some responsible officer answerable to it for the children. If you put responsibilities on all kinds of other organisations you get into the position where nobody is really responsible for the child.

3368. Had you in mind that the officer who had made the original investigation would be the person who would keep an eye on the children after separation or divorce?—I cannot say as to that. All I would say is that even the children's officer is confined to one area, and people may get a divorce in one area and afterwards move to another. There should be a better way of following up. After all, the person responsible for the children is, say, the London court can hardly be responsible for them if they move. If they happen to move to, say, Bournemouth, it should be someone in Bournemouth who would be responsible for the follow-up, and that person would send a report to the court.

3369. It would be a very big development, an entirely new departure, that after a divorce or a separation

somebody should be entitled to come and talk to the parents about their children?—Yes.

3370. You favour that?—Yes.

3371. Up to the age of sixteen or longer?—Yes.

3372. In paragraph 10 you say that it is difficult to see how the position of the children could affect the decision of the court in favour of or against granting a divorce. Had you in mind differentiating between marriages where there are children and marriages where there are no children? It was not clear to me what you meant there.—We did not know enough about the law to see how children could affect the granting of divorce. We thought that divorce was something between two adults. But we did think that the position of the children should nevertheless be taken into account.

3373. (Chairman): I think Mr. Justice Pearce would agree when I say that at the moment the position of the children cannot affect the decision of the court in favour of or against granting a divorce. There are certain grounds for divorce and certain other matters that are not grounds for divorce. That is what you meant?—Yes.

3374. You think that there ought to be some way of bringing in the children?—Yes.

3375. (Mr. Mace): When an application was made for a separation order, and not a divorce decree, would you still want an officer to investigate the position of the children as soon as the application was made?—(Mr. Britton): Yes, that is our view. We do feel that we want to defend the interests of the children, and damage can be done to them if the home is broken up, whether by separation or divorce.

3376. Would it apply to separation whether asked for in the High Court or in the magistrates' court?—We are not conversant with the legal problems involved, but we would say "yes", from the point of view of the child.

3377. (Lady Porter): In paragraph 15 you say:—

"Whether it is wise for the child to maintain contact with both parents is a moot point."

You go on to say that the consequent division of affection sometimes causes more harm than good and that a complete break may be the lesser of two evils. If in a divorce case, custody was granted to one parent and the other refused access altogether, do you not feel that would cause a great anxiety to the child, and that anxiety would last many months? Can a complete break really be made if the other parent has not died?—(Mr. Barnett): If the parents are divorced or separated but there was some kind of friendly relationship, not the bitter hatred there often is, that is a different case and access might be granted to the other parent, but where the only effect of giving access to the other parent is to disturb the child when that access takes place, that is the situation where we doubt the wisdom of granting access. On the point you have just about the lasting effect, a young child has a very short memory and I am quite sure that in the case of very young children the step would not be serious from the point of view of the child. It would very soon have forgotten the other parent. In such cases the parent becomes almost a stranger. The children wonder who the person is that they must see.

3378. I was not considering the young child, but the child of twelve or thirteen.—The case I had particularly in mind was a child of eleven or twelve; the divorce had taken place a year or two previously and it was my job to see the mother three times a year when she interviewed her child. It was obvious to me that the child was very quickly forgetting the mother and was very disturbed, and became increasingly disturbed every time that he had to see her. He did not really want to see her.

3379. I gather from that, that in your opinion a complete break would really not be very harmful to a child eventually? It might be at the start?—In many cases I do not think it would be harmful, it would be better for the child.

3380. (Siriff Walker): I understand that in the case of cruelty you say that much of the damage may be done to the child while living in the family with both parents, is that right?—Yes.

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3381. Leaving aside the cases of cruelty, am I right in thinking that in other cases there comes a stage when one of the parents leaves the home, and there is a separation or desertion? In those cases, is it the fact of separation or desertion that causes damage to the child?—I think Mr. Britton developed this point. Where there is real cruelty going on in the home, I should say the separation was for the betterment of the child.

3382. That is why I wanted to leave aside the case of cruelty and take only the other cases such as desertion or adultery?—The answer is that it is the separation that is the cause of the damage.

3383. That really invades the child's sense of security?—Yes.

3384. Supposing that after the separation or desertion, there is a divorce. Does that in itself do any further damage to the child? Take the case of a husband who goes away with another woman leaving the home with only the mother and children. If a divorce follows on that, does it do any further damage to the children, beyond what has been done by the fact of the father going away?—(Mr. Britton): I would say no, the divorce does no appreciable further damage. The real damage is done when the home visibly and obviously in the child's eyes breaks up.

3385. It is the fact of the conduct of the parent that does the damage rather than the court's act in dissolving the marriage?—That is what I would say.

3386. In paragraph 7 of your memorandum you give an illustration of three girls of fifteen who on seeing a photograph of a wedding made certain remarks. What is that an illustration of?—(Mr. Barnett): I think that this was intended to give the Commission an idea of the effect of divorce on the minds of children. Whereas marriage to a normal girl is something to look forward to, this is the way certain girls reacted where there was a background of divorce.

3387. I was rather struck with the form of the observation, "Do not marry, your husband may be unfaithful to you." It was not "Do not marry, your marriage may be dissolved." I am not sure what the point of that is?—(Mr. Griffith): The girls had a distorted view of things.

3388. You think that is the implication of it?—Yes.

3389. (Chairman): I thought the clue lay in the last sentence:—

"The teacher remembered that the three were children of divorced parents."

It was an illustration of what sometimes happens when children have parents who have been divorced, is not that the point of it?—Yes.

3390. (Sheff Walker): The girls are really saying: "Your husband may be unfaithful and you may have to divorce him?"—(Mr. Britton): I think the illustration is intended to convey rather that a background of divorce causes girls and boys to grow up with a distorted view of marriage in so far as they look on it with a certain amount of suspicion.

3391. (Mr. Beale): Have you any experience of difficulties in the continuation of education owing to the fact that a parent is not required to maintain his child after the age of sixteen?—I could not quote a definite case but it is a general view amongst teachers who deal with older children that that is one of the factors in causing some children to leave school rather earlier than they ought. I would not like to say that it is a clear-cut "Yes", but there is a general feeling on the part of teachers with older children that that does at times enter into the matter.

3392. From all that you have said about the effect of separation of the parents on the children, I would gather that you would feel that reconciliation should be attempted at as early a point as possible?—(Mr. Griffith): Yes.

3393. Have you any views as to whether the kind of parents whom you know would prefer to go to a probation officer or to a voluntary association, such as the Marriage Guidance Council?—(Mr. Britton): I think that,

speaking from experience of the kind of parents in my own locality, the difficulty is that they do not think in terms of going anywhere to seek advice; rather it would be desirable if the advice could be brought to them, incidentally to some other activity, particularly, I feel, if it could be brought in connection with difficulties that arise over children at school. Often the first indication that all is not well between the parents may be slight difficulties that the teacher notices the child is experiencing in school. I think that if the follow-up of those difficulties caused somebody to go to the home in a sympathetic manner, that might do a great deal of good in the way of reconciliation.

3394. It is a very difficult thing to do, because it almost amounts to interference in other people's affairs?—Yes.—(Mr. Barnett): That is where I think the reaction of the parents might be different, according to the type of parent. Whereas in some districts I know in Nottingham the probation officer would be recognised and accepted by the parents because he is so frequently visiting in the district, there are other parents to whom he might give offence because of the nature of the rest of his work; that type of parent would, I think, prefer the Marriage Guidance Council.

3395. So you would really like the two services?—I think there should be both.

3396. Do you feel that the opinion of the schoolmaster or the schoolmistress could be of assistance to the justices or to the judge, as the case may be, when the custody of children is being considered?—As part of somebody else's report, yes.

3397. Like Section 35 of the Children and Young Persons Act?—Yes. I would not like a headmaster's report to go into a judge in a case of custody. Rather I would think that whoever compiled the report for the judge might obtain, among his other enquiries, the opinion of the headmaster.

3398. You would not like to be asked to attend the court?—I should personally be afraid of the time it would involve.

3399. Would it mean attending more than, say, once in three years?—I should say it would, it might take up considerable time.—(Mr. Britton): I think we ought to say that we have not discussed the matter in any way. My personal reaction would be that I should be unhappy about sending in a written report, but I personally would feel that some good could be done by the head teacher, or in a large school, possibly a teacher who has had contact with the child, attending the court in some sort of advisory capacity in regard to the child, but that is a purely personal reaction on that.

3400. Of course, whatever a teacher says would have to be known to both parents and he would run the risk of incurring the displeasure of one or other of them?—Our fundamental point in being here is that we have the interests of the children at heart, therefore I think that the majority of conscientious teachers would be prepared to take the risk of offending one of the parents in the interests of the child. We do it in other respects when parents come to us on certain points.—(Mr. Barnett): If the head teacher were called upon to give evidence and he came down, as he must, on one side or the other in a case of this kind, the court might take a decision in the opposite sense, the child might stay in the same school, and there might be considerable friction on a point like that.

3401. You would think it was worth it?—Yes, definitely, so long as the incidence of such cases was not heavy.

3402. With regard to paragraph 21, have you any experience as to whether marriages contracted before the age of seventeen have been very successful, or less successful than others?—No experience.

3403. It is just a view?—My own view, it may be the view of other members here, is that we would definitely prefer a later age.—(Mr. Britton): This was a majority opinion as obtained from the evidence we collected from members of our local association.

3404. (Mrs. Brace): In paragraph 17 you speak about the father evading payment of maintenance and going to prison, and you go on to speak about the further adverse effects on the children. Do you suggest by that that the

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child suffers from the actions of other children, if it is known that its father has had to go to prison for not paying the mother's maintenance?—(Mr. Barnett): I do not know whether that is what was meant, but I am sure it would be true. If a child's father goes to prison, whatever the cause, that does not help the child's social standing with the rest of his fellows. Other children are not sufficiently interested to consider whether it makes a difference what the offence is. All they say is "So-and-so's father is in prison", and that is a very serious thing for the child concerned.

(The witnesses withdrew).

PAPER No. 41

FIRST MEMORANDUM SUBMITTED BY LADY CHATTERJEE, O.B.E., M.A.,
D.Sc. BARRISTER-AT-LAW

PREAMBLE

This memorandum, based on many years' experience as a barrister practising in the Probate, Divorce and Admiralty Division of the High Court as well as experience in other civil cases and as a social worker in London, contains the following submissions.

RECOMMENDATIONS

CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER
MATRIMONIAL CAUSES

1. Changes of name

(a) As a deterrent to so-called "food office marriages", it is suggested that identity cards should not be issued to persons who assert that they have lost their cards as well as those of their children, without the applicant producing a marriage certificate and birth certificate as proof of identity.

(b) Representations made by several organisations to the Committee on the Law of Intestate Succession¹ are some indication of the prevalence of these irregular practices.

2. Changes in legal preliminaries to marriage

(a) Minors

(a) When one or both applicants are minors, each applicant is required to sign a declaration that the other consent has been given, or that there is no one qualified to give it. In support of this declaration, a written consent should be deposited with the authority who publishes the banns or issues the common licence. In the case of civil marriages the consent should be deposited with the Superintendent Registrar and no certificate with licence should be issued by him, unless the applicant alleges strong reasons for urgency in writing and proves the same to the satisfaction of the registrar.² In addition, this written consent should be accompanied by a statement that to the best of his or her knowledge and belief the party is not suffering from any mental or physical disability which would render the marriage either void or voidable.

(b) These recommendations are based on the facts that a large number of minors, both boys and girls, are married every year and that a certain proportion of them marry men and women who have already been divorced;³ there is frequently great disparity of age between the parties,⁴ and a large number of illegitimate children have mothers under twenty years of age.⁵

(c) Adults

(a) It is suggested that in the case of both religious and civil marriages, both applicants, in addition to signing a declaration that there is no legal impediment to the marriage, should add that to the best of their

3405. Would you be prepared to suggest that the man should not go to prison for non-payment of maintenance?—(Mr. Britton): The point I wanted to make was that in many cases where the money is not obtained from the parent the child has poverty added to its other disadvantages, therefore we feel that the money should be obtained from the father and that he should not be able to work off his debt by going to jail.

(Chairman): We are very much obliged to you for the memorandum and the help you have given us this afternoon. Thank you very much.

knowledge and belief they are not suffering from any mental or physical disability which would render the marriage either void or voidable. In the case of civil marriages, no certificate with licence should be issued by the registrar unless the applicant alleges strong reasons for urgency and proves the same to his satisfaction. This will bring the procedure into conformity with Scottish law, where "a Sheriff's licence, which has the effect of dispensing with the requirement of proclamation of banns or publication of notice", can be obtained "only in exceptional circumstances of urgency."⁶

(b) All applicants, whether minors or adults, should be required to produce their birth certificates and identity cards and where these do not tally they should give reasons.

3. Marriages voidable by statute⁷

(a) It is suggested that medical opinion be taken as to whether the period of twelve months should be extended to cover cases that may become apparent at a later date.

(b) Where a declaration is required regarding mental or physical disability and it is later found that such a disability did exist, the person or persons who signed such declaration may be required to show that they had no reasonable ground for not signing the required declaration.

(c) As a certain number of marriages are annulled each year on grounds of mental and physical disability at the time of marriage,⁸ the above safeguards have been suggested, with a view to reducing the number.

4. Where marriage is sought to be upheld

(1) Decree for restitution of conjugal rights

It is suggested:—

(a) That the grounds on which a marriage may be annulled or avoided during the first year of marriage should also be grounds for refusal of a decree of restitution of conjugal rights.

(b) That development of insanity even without apprehension of physical violence and the conversion or imprisonment of a husband or wife for a criminal offence, may also be made additional grounds for refusing a decree.

(c) The number of decrees for restitution granted each year is comparatively small,⁹ but it is suggested that further relief is required.

(2) Legitimacy

(d) Until the passing of the War Marriages Act, 1944, and the Law Reform (Miscellaneous Provisions) Act, 1949 (now consolidated in S. 98 (1) (b) of the Matrimonial Causes Act, 1950), it was only when the husband was domiciled in England that the Divorce Court exercised its jurisdiction and granted a decree. But now the Divorce Court has the power to grant a decree to a wife who is and has been ordinarily resident in England

¹ Report of the Committee on the Law of Intestate Succession, paragraph 28.

² Abstract of Legal Preliminaries to Marriage, 1951, page 4 et seq.

³ Statistical Review of England and Wales, 1950, Table G, pages 48 and 51.

⁴ Op. cit., Table J, page 53.

⁵ Op. cit., Table AA, page 114.

⁶ Abstract of Legal Preliminaries to Marriage, 1951, page 11.

⁷ Matrimonial Causes Act, 1937, Section 7.

⁸ Civil Judicial Statistics, 1951, Table 24, page 27.

⁹ Op. cit., page 28.

PAPER No. 42—SECOND MEMORANDUM SUBMITTED BY LADY CHATTERJEE, O.B.E., M.A., D.Sc., BARRISTER-AT-LAW
18 June, 1952] LADY CHATTERJEE, O.B.E., M.A., D.Sc., BARRISTER-AT-LAW

Married women—separation orders.
Guardianship of infants orders.
Poor law: orders for maintenance of wife, children and young persons for maintenance.
Adoption.

C.—*Report of the Commissioners of Prisons and Direction of Convict Prisons.*

Table XII—Non-criminal prisoners.
Non-payment of wife's maintenance.
Non-payment of children's maintenance.

D.—*Report of National Assistance Board.*

Table 1. Number of separated or deserted wives receiving assistance.
Table 2. Number of dependants or applicants.

E.—*Civil Judicial Statistics.*

Table 10. Matrimonial Causes heard by Special Commissioners.
Table 11. High Court of Justice, Probate, Divorce and Admiralty Division—Divorce Proceedings.
Table 11. D. Comparative Table 1938-1949, relating to grounds for divorce and nullity.

F.—*Criminal Statistics: Magistrates' Courts.*

Table IX. Juveniles aged fourteen and under seventeen dealt with summarily.
Table X. Juveniles under age of fourteen years dealt with summarily.
Table XI (including juvenile courts). Indictable offences.

G.—*Annual Abstract of Statistics.*

(2) The above statistics are collected by different government departments with differing objects in view.

(3) Many important questions which could be elucidated, by adequate statistics collected with particular ends in view, are in consequence left to guess-work.

In this connection it may be pointed out that in Western Australia statistics are collected, showing:—

(4) The grounds on which decrees absolute have been founded, and these have been divided into two categories according to whether they have been obtained by the husband or the wife.

(ii) The duration of marriage and the number of children in each year group.

(iii) The number of children involved in the husband's petition and the number in the wife's.

(iv) The ages of the husband and wife at the time of divorce.

(v) The age of wife at marriage and duration of marriage.

(4) Other memoranda submitted to the Royal Commission have also made recommendations regarding the need of adequate statistics.

(5) The Magistrates' Association has for some time past been urging the necessity of improving the statistics which are available, on the ground that the marshalling of the facts will be of material help in assessing the value of the work that is being done by juvenile and adult courts, but apparently without much success.

(6) The statistics that are available are very inadequate relating to marriage and divorce and the numbers of children involved, and give no indication of the size and importance of the subject.

(7) No adequate system of collecting statistics can be compiled unless it is done by a co-ordinating body and designed to answer certain specific questions.

(8) Most of the important facts are available in the records of the Divorce Registry of the High Court, in the district registries and in magistrates' courts.

(9) The present arrangements for the collection and analysis of statistics relating to marriage and divorce are not adequate to meet modern needs and in consequence there is grave lack of knowledge and no possibility of research into the social, economic, medical and psychological problems connected with marriage, divorce and the children of divorced parents.

Finally, I beg to make a suggestion, similar to the one embodied in the recommendation of the Royal Commission on Population that:—

1. The collection and tabulation of the statistics relating to marriage and divorce should be entrusted to the Interdepartmental Committee on Social and Economic Research.

2. The functions of the Committee should be extended to include the necessary executive powers.

3. It should have adequate funds at its disposal.

(Received 13th June, 1952.)

EXAMINATION OF WITNESS

(LADY CHATTERJEE, O.B.E., M.A., D.Sc., Barrister-at-Law; called and examined.)

3406. (Chairman): I am sorry that we are starting your evidence so late in the afternoon but your memorandum is so clear and your reasons and references so fully given that I personally have very little to ask you. I see that you base your memorandum on many years' experience as a barrister practising in the Probate, Divorce and Admiralty Division of the High Court as well as experience in other civil cases and as a social worker in London. Can you indicate the nature and extent of your social work for the information of the Commission?—(Lady Chatterjee): My social work has been mainly in connection with government departments but it has always had its human side. I had originally to do work for the Board of Trade and in that connection I had to find out whether certain factories were suitable places for young persons. I also worked in the welfare department of the Ministry of Munitions and there again I had to deal with the human side of the work and to see that proper and adequate arrangements were made for the workers. When I worked in India as an adviser to the Government of India, there again it was the human element that I had to consider, how far legislation should improve the conditions under which women and children worked. So my work has not been social work in the ordinary sense of the term although it has always had the human angle to it.

3407. Before we ask you any other questions, is there anything you wish to add either to your memorandum or

to your supplemental memorandum?—I should like to make a few remarks. I should like to say in the beginning that I am here in my individual capacity and solely responsible for any views or statements of fact in my memorandum or that I may make now, that in my capacity as a member of very large official organisations both of men and women I have had opportunities of inter-changing views with many people and benefiting by their knowledge and experience and that I have also had international contacts because, as you know, the United Nations are at this moment engaged in enquiring into marriage laws in various countries all over the world.

There are three points in respect of which I would like to elaborate my memorandum. The first is with regard to the supplement on statistics. I would like to say that I do not think that I made it quite clear that I was advocating there both an immediate collection of data and a long-term policy. These statistics could be collected from the existing available material; the offer of the Justices' Clerks' Society might be accepted because there is a great deal of information which could come from the Justices' clerks. The table that is at present provided is very vague and just leaves one with a sense of frustration. I am referring to Table XII of the Criminal Statistics of England and Wales. I am making this suggestion because I think that the public should be made aware of the number of children connected with broken homes, the number of custody orders made and, in the Divorce Court,

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[Continued]

the number of men, for instance, who file petitions for adultery against their wives and the number of women who file petitions against their husbands; though statistics as to the number of petitions filed are given, the grounds on which they are founded are never divided up to distinguish between husbands and wives. There are many statistics available but they are scattered over at least six or seven different government publications and I have not come across anybody, except myself, who has had the energy to buy all these sets of statistics and collate them. They are not officially collated and brought into correlation with each other. You are given the numbers of boys and girls who married under twenty-one but you are not given any information relating to whether the marriages have been a success or not. Such statistics could be obtained from the Divorce Registry, because the ages of the parties are given in the divorce petition. Those sort of statistics, I think, could easily be collected here and now. I feel that if they were collected the public would get to know them and would be in a position to support any recommendations that may ultimately be made by this Royal Commission.

3408. I confess that in some cases I am not quite sure what would be the results that we should get from additional statistics, but that is a matter I should like to think over and reflect upon and I do not think I need trouble you at the moment. Of course the Civil Judicial Statistics, just to take one point, do show the number of petitions by husbands, the number of petitions by wives, but maybe there is a great deal more information which might be given. We will study your suggestions from that point of view.—In paragraph 9 of my memorandum, I did not make it clear as to whether I was envisaging that county court judges should continue to act as judges for divorce work. I would like to say here that I do think, if I may say so in my humble submission, that they are eminently suited to act in that capacity with their very wide knowledge of law and the very wide experience they have of human nature in various aspects. In that connection, I would like to draw attention to three reports, which have been mentioned, which rather lead one to believe that the appointment of commissioners to act as divorce judges was not regarded as very satisfactory. The Report of the Denning Committee has been quoted, but I have read through the Report—it is the Second Interim Report—and reading that Report I do not think that that view is borne out by what is said there; the Committee did quote what the Royal Commission of 1912 considered but that was said a long time ago, and all the subsequent remarks go to show that the Committee had the very highest opinion of the county court judges. The Committee thought that they would handle the cases with efficiency and a full sense of responsibility if they should be appointed as commissioners, that the proposal that there should be itinerant divorce judges was not very satisfactory and that all the jurisdiction of a High Court judge and all the dignity attaching thereto should be made available to the county court judge; it regarded their appointment not only as an immediate useful measure but also as a solution for the future. Then in the debates in the House of Lords and the House of Commons, which were also referred to, mention was made on both those occasions about the unsatisfactory position of having commissioners dealing with matters in the place of judges, but in both cases the commissioners referred to were either solicitors or barristers not in actual practice; they were not county court judges and the work of the county court judge was very highly prized on both occasions.

3409. You think as long as commissioners are employed, county court judges are the most suitable to be selected?—I think so.

3410. Of course as long as divorce maintains its present level it is difficult to see how the High Court could deal with all the work without very considerable delays?—I think that the fact that the county court judges know local conditions is a great advantage.

3411. I follow that. Is there anything else you wanted to add?—I wanted to say, with due deference to lay magistrates, that all that has been said about county court judges and the necessity of having High Court procedure and the dignity attaching to a High Court when matrimonial cases are being considered, should be applied to the magistrates' courts, because the magistrates have as wide a jurisdiction as the Divorce Court. It is true that

they do not pronounce decrees of divorce but their separation orders and their maintenance orders have a very wide effect and their findings are the basis very often of Divorce Court proceedings, and therefore I would suggest that the lay magistrates should be assisted in all cases by a Chairman who would be either a stipendiary magistrate or a Chairman with legal qualifications. I make this suggestion because, as was pointed out to you yesterday by the Justices' Clerks' Society, the question of adultery is dealt with in the magistrates' courts in a manner very different from that in the Divorce Court. In that connection, may I refer to the Report in 1941 of the Matrimonial Causes (Trial in the Provincial) Committee, the Chairman of which was Sir Ralph Wedgwood. At page 7 of the Report it says:—

"Thus the rules are directed, amongst other things, to making sure that the party charged with such a matrimonial offence is entitled the other party to relief has in fact been made aware that the proceedings are on foot, and that the allegations upon which the application for relief is based are true and not artificial, and, where adultery is alleged, that those implicated are existing and not artificial persons, and have been served and can be identified before the court."

The Justices' Clerks' Society yesterday made it quite clear that that sort of procedure did not take place in magistrates' courts. The fact that there are no pleadings in the magistrates' courts, that the people who appear before the magistrates have not got the advantage of counsel to help them to conduct their case, that the parties are frequently asked to conduct a cross-examination themselves which is extremely difficult—all these, I think, are pointers to show that it would be extremely useful to have a person with legal knowledge as a Chairman in a magistrates' court.

3412. Is there any other addition you wish to make?—No, those were the three points I wished to make.

3413. Perhaps I should point out that the first two paragraphs of your memorandum are outside our terms of reference. It is quite true that we are called a Royal Commission on Marriage and Divorce, but our terms of reference do not include, for example, changes in the legal preliminaries to marriage. The only marriage problem that is specifically referred to us is whether any changes should be made in the law prohibiting marriage with certain relations by kindred or affinity. I want to ask you about cruelty as a ground for divorce. You suggest that the test should be the degree of cruelty, rather than the mental or physical effect caused thereby, and I see you refer to *Russell v. Russell*. Why do you think that the degree of cruelty is more important than the effect of it upon the person who is cruelly treated?—I do not think that it is more important but I do think that a person with a strong character and a strong mental and physical make-up may be able to stand up to a greater degree of cruelty and would therefore not now be entitled to a divorce, whereas a person of less strong character would succumb more easily and would come to the court with obvious traces of having had her health affected; the first may have been treated with greater cruelty but have had the courage to stand up to it whilst the other may not have the physical or mental calibre to stand up to the cruelty but would thereby become entitled to a divorce.

3414. That may be true, but there is room for difference of opinion as to whether the important thing is, what effect has the cruelty had, or what is the amount of cruelty. That is a matter upon which there may be two opinions. Will you explain something on paragraph 3 (b) which says:—

"Where a declaration is required regarding mental or physical disability and it is later found that such a disability did exist, the person or persons who signed such declaration may be required to show that they had no reasonable ground for not signing the required declaration."

I could not understand that.—I am afraid I have used a double negative there. This suggestion really turns on a previous suggestion in paragraph 2 (E), which is "out of court", where I have suggested that parties about to marry should be required to make a declaration that they are not suffering from a mental or physical disability which would render the marriage void or voidable. I wish to suggest that, if such a declaration were to be required

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 QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

[Continued]

and it is found later on that such a disability had in fact existed at the time, the parties should be asked to show cause why they did not declare its existence if they had reasonable ground for knowing of it. It is a bit involved.

3415. Will you turn to paragraph 5 (2) (d) where you say:—

"When the husband is petitioner, damages should be assessed not merely on the loss of his wife but on the damage done to the children."

I was not sure as to the basis on which you thought the court should assess the damages. If the damages are to be assessed on the injury done to the children, on what principles would you assess them? The children have lost their mother, she may have been a good or a bad mother. What sort of line would the court follow?—I do admit that it is rather a vague suggestion, but I think that when damages are being assessed on the loss of a guilty wife, the damages can never be very high because obviously the husband has lost a wife who has committed adultery, but the people who have suffered are the children. Their home is, to some extent, broken up and they need rehabilitation, but how the damages should be assessed is, I do admit, extremely difficult.

3416. Then you go on:—

"When the wife is a petitioner, loss of a home and financial support for herself and her children should be taken into consideration."

I was not quite sure how much further you were suggesting the court should go. At the moment the court has full power to make the guilty husband provide for his wife and family. Were you thinking of some damages from the woman named?—Yes, because whatever a wife obtains as alimony or maintenance is generally a very small proportion of the man's income. She is supposed to be able to live on less than the husband living alone has to live on, though she does get financial support for her children in addition. Where the home is broken up the divorce is more in favour of the guilty husband than the wife and enough consideration is not given to the fact that she has lost a home and has to endeavour to maintain her children in the state of life in which they have hitherto been brought up.

3417. Would you turn to sub-paragraph (g) where you say:—

"Both the respondent and co-respondent (man or woman) should be required to be present at the hearing."

(The witness withdrew.)

(Adjourned to Thursday, 19th Jan., 1952, at 10.30 a.m.)

PAPER No. 43

WRITTEN ANSWERS SUBMITTED BY LADY CHATTERJEE TO FURTHER QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

1. Does Lady Chatterjee advocate setting up a special domestic court from amongst the magistrates in a given division? (See para. 8 of Paper No. 41.)

Yes. A special domestic court consisting of magistrates specially chosen for their experience and knowledge of the work, one of whom should be a woman, would, in my opinion, have certain advantages:—

(i) Such a court would enjoy many of the privileges now enjoyed by juvenile courts. There would be attached to it a panel of magistrates with special qualifications.

(ii) Such a court would be able to deal with applications for summonses as a routine matter. The court could ensure the attendance of a probation officer or a court welfare officer; and as it would be dealing with the initial stages of the trouble, it might, with the help

I wondered whether the purpose of that was to give effect to your proposal under sub-paragraph (f) where you say:—

"The co-respondent (man or woman) should be required to make an affidavit regarding his means when damages are claimed."

Is that the reason why you think they should be present? It does add to the cost of a divorce suit requiring them to be present?—Yes, it does add to the cost and there I was following, and I ought to have quoted it, a recommendation that I obtained from the Report of Lord Justice Denning's Committee where it is said that there would be many advantages if the respondent and co-respondent were in court. I think in any case as far as the respondent is concerned it is very important because the question of custody of the children and so forth would arise.

3418. But as regards the co-respondent, I thought the reason why you were suggesting it was because of your proposal in sub-paragraph (f). Is that right or wrong?—That is partly the reason and it is partly because of what the Denning Committee said. It thought that a greater degree of truth might often be arrived at, especially in hotel cases and suchlike matters, if the parties were there and could, if necessary, be questioned.

3419. I think I follow all your other proposals very fully and I have nothing else to ask.—May I make another supplementary remark? I have tried not to go outside the terms of reference of the Commission but I would like to draw attention to the fact that when Mrs. White asked the former Prime Minister whether the terms of reference would be narrow or wide, and whether such questions as marriage guidance and advice and help to avoid the break-up of marriages would be considered, the Prime Minister said that he would certainly take into account the points put forward by Mrs. White when considering the terms of reference. They were eventually left out, as we all know, but he did make such a statement.

(Chairman): I am very familiar with that Answer but we have to look at our terms of reference as they are. If other matters had been intended to be investigated the personnel of the Commission might have been different. I do not know about that, but we have to see our terms of reference as they are, and I can assure you that the terms of reference embrace a very great deal. May we leave it like this? If the Commission want further light upon your memorandum we will ask you to come and help us again. (See Paper No. 43.) If we do not, you will understand that we have read and considered your memorandum and we are very grateful to you for it.

of the probation officer, be able to help the parties to settle their differences without pursuing their legal remedy.

(iii) As the work and popularity of such a court increased it would be possible to have special premises set apart, so that the link between it and the ordinary police court would eventually cease to exist.

(iv) Applicants would feel their matrimonial difficulties put them in a class apart from other police court cases and this would have a wholesome psychological effect on them. They would feel more inclined to approach the court at a much earlier stage of their difficulties.

(v) When the provisions of the Legal Aid and Advice Act are made applicable to magistrates' courts, the existence of a special domestic court would be a useful link, not only between the court and those administering the Act, but also for those solicitors and barristers wishing to specialise in matrimonial cases.

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QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

2. *Would every such court throughout the country have to be presided over by a stipendiary magistrate? (See para. 8 (e) of Paper No. 41.)*

In view of the importance of the matrimonial work done by magistrates it is advisable, in my humble opinion, that domestic courts should be presided over by stipendiary magistrates. The reasons for holding this opinion are set out in my answer to question 3 below.

3. *Is this feasible . . .*

Admittedly it would be difficult to obtain the requisite number of persons with suitable legal qualifications and social experience to undertake the work in the beginning. Lay magistrates with suitable legal qualifications may be willing to be appointed as stipendiary magistrates. The importance and social significance of the work would undoubtedly make a large appeal so that the supply would eventually meet the demand.

The fact that there are a very large number of magistrates' courts would make it necessary for stipendiary magistrates, in certain cases, to preside over a number of different courts as is done by county court judges.

. . . and is the nature of the work such that lay magistrates could not cope with it?

The following facts, in my humble submission, make it difficult for magistrates to cope adequately with the matrimonial cases on which they have to adjudicate:—

(i) The wide matrimonial jurisdiction conferred on magistrates by the Summary Jurisdiction Acts and the Guardianship of Infants Act, which is similar in many respects to the jurisdiction exercised by the divorce judges of the High Court, lays a heavy burden on them without there being any provision to ensure that they have legal qualifications. While the magistrates have the assistance of legally qualified clerks, the final decision and responsibility rest with the magistrates.

(ii) The volume and complexity of the work have increased considerably since 1895 when the Summary Jurisdiction Act was passed extending the powers of magistrates, and now require a knowledge of many statutes amending and extending their powers as well as a knowledge of case law.

(iii) There are no pleadings. Except in the case where adultery is charged, the defendant does not know before trial in detail what charges he has to answer, the petitioner is unaware of any counter-charges.

(iv) Adultery may be charged by either the husband or the wife, without the person with whom the adultery is alleged being made a party to the suit. It would appear to be rather difficult, in these circumstances, for the magistrates, especially in an undefended suit, to satisfy themselves that there is no collusion or that adultery has in fact been committed.

(v) The fact that the provisions of the Legal Aid and Advice Act relating to legal aid and advice in magistrates' courts have not yet been implemented means that the parties as well as the magistrates are deprived of the legal assistance to which they would otherwise be entitled.

(vi) The parties are, in many cases, not legally represented and, though there is a provision in the Summary Procedure Act, 1937, Section 6, enabling them to obtain assistance in cross-examination, their lack of knowledge of the law puts them at a grave disadvantage and may prevent the court from being seized of relevant and important matters which so often form the basis of applications to the Divisional Court. Further cross-examination and re-examination cannot be satisfactorily done by the court as it needs to be done for both parties separately by persons acquainted beforehand with the relevant facts. The prosecution and defence need to be represented from different angles. To cross-examine satisfactorily needs considerable legal experience and legal knowledge as to what questions are admissible.

(vii) As the findings in a magistrates' court are often used as corroborative evidence in subsequent Divorce Court proceedings it is essential that as far as possible all relevant facts should be brought to the notice of the magistrates' court. The parties to the suit are

comparatively ignorant of the law. They have frequently had no legal help beforehand in the preparation of the statements and often do not know how to elicit all the relevant facts, and without pleadings it is difficult for the magistrates to assess them adequately. It is also necessary that there should be an accurate transcript of the evidence. There is no statutory requirement that shorthand notes shall be taken of the matrimonial proceedings in magistrates' courts.

(viii) There is no panel of magistrates specially qualified to deal with matrimonial matters as is required in juvenile courts, although their orders relating to separation and maintenance may result in separating the spouses as effectively as a decree *nisi* pronounced in a Divorce Court.

(ix) Desertion, and what amounts to constructive desertion, legal cruelty, condonation, connivance, collusion, are all legal terms requiring to be interpreted in the light of legal knowledge and determined by a knowledge of case law.

(x) The parties having recourse to the court need to understand on what grounds their case has been decided. Without the assistance of solicitors and barristers, this throws an extra burden on the court.

I have ventured to state some of the difficulties with which magistrates are confronted because, in my opinion, many of these difficulties could be removed if there was sufficient recognition of the importance of their work and of the far-reaching consequences of their decisions, and if adequate financial assistance were given and the necessity of giving legal aid and advice were recognised.

4. *Is it feasible to have special probation officers for this particular work in every part of the country? (In rural areas the volume of work is small.) (See para. 8 (h) of Paper No. 41.)*

Admittedly it would be difficult, especially in rural areas, but, in my opinion, it is essential that for work of this importance there should be uniform procedure and adequate facilities throughout the country so that no persons need be penalised.

The probation service is sufficiently flexible to allow for expansion and strengthening to deal with the new work. There is already in existence machinery to deal with new situations and as there are in each petty sessional division in the country at least two officers, it is possible for arrangements to be made for courts to be attended.

As the officers on whom the courts would rely—whether they are called probation officers or court welfare officers—would have to have special qualifications and ability to enable them to undertake conciliation work and court work, they would need to be specially trained in social service, particularly in marriage guidance and the welfare of children, and have the qualities envisaged for such persons by Lord Justice Denning's Committee (see Final Report, page 14, para. 29 (iv)). This recommendation is based on general recognition of the successful conciliation work being done by probation officers and on the need for training additional specialist officers.

5. *Does Lady Chatterjee envisage the county courts continuing to function as divorce courts on special occasions at present? (See para. 9 of Paper No. 41.)*

(i) Yes. The courts are undoubtedly meeting a great need. The statistics for the year 1949 show that the matrimonial causes heard by special commissioners, who have usually been county court judges, totalled over 20,000 undefended cases, over 1,600 short defended cases, and 26 long defended. (See Civil Judicial Statistics for 1949, pages 26 and 21.)

(ii) The wide experience and the extensive jurisdiction exercised by the county court judges gives them an insight into all classes of people confronted with many different kinds of legal difficulties. This is a considerable asset when they have to deal with matrimonial cases. Further, their familiarity with children's cases, arising out of their jurisdiction under the Guardianship of Infants Act, brings them into close contact with parents and with welfare officers of the local authority on whom they can call for enquiry and report. The experience gained thereby is invaluable when dealing with applications for custody of children. The accessibility of the courts in such cases to the parties and their witnesses is an additional advantage.

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QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

(iii) The above facts support the views of the Committee on Procedure in Matrimonial Causes—

(a) that "the County Court Judges would handle matrimonial cases with efficiency and a full sense of responsibility";

(b) that "the assumption that divorce involves a peculiar discretion which only a few know how to exercise is not valid";

(c) that their proposals have "the advantage that they provide a solution for the pressing needs of the moment and also for demands of the future". (Second Interim Report, page 9, para. 7 (ii) and page 12, para. 11 (ix).)

6. *Would the judge sit as a High Court judge?*

Yes. Both the Committee on Procedure in Matrimonial Causes and the Royal Commission of 1912 recommended that the High Court jurisdiction should be exercised by county court judges acting as commissioners. The Committee pointed out that while they agreed with the Royal Commission that trial by county courts did not pay "adequate regard to the significance and the public importance attaching to matrimonial causes of every kind", they also agreed with the above solution suggested by the Royal Commission that the High Court jurisdiction should be exercised by county court judges. (Second Interim Report, page 10, para. 9.)

Further, the Committee on Procedure in Matrimonial Causes, in accordance with their view that "the attitude of the community towards the status of marriage is much influenced by the way in which divorce is effected", and that "if there is a careful and dignified proceeding such as obtains in the High Court... then quite unconsciously the people will have a more respectful view of the marriage tie" (Second Interim Report, page 7, para. 4), added the following further recommendations:—

(i) that the "Commissioners should sit in Courts commensurate with the dignity of the High Court" (page 11, para. 11);

(ii) that the "Commissioners should be accorded all the dignity of a High Court Judge. When sitting in Court they should wear the same robes as a Judge of the Divorce Division and be addressed in the same way as a Judge" (page 11, para. 11).

7. *Is it intended to take the place of the Divorce Division of the High Court?*

No. Both the Committee on Procedure in Matrimonial Causes (Second Interim Report, page 7, para. 4) and the Royal Commission of 1912, while agreeing to the delegation of High Court jurisdiction to the county court judges, acting as commissioners, were strongly of the opinion that divorce "cases should be determined by the Superior Courts of the country assisted by the attendance of the Bar, both in the interest of the parties and in the public interest".

The great respect of the public for the High Court judges, to which attention was drawn by the Committee on Supreme Court Procedure (page 49, para. 154) is an additional reason for supporting the recommendation of the Committee on Procedure in Matrimonial Causes that "the High Court jurisdiction should be maintained in London and the provinces" (Second Interim Report, page 9, para. 8).

8. *Can Lady Chatterjee tell us more about the lines followed at Cambridge House and the Mary Ward Settlement in operating their legal advice centres? (See para. 11 (c) of Paper No. 41.)*

The legal advice centres attached to Cambridge House and the Mary Ward Settlement are, to a large extent, run on somewhat similar lines:—

(i) They are both attached to settlements—the aim of which is service to the less fortunate members of the community and not profit. Their staff are therefore imbued with the same ideals.

(ii) The object of both centres is to give legal advice and, where practicable, legal aid to persons too poor to be able to consult lawyers in ordinary practice at the ordinary fees, and for whose needs no official provision is made. Normally only such are eligible if their means at the time of application do not exceed 44 10s. 0d. a week (increased by 5s. 0d. a week for each dependent child).

(iii) Both centres rely on the services of full-time paid solicitors. At Mary Ward there are two full-time solicitors. At Cambridge House there is a full-time solicitor with a full-time solicitor as his assistant, and the principal clerk has also similar qualifications.

(iv) At Cambridge House and at Mary Ward Settlement the legal advice is given principally by the paid solicitors with some assistance from the Bar; but great importance is attached to the "unfailing generosity of the Bar who furnish opinions, draft pleadings and accept briefs to appear in court" (Cambridge House Annual Report, 1954, page 21).

Mary Ward has a rota of fourteen or fifteen members of the Bar, some of whom attend the centre regularly once a week to give *ad hoc* legal advice, while others do similar work to that done by barristers at Cambridge House.

(v) The volume of work done at each of these centres is very considerable. At Mary Ward, the legal advice centre dealt with over 4,000 cases, interviewed over 8,000 persons, and the correspondence consisted of over 11,000 communications. In addition there were innumerable telephone calls and the waiting room was filled to overflowing. These figures relate to the year 1951 and are given in the Annual Report of the Settlement, page 3.

At Cambridge House in the year 1950, the legal advice centre dealt with over 4,000 applications and granted more than 5,000 interviews. They also wrote over 12,500 letters, and over 280 cases were represented in court.

The cases dealt with require a considerable knowledge of law, as the applicants ask for advice, not only on matrimonial questions, but also on questions relating to landlord and tenant, contract, debt, hire-purchase, pensions, income tax, affiliation, compensation, etc.

Without the facilities given by the Bar it would in many cases be difficult for solicitors working at such high pressure to give adequate answers to so many and such varied legal questions.

(vi) The advice centres are in close touch with probation officers and also with outside social agencies. It is the experience of Cambridge House that "about one-third of all matrimonial applicants have before their first visit already applied for and been granted summonses, and arrive with letters from the probation officer concerned, requesting that arrangements be made to secure legal representation for the applicant at the hearing. Approximately another one-third arrive with letters from the probation officers requesting that the applicant may be advised 'what summons, if any, to apply for'. The remaining one-third are direct applications by members of the public on their own initiative because they are in some form of matrimonial difficulty".

Mr. Hines, the solicitor in charge at Cambridge House, informed me that "the basic principle on which it is sought to handle such problems is to deal with them as far as conditions permit in the same way as would be done by a sound and reasonable firm of solicitors in private practice". Sitting by his side and listening to the advice he gave, I was very forcibly impressed by the fact that while, in certain cases, the applicant might have legal grounds on which to seek a dissolution of marriage, yet when possible he suggested that it might be a wise and prudent step to seek a solution of the difficulties by ways other than legal proceedings. If this advice were accepted he was furnished with the name of the organisation best calculated to afford him expert help; as, for instance, the probation service, the marriage guidance council, a minister of religion, a doctor, and so forth.

(vii) Both centres are run at extremely low cost. The expenditure at Mary Ward for 1951 amounted to £3,342 (see Annual Report for 1951, page 24); and the expenses of the legal advice centre at Cambridge House amounted to £2,557 odd for the year 1951 (see Annual Report, Cambridge House, page 31).

Both centres have had to face a severe financial crisis, as many societies that contributed to their work ceased to do so when the Legal Aid and Advice Act was passed. In the Annual Report, Mr. Hines points out that "a few months before the end of each financial

PAPER No. 43—WRITTEN ANSWERS SUBMITTED BY LADY CHATTERJEE TO FURTHER
QUESTIONS ARISING OUT OF HER FIRST MEMORANDUM

year there is a time of anxiety when the continuation of the Centre for another year remains in doubt". And Mr. Yorke points out that should the centre be obliged to close, it "undoubtedly would be a great denial of the means of obtaining justice to thousands of people".

9. *What recommendations would Lady Chatterjee consider as having the "full force of enlightened public opinion"?* (See para. 12 of Paper No. 41.)

Recommendations relating to the following subjects would, in my view, have general support:—

(i) *Orders relating to custody, maintenance, and access*

(1) When deciding such questions, all courts should have the assistance of a court welfare officer or a probation officer to represent the interests of the children. Such questions should be regarded as an issue separate from other issues, and should be determined by the trial judge before whom the parties should appear; and affidavit evidence should not be accepted. (2) The parent who is granted the custody should be required to appoint a testamentary guardian in case of his death. (Final Report of the Committee on Procedure in Matrimonial Causes, para. 20, para. 34 (viii).) (3) In cases of divorce or separation when no application has been made—or even where there is no dispute as to custody—the court should satisfy itself as to the arrangements made for maintenance and custody. (4) The judge should be satisfied in all cases as to the arrangements made for the provision of a suitable home for the children. (5) The wishes of the children should be considered and their welfare be the paramount consideration.

Records should be kept in all courts of all custody orders, and statistics published regularly relating to the number of such orders and the number of children affected.

(ii) *Guardian ad litem*

Upon every application for an order when children are involved, the court should have power to appoint a guardian ad litem to represent their interests; to enforce payments of maintenance; and, when damages are awarded in the Divorce Court, to enforce payment into court if necessary, and to be heard on the application of payment out.

(iii) *Orders relating to maintenance*

(1) "Magistrates should have power to make interim orders for maintenance up to the time of an order being made by the Divorce Court." (Final Report of the Committee on Procedure in Matrimonial Causes, para. 33, para. 87 III 2.)

(2) Orders for maintenance in the High Court should be enforceable in magistrates' courts.

(3) To prevent maintenance falling into arrears, and to prevent evasion as far as possible, collecting officers should be required to report regularly to magistrates the position with regard to maintenance orders which they have been authorised to collect under Section 30 of the Criminal Justice Amendment Act, 1914.

After a summons for recovery of arrears has been applied for, the collecting officers should be empowered to obtain, on the authority of the court, information relating to the whereabouts of the person named in the application—from any government department in possession of such information. (See Paper No. 31, memorandum submitted by the National Association of Probation Officers, para. 31.)

(4) When assessing maintenance, husbands and wives should be required to produce evidence capable of verification relating to their respective incomes.

(5) The court should be given discretionary powers to ensure payment for arrears of maintenance otherwise than by commitment to prison.

(6) Statistics should be regularly published for all courts showing, separately, the number of maintenance orders made; the number of orders in force; number dismissed; number withdrawn; number of suspended commitments; number of orders relating to arrears; and the total amount paid. The number of children affected in each case should be given separately.

(iv) *Damages in divorce suits*

Section 3 (1) and (2) of the Matrimonial Causes Act, 1950, should be amended enabling the petitioner to make the "woman named" as co-respondent, liable for damages and costs.

When assessing damages, the injury done to the children should be taken into consideration in addition to the loss to the husband or wife. Damages should be paid into court. A guardian ad litem should be appointed to safeguard the interests of the children—thus preventing the parties from entering into any agreement detrimental to their interests.

(v) *The implementation of the legal aid and advice portions of the Legal Aid and Advice Act*

The portions of the Legal Aid and Advice Act relating to legal advice should be implemented immediately.

The services of probation officers and court welfare officers should be available to legal advisors at the legal aid centre; and the existing rules relating to probation officers should be amended so as to make this possible. (Para. 17, Paper No. 31, memorandum of the National Association of Probation Officers.)

The legal aid portions of the Act should be implemented and legal aid should be made available in the lower courts to assist persons in the preparation and presentation of their case.

(vi) *Bar to a petition*

(a) *Condonation and desertion.* The law regarding desertion should be amended so as not to act as a deterrent to reconciliation.

(b) *Collusion.* The law as to collusion should be clarified so as to permit, with certain safeguards, negotiations for the financial support of the wife and children to take place prior to the hearing.

(vii) *Prevention of marriage breakdown*

As there is a general consensus of opinion supporting recommendations for effective methods for the prevention of marriage breakdown, it is suggested that the Royal Commission may consider bringing the following to the notice of the legislature:—

(1) The implementation of the recommendation contained in the Final Report of the Committee on Procedure in Matrimonial Causes relating to the granting of financial support to voluntary agencies specialising in conciliation work—such as the Marriage Guidance Council and the Family Welfare Association.

(2) The granting of financial aid to existing legal aid centres.

(3) The recommendations contained in the Royal Commission's Report on Population relating to pre-marital education. (Paras. 588-592.)

(viii) *Statistics*

To ensure the support of the public for the recommendations, and to make the public fully aware of the facts, full and detailed statistics, relating to all matters arising out of the matrimonial jurisdiction of all courts, should be published as soon as possible, and regularly collected in the future, by some central authority.

(Received 18th August, 1952.)

FIFTEENTH DAY

Thursday, 19th June, 1952

PRESENT

The Rt. Hon. Lord Morton of Henryton, M.C. (Chairman)

Mrs. MARGARET ALLEN
 Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
 Mr. R. BELOE, M.A.
 Mrs. E. M. BRACE
 Lady BRAGO
 Sir WALTER RUSSELL BRAIN, D.M., P.R.C.P.
 Mr. G. C. P. BROWN, M.A.
 Sir FREDERICK BURROWS, G.C.S.I., G.C.I.E.
 Mrs. K. W. JONES-ROBERTS, O.B.E.
 The Honourable Lord KEITH

Mr. F. G. LAWRENCE, Q.C.
 Mr. D. MACE
 Mr. H. H. MADDOCKS, M.C.
 The Honourable Mr. JUSTICE PEARCE
 Dr. VIOLET ROBERTSON, C.B.E., LL.D.
 Mr. THOMAS YOUNG, O.B.E.

Miss M. W. DUNNIE, C.B.E. (Secretary)

Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 44

MEMORANDUM SUBMITTED BY THE RT. HON. LORD MERRIMAN,
 G.C.V.O., O.B.E., LL.D., PRESIDENT OF THE PROBATE,
 DIVORCE AND ADMIRALTY DIVISION

In view of the general instructions contained in the terms of reference, I assume that it is intended to preserve the principle that matrimonial disputes are to be judicially determined, and are not to be handed over to an administrative department of government.

(a) *What, if any, changes should be made in the law of England concerning divorce and other matrimonial causes?*

1. The Matrimonial Causes Act, 1937, has fully justified the expectation that it would produce a greater measure of fairness and reality in the divorce law. It is, I am afraid, inevitable in this jurisdiction that there will always be a certain amount of deliberate deception, but since the passing of that Act it cannot fairly be said, in my opinion, that this has been due to the inadequacy of the law itself. Moreover, in 1949 advantage was taken of a small Private Member's Bill which became the Law Reform (Miscellaneous Provisions) Act, 1949, to correct some anomalies that had been found in the course of twelve years' experience of the working of the Act, and to introduce certain additional improvements, including, for example, the right of a wife to sue in the High Court in respect of wilful neglect to provide reasonable maintenance for herself or the children, and the abolition of the rule in *Russell v. Russell*. These amendments are all consolidated in the Matrimonial Causes Act, 1950.

2. The only major matter which, so far as I am aware, was then deliberately left outstanding was the suggested right of either party to an agreement of separation to obtain a divorce after the lapse of a certain period. Before dealing with this, however, it may be well to recall two other grounds of divorce which have been mooted in the past, namely:—

(i) *Drunkenness*. I regard this as of no practical importance. It is true that the law has always been that drunkenness, *per se*, is not a ground of divorce. I can only say, after eighteen years' experience of this jurisdiction, that I cannot recall a single case in which drunkenness was unaccompanied by any other form of misconduct or ill-treatment.

(ii) *The fact that the respondent has been sentenced to a long term of imprisonment*. The argument often used in support of this suggestion is that the situation is analogous to insanity and should be dealt with accordingly. No doubt there is such an analogy in cases where the spouse, usually the wife, is herself the innocent victim of the respondent's criminal courses. But if the petitioner has either participated actively or has even acquiesced in these courses, I can see no justification for allowing divorce on this ground. The practical difficulty that I see is that while some cases would clearly

be on one side of the line or the other, there would be a large proportion of doubtful cases which the Divorce Court would be very ill-equipped to decide.

3. As regards insanity, it has often occurred to me that there is a certain unreality in the definition of "care and treatment" still preserved by the Law Reform (Miscellaneous Provisions) Act, 1949 and the Matrimonial Causes Act, 1950, whereby treatment as a voluntary patient can only be reckoned in the five-year period if it succeeds certification. Owing to the policy, adopted for some years past by the Ministry of Health, of encouraging the submission to voluntary treatment in lieu of certification, there is, I think, no doubt that in a considerable number of cases which are really hopeless from the first the statutory period has been unduly prolonged. I recognise that this is not an easy question, and it certainly would not have been appropriate to raise it when the Private Member's Bill was before the House in 1949; but I think it is a matter for consideration whether the somewhat arbitrary provisions about "care and treatment" might not, with proper safeguards, be amended so as to conform with reality.

4. As to divorce on the ground that a separation agreement has endured for a fixed period, the arguments for and against this proposal have been so fully and so recently stated in both Houses of Parliament that I do not propose to go into them in great detail. The fundamental objection to this proposal is that it cuts at the root of the principles upon which divorce has hitherto been allowed in this country, namely, that, with the exception of the special case of insanity, it is granted to the aggrieved spouse as the remedy for a proved injury. Speaking generally, separation agreements are made deliberately either because the marriage has been broken by the fault of one spouse or the other and in lieu of a divorce or judicial separation; or else because, in the absence of any grounds for divorce, the spouses are tired of each other. In the first case it is utterly incompatible with the principles which have hitherto prevailed that the wrongdoer should be entitled, after a certain lapse of time, to claim a divorce. In my opinion this fundamental objection is not met by the argument that, if a sufficiently long period is chosen, the marriage is so obviously irreparable that it ought not to endure. This argument proves too much. My experience is that in nine cases out of ten at least, the marriage is irrevocably broken at the time when the separation agreement is made. Therefore, apart from the fact that it has been avowed by some advocates of this so-called reform that, when once the principle is established, progressive reductions of the period may be demanded, there is little logical justification for imposing a long period at all. In the other case, the

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objection to this proposal, which gains force the more the prescribed period is reduced, is that it introduces divorce by consent, since if the prescribed period is, or becomes, reasonably short the simplest of all ways to dissolve a marriage for mere incompatibility in the absence of any matrimonial offence, would be to enter into a separation agreement, and await the expiration of the period.

(b) *What, if any, changes should be made in the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife in England?*

5. I have no changes to recommend, but I suggest that the time has come for a codification of the law from 1835 down to date, including of course, the relevant Sections of the Money Payments (Justices Procedure) Act, 1935; the Summary Procedure (Domestic Proceedings) Act, 1937; Section 11 of the Matrimonial Causes Act, 1937; and the Married Women (Maintenance) Act, 1949.

(c) *What, if any, changes should be made in the administration of the law relating to any of the above subjects?*

6. It is for consideration whether Section 32 (3) of the Matrimonial Causes Act, 1950, should be amended or repealed. In practice little difficulty arises; but since adultery as a ground for a separation order in courts of summary jurisdiction was added by Section 11 of the Matrimonial Causes Act, 1937, and was made open to either spouse, but without applying the Section to that jurisdiction, and since adultery is now frequently coupled with the other grounds for divorce included in the Act of 1937, to which the Section does not apply, there is now a certain unreality in this provision. Nevertheless I think it does operate to prevent what may be called the "black-mailing" of witnesses, or fishing enquiries for the purposes of other matrimonial proceedings. If any change is contemplated I would suggest that the repeal of the Section should be limited to the parties to the suit, but retained as regards other witnesses.

7. The power to award maintenance "on any decree" (see now Section 19 (2), (3) and (4) of the Matrimonial Causes Act, 1950) has always created a certain amount of difficulty which has not been wholly clarified by judicial decisions. I would suggest repealing these words and substituting some less rigid limitation, or, at least, empowering the court to extend the time in a proper case. At the same time, as the converse of the new Section 28 of the Act, imported from Section 6 of the Law Reform (Miscellaneous Provisions) Act, 1949, I would suggest that it should be possible to order a secured provision for maintenance otherwise than "on decree" so as to correspond with the new power to vary or suspend such a provision at any time.

8. It is also for consideration whether the time has not come to recognise that wilful refusal to consummate a marriage should be a ground of divorce and not of nullity.

(d) *What, if any, changes should be made in the law prohibiting marriage with certain relations by kindred or affinity?*

9. I presume that this heading refers to the proposal to extend the right to marry a deceased wife's sister or husband's brother to a divorced wife's sister or divorced husband's brother during the lifetime of the divorced spouse. This is a question of social policy about which I do not think my official position qualifies me to speak with any particular authority. Assuming that the sister or brother, as the case may be, is in no way responsible for the divorce, it may well be (particularly in the case of the divorced wife's sister) that he or she may be the right person to look after or to provide a home for the children. In other words, one of the strongest arguments in favour of the existing Acts would apply, *mutatis mutandis*. On the other hand, it may be thought that in cases where the brother or sister has been the co-respondent or the woman named, as the case may be, it is rather shocking that Parliament should be asked to legislate in their favour. Even so, the advantage of making the best of a bad job in such a case may be thought to outweigh the possible danger that liaisons of this kind might be encouraged by legislation.

(Dated 13th December, 1951.)

EXAMINATION OF WITNESS

(The Rt. Hon. LORD MERRIMAN, G.C.V.O., O.B.E., LL.D., *President of the Probate, Divorce and Admiralty Division; called and examined.*)

3420. (Chairman): Lord Merriman, we all know that you are the President of the Probate, Divorce and Admiralty Division of the High Court of Justice. Would you tell us how long you have held that office?—(Lord Merriman): Since October, 1933.

(Chairman): And you very kindly sent us in a short memorandum. As you may remember I asked you simply to give your answers to the five questions which we issued generally. Since then a number of matters have been raised in the course of other evidence, on which we felt we would like your help, and I am going to ask Mr. Justice Pearce to put to you those matters.

3421. (Mr. Justice Pearce): I will deal first with appellate jurisdiction. There has been some general criticism of the hearings before justices, based on experience gained from the conduct of appeals to the Divisional Court. A witness who said that he conducted appeals to the Divisional Court considered that the way the cases had been heard was much to be criticised. I should like to have your view on the way in which these cases are conducted, remembering that the cases appealed from are the least satisfactory presumably of the thousands of cases that are tried annually?—First of all, I entirely agree that it is necessary always to remember that in the nature of things the cases that are appealed are likely to be the least satisfactory cases, but my view is that, taken by and large, the conduct of these cases by the justices all over the country is extraordinarily good. If I may make one point to illustrate that: when I first became President it was the exception to get an intelligible note of the proceedings or an adequate statement of the reasons for the decision, in spite of the fact that that requirement had been insisted upon over and over again. I say now that

it is the exception not to get one. The notes are extraordinarily good and one gets a statement of the reasons for the decision which makes perfectly clear what has happened, whether the decision is right or wrong. At any rate one knows what one has to deal with, which is extremely important. I think that the improvement in the time in which I have been concerned with these appeals—and I do make a practice of presiding whenever I possibly can—has to be seen to be believed.

3422. Is it your view that the jurisdiction of the Divisional Court is extremely valuable for keeping a uniformity of law in such matters?—I think that it is almost the most important part of our work, because the magistrates' courts deal with an enormous number of cases all over the country, many of them having a very important bearing ultimately, perhaps, on a divorce suit, but in any case having a great deal of temporary importance in people's lives. I think it is very important that there should be as much uniformity as possible and that the High Court should be able to give as much guidance as possible in these cases, and I think that magistrates do pay a great deal of attention to their decisions because of that jurisdiction. That has been borne in upon me in various rather intangible ways not easy to describe, but I am sure it is so.

3423. It has been suggested that it is necessary or at least desirable to have re-hearings at quarter sessions in addition to the Divisional Court. The Divisional Court acts, does it not, on the same principle as the Court of Appeal acts in relation to judges of first instance?—Yes, or the House of Lords for that matter.

3424. I do not want to go into the arguments for and against the question of re-hearings at quarter sessions

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[Continued]

because I think that was debated in the House of Lords, was it not?—The proposal that appeals from the decisions of magistrates' courts dealing with domestic troubles should go to quarter sessions slipped, by a curious inadvertence, into a Bill without debate, and it came up to the Lords as a clause without ever having been debated in the Commons. However, there was a full-dress debate about it and eventually the clause was abandoned and the Bill went through without it, but I personally—I do not want to go into all the details—am absolutely dead against it. The idea of introducing a procedure by way of case stated, I think, is quite unreal; once the facts have been determined by the hearing in court there is usually not much use in having the case stated, because the tribunal is then bound by the facts. After all, the Divisional Court is not bound by the facts. Further, if the decisions are founded on utterly insufficient evidence we can say so. Speaking generally, I deprecate the multiplication of appeals. It seems to me really that there is no more reason for saying that there should be an extra appeal on fact in these cases than there would be for saying that if a High Court judge decides a case against one side or the other, automatically, without going to the Court of Appeal, it should be possible to have another trial before another judge. That is really what it comes to.

3425. The difficulty is that the second lot of judges may be no better than the first or may be worse, and their result wrong where the first was right?—Well, no. After all we can, often we are obliged to, order a re-hearing because we do not think that the first trial has been satisfactory. There may be another hearing but at any rate it is as the result of an appeal to a higher court; it is not a second shot before the same sort of court.

3426. And the number of appeals to the Divisional Court has very largely increased?—Yes. I cannot tell you exactly how much—I had meant to get the figures—but I can give you a general idea. When I gave evidence before the Peel Commission the year after I was appointed we sat twelve-and-a-half days in a whole year in Divisional Court, that is twenty-five judge-days. Except for an interval of a few weeks, the Divisional Court has been in session most of this year. (Chairman): Of course the civil judicial statistics will give us the number of cases, but it is not possible to know the time from these statistics.

3427. (Mr. Justice Pearce): There is a small point that has been raised by the Justices' Clerks' Society who say that the justices' clerks are not notified of the results of appeals. Now with regard to appeals from judges of first instance to the Court of Appeal, until two or three years ago the judges of first instance never heard whether an appeal had been allowed or why it had been allowed; it has been thought, as you know, desirable that they should not only be notified but given a transcript of the judgment criticising their decisions so that they may know where they have gone wrong and do better in future. Do you think it would be a good idea that the results of appeals should be notified direct to the justices' clerk concerned?—I think that is a thoroughly sound idea.

3428. That can be done?—Yes, that is a mere matter of administration, I think.

3429. Do you think that it would be possible for transcripts to be sent to the justices in cases where they have been over-ruled, or where the decision has been upheld but there has been serious criticism directed at the conduct of the case?—I think, if I remember rightly, that in the Court of Appeal the court itself decides whether it is worth while for a transcript of the judgment to be circulated, and I think copies are then put in the Bar Library and sent to the judge concerned. I am not sure that it is not sent to others too, but it is done as the result of a specific decision in the particular case. I think it would probably be unnecessarily expensive if transcripts were taken up automatically in every case, but it would be very useful indeed if we had the power to certify that a case was a proper one for sending the transcript of the judgment to the court from which the appeal came.

3430. That could be done without any further difficulty?—We should have to have some sort of sanction for it. Of course if the Divisional Court has ordered a re-trial I think it almost automatically happens, but otherwise there would have to be a sanction.

3431. (Chairman): It would need legislation?—I think it could be done by rule or Treasury minute. There would have to be some form of sanction for the expense, you know, which would be considerable.

3432. (Mr. Justice Pearce): It has been said that the duties of the justices' clerks, where there are appeals, are difficult to ascertain. I do not want to go into whether that is so or not, but would the best method of dealing with that be for the Justices' Clerks' Society and the Senior Registrar to discuss the matter and, if there is a difficulty in the rules, that could be corrected?—Yes, but I would like to know, if you can tell me, what is supposed to be the difficulty? I know there are one or two—sometimes the time factor is a difficulty. An appeal has to be set down within twenty-one days, and at the time of setting down the appellant has to file the requisite number of copies of the notes of the justices' clerk and of the reasons for the decision. It is not always possible to get these out in the time, and the result is that we have to extend the time for appeal. But if it is a question of a general extension of the time, that is rather a big question, because after all the quick disposal of these appeals is rather important.

3433. I think that we shall have to find out more about that point. Then, it has been suggested from many quarters that there should be a codification of the statute law on matrimonial matters in magistrates' jurisdiction. Do you agree that that is desirable?—Yes, I do. I did say something about it in my memorandum. I think it is high time that the substantive law administered by the magistrates' courts was codified. You have to look at so many different Sections now to pick up any given point. I think codification would not be a very difficult matter. There is at the moment on the stocks a Bill codifying the procedure and jurisdiction, the Magistrates' Courts Bill. How far it has got I cannot tell you off-hand, but I have been given a copy in print and of the draft rules.

3434. (Chairman): You think the substantive law should be codified?—Yes, the other is in process of codification.

3435. (Mr. Justice Pearce): It has been suggested that there should be a clarification of the magistrates' power to make interim orders for custody or maintenance where High Court proceedings supersede or are pending. Do you think that clarification is desirable?—I do think it is desirable because at the present time the law hangs solely on judicial decisions. You see, there are two statutory jurisdictions running side by side; neither has any real right to control the other—they are both there by Act of Parliament. But as a result of decisions both in the Queen's Bench Division and our Division, it is, I think, established, at any rate by judicial authority, that the junior court, so to speak, should give way if there is an issue pending in both. It is obviously very undesirable, if there is a charge of adultery by a husband against a wife, that the case should come on one week in the magistrates' court and be determined there, and then that the petition should come on the week afterwards in the High Court with the embarrassment that the facts had already been fought out a week before in an inferior court. The difficulty that I see is this: one cannot isolate questions of maintenance from issues about matrimonial offences for the reason that it is upon proof of a matrimonial offence that the right to award maintenance in the magistrates' court depends. As regards custody, I think that, speaking generally, such difficulties as there are have resolved themselves without undue friction. But it would be a very good thing if in respect of jurisdiction some definite rules were laid down by Act of Parliament.

3436. There has been some conflict of opinion as to whether a third party should be served with notice of a charge of adultery made against him in a magistrates' court. You know the sort of case, which in fact has come up in the Divisional Court at times, where the woman is accused of adultery and the man with whom she is said to have committed adultery is not served. Is it your view that he ought to be served?—At any rate he ought to be given notice in some form or another, I think that is clear. At one time all that happened was that the husband took out a summons to discharge a magistrates' order on the ground that since the making thereof the wife had committed adultery, no more. She might go to court not knowing the details of what she

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had been charged with. The Divisional Court put that right by insisting that proper particulars of the charge must be given. By the same reasoning, the alleged adulterer ought to be informed of what he or she has been charged with.

3437. (Chairman): May I put a supplementary question on that? It has been suggested that in many cases it would be very difficult to trace the person with whom it was alleged that adultery had been committed. Would you be in favour of a fairly generous power to dispose with service if, say, a letter was written to the last known address, or something of that kind?—Yes, in other words follow the practice in the High Court. Service on a co-defendant can be dispensed with if he cannot be traced or can only be traced with difficulty. And of course there is the not uncommon case where adultery is alleged with a person unknown. In that case the question of service cannot arise. But I should have thought that, speaking generally, the way to deal with the question is on the same lines as the same subject matter is dealt with by the Matrimonial Causes Rules.

3438. (Mr. Justice Pearce): Now, to come to the Divorce Court, first the welfare officer. Do you think that his appointment has worked well?—Yes, I have no doubt about that at all. It has, of course, been a matter of experiment. You are speaking, I take it, of the use of the welfare officer in connection with custody matters. I have, as a matter of fact—all of us, I expect, have—used him for the purpose of trying to effect reconciliation between the spouses, but the terms of his appointment are only to assist in cases of custody. He is willing, of course, to help in other cases, and has helped very much. It might interest you to know that I had some figures given to me only yesterday. May I say by way of preface that I am against an automatic employment of the welfare officer in all cases contested or uncontested; for one thing, because it is a waste of time and of money. I saw a suggestion that he or somebody else should be automatically appointed guardian of *homo* of every child the moment there was a divorce suit in which that child was concerned. I think that is overdoing it, frankly, and I think, when the matter was debated in the House of Lords, that was the general feeling. Certainly the then Lord Chancellor expressed that view. It is in the cases where there is a contest that the welfare officer is so valuable. In 1950 he was applied to by the judge in ten per cent. of the contested cases, in the next year in about twenty per cent. or rather more, and this year up to date his assistance has been invoked in about forty per cent. of the cases. So the thing is growing and in fact it is getting just a little out of hand as far as he is concerned, because he told me the other day that while his programme every week for several weeks ahead is pretty full, the judges ask him suddenly to deal with an urgent matter and that this, willing as he is to help, necessarily disorganises his programme. The result is that recently I got sanction for the attachment to him of two women probation officers from metropolitan courts, one who will be the regular deputy for the moment and the other, so to speak, is coming on in reserve. That will ease the situation, and I have not the slightest doubt that, in due course, there will have to be a considerable increase in number.

3439. (Chairman): Would you think it better to have a number of welfare officers or one head welfare officer with deputies such as you describe?—I should think probably the latter is the best way.

3440. (Mr. Justice Pearce): It was suggested by the Law Society that the names of illegitimate children should be set out in the petition and that the court should have power to deal with such children. Where there is a child born before the marriage and the court has no power over it, difficulties may arise. For instance, the court could allow access by the husband to the children born after the marriage, but the wife could spitefully withhold any access to the children born before the marriage who were illegitimate. If the court had power to deal with illegitimate children it would solve that kind of difficulty. Do you see any objection to the court having that power?—The first objection, of course, is that you have to start with the big issue as to whether the child is or is not illegitimate.

3441. I meant where there are parents with, say, three children, two born before marriage who could not be legitimated by the marriage. Although you can make the parents behave reasonably about the child born after the marriage you cannot do anything about the children born before the marriage as the law stands at present.—Limiting it to that, I see very great difficulties. The moment you travel outside the marriage and children of the marriage you at once raise all sorts of complications. It may be very desirable to have this power but it is difficult—I think if you limit the proposal to the children of the spouses through illegitimacy—

3442. You would see no objection to that?—I think we have got to be careful over the whole of this. I am now trying, not by way of criticism, to put the other point of view. The whole of our jurisdiction about children depends upon the statute and is linked with matrimonial causes. Apart from that, the Lord Chancellor, or the Chancery Division, is, by tradition, the protector of children. One has to be a little careful about trenching upon these ancient jurisdictions by undue extension of the matrimonial causes jurisdiction beyond what is intended.

3443. (Chairman): Perhaps you would like to consider that question and let us know later what you think about it?—Yes, by all means. (See Paper No. 45.)

3444. (Mr. Justice Pearce): The other problem is the suggestion of the Bar Council that where a petition has been brought and dismissed, the Divorce Court should have power over the children. The reason for that proposal is that when the parents have fallen out and there has been a full-dress battle before a judge, the children ought to have somebody to regard their interests and the judge knows a good deal about the family by then.—I think that exactly the same considerations apply. There is a great deal to be said for that proposal, but the objection that it would be a usurpation of jurisdiction on our part against the traditional jurisdiction of the Chancery Court still remains.

3445. If the Chancery Division did not consider that an unreasonable usurpation of its functions, would you consider that the proposal was useful?—I think that if there has been a fight in the Divorce Court about a particular marriage and the custody of the children has come in issue, the mere fact that the particular charge of adultery or cruelty or desertion, or whatever it is, has been dismissed is not really a logical bar to the continuance of the jurisdiction to deal with the children.

3446. (Chairman): If the question of custody has not been expressly raised in the proceedings and you decide just the question of cruelty or adultery or no cruelty or no adultery, neither of the parties has ever, so to speak, handed over the care of the children to the court. I am not expressing any view, but of course the procedure for making a child a ward of court after a dismissed divorce petition has been very much simplified. That is still open to the parties. I make these observations as possibly bearing on the matter.—If I may say so, I think that is very pertinent. If the only justification, so to speak, for the extension of our jurisdiction would be that the question had been enquired into, then if it had not been enquired into I suppose the jurisdiction ought to be left as it is at present, that is, with the other Division of the High Court.

3447. I do see advantages in this, that a judge has seen the parties in the witness box and formed some conclusion of what sort of people they are, and if the Divorce Court were to deal with the question, following straight on after the hearing, it would save some expense; but it is a matter which would require very careful consideration from both points of view?—Yes.

3448. (Mr. Justice Pearce): It has been suggested by the Law Society that on an application for maintenance the court should have power to declare that the husband is under no liability in respect of a bastard child, provided that the child is represented—in other words, where it emerges in the case quite clearly that the child is a bastard, the husband should then be able to have a declaration that he is under no financial liability. At present, if the matter is left undecided and the mother comes back to the court for an order for maintenance, she would presumably get it automatically although the child was a bastard. Do you think it would be useful to have a power to declare that there was no liability?—Yes, I think it would.

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3449. It is also suggested by the Law Society that the court should have power in proper cases to direct separate representation of the children. Supposing that that power were to be used sparingly and only where it was really necessary, would you think it a good idea?—I think that there are certainly cases in which the power would be useful. Its use certainly ought not to be automatic. The fundamental difficulty is always, where the spouses are at issue about the children, who is going to give the instructions to the person who is separately representing the child. (Chairman): Of course, in the Chancery Division, as I think you know, the court very often directs the Official Solicitor, for instance, to inspect the home.

3450. (Mr. Justice Pearce): I think the Official Solicitor would be the person in a matrimonial case, would he not? One would merely tell the Official Solicitor to present the case from the child's point of view?—Yes.

3451. The necessity would arise presumably when the probation officer reports that neither parent is giving the court the true position and that there are several witnesses who could help, but that he cannot do anything more because he must remain impartial. Then one would get the Official Solicitor to call the missing witnesses, the relatives who ought to be consulted. I imagine that is where the power would be useful?—Yes, I think it would be a useful power.

3452. (Chairman): I suppose really that the instructions would come from the court and the Official Solicitor would simply act for the child in a suitable case?—Yes, but I think it would be a mistake to make the process automatic. It would hamper the proceedings if it was automatic in every case. I do think that it is a mistake to assume, as is sometimes done, that, because the parties are at loggerheads over their matrimonial disputes, the children are merely handed about as pawns in the game. It very often is so, and it is very dreadful when that happens, but it is by no means always so. Many of the spouses, however bitter their own differences, are only too anxious to do what is best for the children in the unfortunate circumstances.

3453. (Mr. Justice Pearce): Now turning to insanity, the suggestion of the Bar Council is that there is no necessity for five years' care and treatment since what one is really trying to find out is whether the person is incurably insane. I think that you feel that voluntary treatment before certification ought to be included in any period of care and treatment as well as voluntary treatment, after certification?—Yes. At the moment you have got the double test, you have the one test now that there shall have been a certain statutory form of care and treatment for a statutory period, and then in addition to that, you have got the ultimate question as to whether the respondent is incurably of unsound mind. Now of course it is a matter of history and there is no question whatever that this care and treatment proviso was put in as a precaution to make sure that nobody was divorced without every possible safeguard, but logically what one has to decide is whether the person is incurably of unsound mind—that is the ultimate conclusion. But whether it is necessary to have any artificial proviso as to a period of care and treatment seems to me to depend upon whether it can safely be left to medical opinion merely to say that for this reason or that reason a person is incurably of unsound mind, without any objective test at all. My point about voluntary treatment being included in a period of care and treatment is based on the assumption that there is still some sort of arbitrary test as to treatment. The practical difficulty is this. In every case the judge has before him the Board of Control file. From the moment there has been a reception order, certification in other words, the reports by the properly constituted medical officers automatically appear on this file and one can see the whole history of the case at a glance. There is nothing of the sort—as I think, unfortunately—in connection with voluntary treatment. One merely gets the beginning of the insanity and the certification and the intervening period is a complete blank. Since the Act of 1932 patients have been encouraged to become voluntary patients first; afterwards there may be perhaps some short period of certification although it is apparent to everybody that from first to last there has been just one progressive state of insanity, ultimately culminating in certification simply because the patient is threatening to

terminate the voluntary treatment. It has always seemed to me, in considering these cases, that it is a little bit artificial and unreal to draw a rigid distinction between treatment as a voluntary patient and treatment after certification, and only to pay attention to the period of voluntary treatment if it exceeds a period of detention, which it is unlikely to do—it is far more likely to precede it. It may be that the proper way, I say to more than this, is to cut out the care and treatment provision altogether and to concentrate simply on evidence of the real issue, is this person of unsound mind, and if so, incurably so, without requiring an experimental period of any sort to give, so to speak, a *prima facie* case that the unsoundness of mind is incurable.

3454. It is suggested by the Law Society that the Official Solicitor should not file an answer unless there is a contest. Do you agree that there is no need for an answer where it is a purely formal matter?—Yes, I do, but I would not limit the functions of the Official Solicitor at all, because it is, I think, extremely important that he should be able to raise any sort of point. As we know, of course, he nearly always—I think always—takes an independent medical opinion about the patient's state of mind, although it has been complained—I think unjustly—that that is an unwarranted addition to the expense. I do not take that view at all; I think it is wholly right that he should do so. But then there may be a case in which the petitioner has been living with somebody else; the court ought to know about this and it has not been revealed in the petition. The Official Solicitor ought to be and is, of course, free to raise that sort of point by answer. I would not limit his right to filing an answer to cases where there is some issue to be dealt with on the question of the patient's state of mind.

3455. (Chairman): I understood the suggestion to be simply this—if the Official Solicitor decides, after taking every step that it was possible to take, that he had nothing to say, he should not have to file a formal answer.—That is absolutely right. Very often it simply means that his counsel gets up and says there is no real fight in this case.

3456. (Mr. Justice Pearce): In fact the practice is now, is it not, that the Official Solicitor files a formal answer to protect his position? He writes a letter or notifies the other side if there is going to be a contest.—You mean that he is liable to be shot at by the patient if it turns out that he has given away the fight too readily?

3457. Yes, that is what I meant. He has got to keep a possible contest going and I think it would need a special direction to absolve him from the necessity of filing an answer?—Yes.

3458. On the bar to divorce for three years after the marriage except where there has been depravity or serious hardship, it has been recommended by some witnesses that the bar should be abolished, by some that the court should have a general discretion, and by one—the Bar Council—that it should remain a discretionary matter to be allowed where there is serious hardship, reconciliation being taken into account. Now of those three, which do you prefer?—The last, unquestionably.

3459. It has been suggested by some witnesses that the court should have a discretion to withhold a decree or to grant a suspension instead of divorce on the ground that it thinks that reconciliation is possible. Are you in favour of or against that proposal?—I should be against it. I think it is important to remember that ever since divorce was entrusted to a court instead of having to be a matter of an Act of Parliament, on the proof of whatever is required as the condition of the divorce the court has been obliged to pronounce the decree, and that of course was no doubt in part to ease consciences and so forth and also, I think, to remove from the judge a very odious discretion whether or not to pronounce a decree after the facts have been established.

3460. (Chairman): There might be a risk that different judges would adopt very different standards in exercising such a discretion, and that you might get a sort of contest to get before Mr. Justice So-and-So?—Yes, I agree absolutely; I do not think that that ought to be left to "the measure of the judge's foot".

3461. (Mr. Justice Pearce): It has been suggested by some witnesses that cruelty ought to be defined and by others that it should be left fluid. What is your view of those two choices?—My view is it should be left as it is because, although there has never been any statutory

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definition either of cruelty or of desertion, there is a very well-known and authoritative definition of cruelty which I suppose most of us could say by heart and which is the result of combined judgments of the Court of Appeal and of the majority in the House of Lords in 1897. It has all recently been canvassed again in a case in which I happened to be sitting in the House of Lords. I should leave cruelty alone.

3462. On the law of condonation, I think that you do not agree that it should be a discretionary matter for the judge because you think it might get out of hand. I think that you would not object to the parties being allowed to cohabit for a specified period, say three months, to see if they really could become reconciled?—You are talking also about an attempted reconciliation in connection with the interruption of the period of desertion?

3463. I think the two problems can be dealt with together. The difficulty is, is it not, that if a wife has to decide whether, in spite of her husband's lapse, she will go back to him, at the present moment she has to decide if by meeting him in a solicitor's office or some place like that, because if she goes back to the home, as a rule she has lost her remedy? It would be better, would it not, to try a reconciliation by living a married life together at the home?—Yes.

3464. And the present law does create serious difficulties in that way, does it not?—I think the present law is in a very difficult state. If it is to be accepted as a principle, that a resumption of married life, even going to the full extent of sleeping together as man and wife, is not to be regarded as an interruption of a period of desertion or as the resumption of cohabitation or as condonation, as the case may be, I would be inclined to make it cut both ways, that is, in favour of both the husband and the wife, and not to have any artificial distinction between them, of course it must be remembered that there is always the question of a possible pregnancy to be taken into account. I think that there should be some specified time limit and again that the question should not be left to judicial discretion.

3465. Would three months seem to you unreasonable as a period?—No, I do not think it would.

3466. You would not be in favour of this, for example, that cohabitation for a period not exceeding three months, if it was a genuine attempt at reconciliation, should be only a discretionary bar, so that the judge could regard it as condonation or not?—I would rather have a "cut and dried" period of living together regarded as permissible. Of course, you have got to face this. Until recently there was thought by the majority of people to be a line beyond which, at any rate as against a husband, the question as to whether the resumption of sexual relations amounted to condonation or not ceased to be arguable, but that has been thrown into the melting pot by a recent decision. Therefore, the moment you introduce your statutory period of three months, the argument will begin again, that, if attempted reconciliation for up to three months does not amount to condonation, commensurate demands that if the parties have another try at reconciliation for one week more, or after the lapse of another month or two, that period too should not be regarded as either condonation or an interruption of desertion. If there is to be this period, let it be a definite period so that there can be no doubt about it one way or the other.

3467. (Chairman): And no discretion, just a definite rule?—I think, a definite rule.

3468. (Mr. Justice Pearce): I wanted to ask you about the law as to collusion. I think you must take it from me that there is considerable confusion among a large number of practitioners as to what is or is not permissible in the existing state of the law. Its real aim, is it not, to provide against a corrupt bargain to put forward a false case to deceive the court either by *aggravate falsi* or *suppression veri*? I think there is a decision of Lord Stowell which makes that clear. Do you agree that it would be convenient if one could get some clear definition of what is or is not permissible?—Yes, I think the clearer it is the better. I am rather surprised at some of the things I have seen suggested as collusion, the mere fact that after a case has started the parties have put their heads together about questions of maintenance and so forth. As it happens, to avoid having to wait until after the decree had been pronounced before filing a separate petition for maintenance, it was I who proposed that you could start

the ball rolling by making a claim in the petition itself, or at any time during the proceedings, and this was put in the 1937 Act. Seeing that the parties and their solicitors must inevitably meet, for example with regard to alimony pending suit, which everybody knows is very often the foundation of the ultimate order for maintenance, the suggestion that mere discussion about figures should be regarded as collusive seems to me frankly to be quite absurd. But if there is any attempt to buy a divorce by saying, if you do this, that and the other, I will pay you so much, or, I will agree to this, that and the other, you get on the wrong side of the line at once: I should have thought it is the element of corruption which is wrong.

3469. I have one or two points about the financial jurisdiction of the Divorce Court. First, with regard to maintenance, there have been suggestions that maintenance payments depending on a Divorce Court decree should be collected and the orders enforced in the magistrate's courts. There has also been a suggestion by the Law Society that a summary procedure for enforcement of maintenance orders should be employed in the Divorce Court as it is in the magistrate's courts. Of those two, which do you prefer?—I do not like the idea of summary procedure in the Divorce Court because I do not know how it would work. I think there is a great deal to be said for employing, if it can be so arranged, the machinery of the courts of summary jurisdiction.

3470. Handling the order over to them to enforce?—Yes. After all, this jurisdiction has been handed about. At one time the enforcement of all our maintenance orders was dealt with by the Chancery Division, I suppose on the principle that it dealt with bankruptcy. Then it was brought back to the Divorce Division. I agree that the enforcement procedure is the most distasteful procedure that it is possible to imagine. There is always of course a very considerable time lag. A man can, I was going to say, evade his liability indefinitely, but he can always make sure that there is a very long time between the moment a payment is due and the moment when it is paid.

3471. That part of the Divorce Court's jurisdiction is not working very well?—No, it is not. In the Magistrates' Courts Bill there is a whole Part devoted to this question of enforcement. If there is no insuperable difficulty I think it would be the best possible way out to employ the machinery of the magistrate's courts.

3472. (Chairman): The collection of all maintenance to be handed over to the courts of summary jurisdiction?—Collection and enforcement.

3473. (Mr. Justice Pearce): It has been suggested by many people that it would be convenient if the court had power to make an order as to the division of the home, not merely by finding out who paid for what and making an order under Section 17 of the Married Women's Property Act, but by making a fair and equitable order according to need and justice dividing up the existing matrimonial home. Provided third parties could be safeguarded, for instance hire-purchase firms, would you think that was a useful power for a judge to have?—Yes. It rather surprises me that it is suggested that it does not or cannot happen now. I should have thought myself that, on a discussion about what should be the amount of maintenance, it would be said on the husband's side that the wife can keep all the furniture she wants, and then perhaps he will have to pay her a little less. All that would be argued out before the registrar. I would suggest that you have to look at the thing as a whole. You have got to be in the question of the tenancy. Another suggestion has been made as to a lump sum payment. The whole question of furniture is obviously mixed up with the lump sum at any rate. In a sense they are more or less bound up, at any rate as regards the tenancy rights nowadays. The rights of third parties, of the landlord and other tenants in the same structure, are all very important. Taken by itself, it is a sound idea that the court should have power to deal with the tenancy and with the furniture whether in conjunction with the award of a lump sum or not.

3474. But your view of lump sum payments would be this, would it not, that, if there is power to order a lump sum payment, there ought to be a power in the court finally to extinguish the wife's rights, to protect the husband?—At the moment I think the question of lump sum payments is in a very unfortunate position. It has been

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held that a woman's statutory right to maintenance is not barred by her accepting a lump sum. The most that can be done is for an order to be made that no further application for maintenance shall be entertained without leave of the court. That is rather a cumbersome way out, if it is a way out. If a lump sum is to be permissible, I do not know that there ought necessarily to be any difficulty about it. Let it be remembered that the Section of the Act dealing with the provision of maintenance deals first with a secured provision and then adds that periodical sums may be ordered to be paid. Of course in ninety-nine cases out of a hundred the only thing that matters, and the only thing that is discussed, is the award of the weekly sum, but I do not see why one should not put into that Section the power to award a lump sum which would be in satisfaction of the wife's claim. May I just add that on the question of maintenance, I do hope the Commission will make some recommendation about getting rid of the artificiality of maintenance orders having to be made "on" decree and of all the string of difficult and not always reconcilable decisions on that topic that that little word has given rise to.

3475. (Chairman): Acting out of your answer, I want to see exactly what you thought about the suggestions for dealing with the tenancy and the furniture, because of course the furniture may be on hire-purchase and the tenancy may be in the name of A with a sub-tenancy to B and so on. I think we all feel that if such a power could be given to the court it might work justice, especially to a wife, but there are many difficulties in the way of safeguarding the rights of third parties. I do not know if you have anything to say about that particularly?—It is quite clear, is it not, that the third parties would have to be brought in somehow? The landlord would have to be allowed to say, he would have to be served with some sort of third party notice. Of course, even as regards furniture it is pretty common, is it not, that the furniture may be on loan, not on hire-purchase, but on loan from one or other of the parents, for example?

3476. I suppose one could say that such rights as the husband has over furniture and the tenancy could, at any rate as long as the wife has got the custody of the children, be handed over to the wife? It would be an entirely new power to deal with property in that way.—Yes, I should have thought you might keep the proposal a bit more general so that the court shall have power to make orders as to the disposal of the property, and not that the wife shall have the property automatically on a divorce. (Chairman): That was what I intended. I did not mean that the division should be automatic or compulsory.

3477. (Mr. Justice Pearce): Finally, you know of the suggestion of Mr. Registrar Wilkinson, with which all the registrars agree. I do not know what your view is?—I think there is a lot to be said for the suggestion that the wife should be allowed to claim against the deceased husband's estate. It is undoubtedly a hardship that maintenance orders, which are habitually made only for joint lives, should end with the husband's death. It must be remembered of course that there is always the power to order a secured provision for the wife's life. I suppose the argument the other way is this: that we come back to the major premise that what we are dealing with is the divorce between two living people. Death in any case would sever the marriage relationship and, in the case of a wage-earner, the power to maintain; that, I suppose, is the sort of underlying basis of the power to make the ordinary maintenance order for joint lives only and not for the life of the wife.

3478. But this proposal, I think, is really aimed at the sort of case where the wife was not able to get adequate secured maintenance and the husband subsequently inherited a very large sum, or came by a very large sum of money. The husband then dies and the wife is left destitute although the husband is leaving a considerable estate. In that sort of case, the proposal would enable the court to allow a claim against the estate. You would not oppose that?—I certainly would not oppose it because, after all, the registrars have all considered it, they are an extremely experienced body and they know exactly from day-to-day what are the problems which arise in these matters. If they are satisfied that this is a real problem and a real hardship, I certainly should not oppose the recommendation.

3479. (Sir Russell Brain): I would like to ask one or two questions in addition to those Mr. Justice Pearce has asked in regard to insanity. I think we may take it that the reason for a period of five years' care and treatment was that in those days the treatment of mentally ill people was not as advanced as it is today and often the only criterion was really time—if the patients had not recovered in five years they were not likely to recover. Fortunately now with modern methods of treatment it is possible to answer that question much more quickly. Would it be fair to say that in your view, if the doctors exercise the care which the court has a right to expect, they would take into account any implications now contained in "care and treatment" and therefore the requirement of a period of care and treatment would be redundant? (Chairman): You mean, there should be simply the test—is this man incurably insane?—without any specified period? (Sir Russell Brain): Yes. If medical evidence was adequate upon that point the other factors would be redundant?—Yes, I am inclined to accept that view but I would like, if I may, to make one proviso. It is the fact that in the early days, and I think I took all the cases for the first four or five years, I was a little disquieted by the impression that there was a feeling that it was necessary in each case to try every sort of experiment, shock treatment and so forth, sometimes with pain and discomfort to the patients. I would not like to lay down or to accept any principle which involved the suggestion that every conceivable form of treatment had to be tried before the court could accept the medical opinion that the case was incurable.

3480. There is one other factor. As the result of modern treatment, as you know, many patients are discharged from mental hospitals who would previously have had to be kept there and, although they may be sufficiently recovered, they may be far from well. The present law does not cover them at all because they are not under continuing care and treatment. If the provision of care and treatment was abrogated they would now be included and a petition might be brought for divorce from such a person. Would that be an advantage in your view?—Yes, I think it would be an advantage to get rid of anything which is merely arbitrary or artificial. I must say that sometimes one has been rather struck by the fact that a patient is discharged cured one month and is back again under a reception order the following month, and the Board of Control file shows that things from first to last have been getting progressively worse and worse; there has been an interruption in the period of care and treatment of a month or two months but I was not always sure that it was a very real interruption.

3481. Could I have your help on a practical problem? At present the patient is in a mental hospital under medical care, and everyone knows where he or she is. Supposing that that condition no longer had to be fulfilled. You would have actions brought against people who were living apart from their spouses and not in mental hospitals. How would the petitioner set about obtaining the necessary medical evidence, or would there be any means to require the respondent to be medically examined?—That is a very real difficulty. That of course is one of the advantages of having some arbitrary and artificial provision about care and treatment, that you have got a definite starting point.

3482. I do not think it would apply to many patients, but it would certainly apply to some. Might I suggest that if there were a short period of care and treatment, say a year, and it had to be a continuing period but might have occurred during the past five years, that would in effect, I think, cover the very large majority of such cases?—That is really what I am driving at in including the voluntary patient. Is there any real reason why in the case of a voluntary patient the same reports should not be demanded as in the case of a patient in respect of whom a reception order has been made? Putting it in another way, is it not a little unreal to make out that a voluntary patient is simply there of his or her volition and that the reason is unconnected with the question of insanity?

3483. Of course you appreciate that there is a distinction to which the authorities attach a good deal of importance, in that they wish to encourage as many patients as possible to go as voluntary patients?—I know.

3484. I think they fear that if the distinction were blurred it would become more difficult to encourage people to do that but, as you know, there has been an increasing

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THE RT. HON. LORD MERRIMAN, G.C.V.O., O.B.E., LL.D.
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[Continued]

tendency for more and more people to go as voluntary patients in recent years.—Of course, that was the whole object of the Act of 1932, was it not?

3485. Yes.—At present, of course, any petitioner can get the benefit of the evidence from the mental hospital. If there is no form of treatment and a stay at the mental hospital does not come into it at all, there is going to be that difficulty on the threshold of every case, is there not?

3486. (Chairman): Might I make a suggestion? It would be so helpful to us if the President and Sir Russell Brain could discuss this matter and give us their considered views for the assistance of the Commission. Could that be done, because the procedure by question and answer now, before you have had time to get together and thrash out all the pros and cons, is perhaps more difficult? What do you think, Lord Merriman?—Yes, I should be very grateful if I could have some practical suggestion in writing and then be allowed to hammer it out with Sir Russell if possible. (Chairman): Perhaps Sir Russell Brain could formalise either suggestions or questions and let the President consider them at his leisure and give us his views upon them?

3487. (Sir Russell Brain): I would be very pleased to do that.—It would be very kind if you would, because I think it is a very difficult question, and it would need very careful hammering out, as the original clause was very carefully hammered out between the doctors and the Ministry and the promoters of the Bill.

3488. (Sir Frederick Burrows): In matrimonial cases in the magistrates' court, should the magistrates give their decision without reasons or fortify their decision by giving reasons, as is done in other courts, bearing in mind of course that their decision might be right and their reasons all wrong?—Do not think I am hedging if I give this answer, which is one I gave to the whole body of magistrates when I had the pleasure of addressing them on a certain occasion. My view is, and we have said this often in court, that they ought, when they retire to discuss the case, to formulate, if not on paper, at any rate in their own minds, what the reasons for their decision are. I think any person who is giving a decision ought to know why he

(The witness withdrew.)

(Adjourned to Monday, 21st July, 1952, at 2.0 p.m.)

PAPER No. 45

SUPPLEMENTARY NOTE SUBMITTED BY THE RT. HON. LORD MERRIMAN

(NOTE.—In the course of his evidence (see questions 3440 to 3445) Lord Merriman was asked to comment upon a proposal by the Law Society that "there should be set out in the petition the name and date of birth or age of any illegitimate child born to the wife prior to the marriage who is under the age of sixteen at the date of the institution of the proceedings and who has been under the care and control of the parties to the marriage during the subsistence of the marriage" and that "the court should have power to make orders for custody and for maintenance relating to all of such children". This supplementary note contains the witness's comments on the proposal which he gave at a later stage.)

Referring to the Law Society's memorandum, I regret to say that the law is in a somewhat confused state, and that it is uncertain whether, as stated therein, the power to make custody orders is "confined to legitimate or illegitimate children or children adopted by the parties". In *M. v. M.* (1946), P. 31, Denning J. (as he then was) held that the words (in what is now s. 26 (1) of the Matrimonial Causes Act, 1950) "children the marriage of whose parents is the subject of the proceedings" made parenthood the sole test of jurisdiction.

If this is right, it would be possible to decide, on appropriate allegations in the pleadings, the issue of paternity, even though the issue of legitimacy, strictly speaking, could not arise. But in *Colquhoun v. Colquhoun* (1948), P. 13, a Divisional Court, on an appeal under the different wording of the Summary Jurisdiction (Married Women) Acts, expressed the view that, as to children incapable of legitimisation at any rate, this went too far; and in *Harrison v. Harrison* (1951) 2 A.E.R. 346, Bernard J. expressed the same opinion.

or she is giving it, but I do not think they ought to have to state that reason in open court. The advantage is that they have discussed the matter, as we all know, with the clerk, and probably the clerk has taken notes and they have come to this conclusion or that conclusion for this, that or the other reason, and a note is made of it. Then they say in court we find this, and we make the order or dismiss the summons as the case may be, and when called upon to do so for the purpose of appeal they can give the reasons. I am not only getting it from the point of view of being able to give the reasons when called upon to do so for the appeal, but because on broad principles nobody ought to give a decision without knowing why he is doing so.

3489. That, if I may say so, is appreciated. The question was should the reasons be stated in court?—No, I do not think it should be necessary to state it in court.

3490. (Lord Keith): Might I just follow up that last question, Lord Merriman? I think the suggestion was that the losing party would feel less dissatisfied, less disgruntled, if he knew the reasons why he had lost, and of course unless the reasons were stated by the magistrates in court he really would not know the grounds or the reasons that moved them to give the decision. I do not know whether that affects your answer in any way?—My answer to that is a practical one. It is the one which Sir Frederick inclined himself. Over and over again one gets one side or the other saying, the Chairman said this, but look at the considered statement of the reasons, they are not the same. It may be right that they should state their reasons in court but it would be a very big task with tradition in connection with a court of summary jurisdiction.

3491. (Chairman): Is it not possible that the losing party might be even more disgruntled if he heard the reasons?—Yes, after all, in nine cases out of ten it is apparent straight away that the reason is "We believe her and we do not believe him" or vice versa, and that certainly would not add to the satisfaction of the loser if it was said in open court.

(Chairman): I have no further questions, but we are all most grateful to you for coming and helping us this morning.

Nevertheless, I recognise that there is force in the suggestion that, as regards illegitimate children born to the wife before marriage, who have actually been living in the care and control of the parties to the marriage, their names and particulars of their alleged status should appear in the petition and that the court should have jurisdiction over their custody and maintenance. It will not be forgotten, however, that, apart from the use of the adoption procedure in such cases, the Guardianship of Infants Acts apply to such children, who are not, therefore, left "in the air". Indeed it is quite common to find that guardianship orders have been made about them before the divorce proceedings. On the whole, I am still of opinion that the disadvantages of cumbering divorce proceedings with ancillary issues about the paternity, custody and maintenance of children who cannot possibly be legitimised as children of the marriage, outweighs the advantages of this proposal.

(Received 22nd July, 1952.)

19 June, 1932]

THE RT. HON. LORD MERRIMAN, G.C.V.O., O.B.E., LL.D.

[Continued]

held that a woman's statutory right to maintenance is not barred by her accepting a lump sum. The most that can be done is for an order to be made that no further application for maintenance shall be entertained without leave of the court. That is rather a cumbersome way out, if it is a way out. If a lump sum is to be permissible, I do not know that there ought necessarily to be any difficulty about it. Let it be remembered that the Section of the Act dealing with the provision of maintenance deals first with a secured provision and then adds that periodical sums may be ordered to be paid. Of course in ninety-nine cases out of a hundred the only thing that matters, and the only thing that is discussed, is the award of the weekly sum, but I do not see why one should not put into that Section the power to award a lump sum which would be in satisfaction of the wife's claim. May I just add that on the question of maintenance, I do hope the Commission will make some recommendation about getting rid of the artificiality of maintenance orders having to be made "on" decree and of all the string of difficult and not always reconcilable decisions on that topic that that little word has given rise to.

3475. (Chairman): Arising out of your answer, I want to see exactly what you thought about the suggestions for dealing with the tenancy and the furniture, because of course the furniture may be on hire-purchase and the tenancy may be in the name of A with a sub-tenancy to B and so on. I think we all feel that if such a power could be given to the court it might work justice, especially to a wife, but there are many difficulties in the way of safeguarding the rights of third parties. I do not know if you have anything to say about that particularly?—It is quite clear, is it not, that the third parties would have to be brought in somehow? The landlord would have to be allowed his say, he would have to be served with some sort of third party notice. Of course, even as regards furniture it is pretty common, is it not, that the furniture may be on loan, not on hire-purchase, but on loan from one or other of the parents, for example?

3476. I suppose one could say that such rights as the husband has over furniture and the tenancy could, at any rate as long as the wife has got the custody of the children, be handed over to the wife? It would be an entirely new power to deal with property in that way.—Yes, I should have thought you might keep the proposal a bit more general so that the court shall have power to make orders as to the disposal of the property, and not that the wife shall have the property automatically on a divorce. (Chairman): That was what I intended. I did not mean that the division should be automatic or compulsory.

3477. (Mr. Justice Pearce): Finally, you know of the suggestion of Mr. Registrar Wilkins, with which all the registrars agree. I do not know what your view is?—I think there is a lot to be said for the suggestion that the wife should be allowed to claim against the deceased husband's estate. It is undoubtedly a hardship that maintenance orders, which are habitually made only for joint lives, should end with the husband's death. It must be remembered of course that there is always the power to order a secured provision for the wife's life. I suppose the argument the other way is this: that we come back to the major premise that what we are dealing with is the divorce between two living people. Death in any case would sever the marriage relationship and, in the case of a wage-earner, the power to maintain; that, I suppose, is the sort of underlying basis of the power to make the ordinary maintenance order for joint lives only and not for the life of the wife.

3478. But this proposal, I think, is really aimed at the sort of case where the wife was not able to get adequate secured maintenance and the husband subsequently inherited a very large sum, or came by a very large sum of money. The husband then dies and the wife is left destitute although the husband is leaving a considerable estate. In that sort of case, the proposal would enable the court to allow a claim against the estate. You would not oppose that?—I certainly would not oppose it because, after all, the registrars have all considered it, they are an extremely experienced body and they know exactly from day-to-day what are the problems which arise in these matters. If they are satisfied that this is a real problem and a real hardship, I certainly should not oppose the recommendation.

3479. (Sir Russell Brain): I would like to ask one or two questions in addition to those Mr. Justice Pearce has asked in regard to insanity. I think we may take it that the reason for a period of five years' care and treatment was that in those days the treatment of mentally ill people was not as advanced as it is today and often the only criterion was really time—if the patients had not recovered in five years they were not likely to recover. Fortunately now with modern methods of treatment it is possible to answer that question much more quickly. Would it be fair to say that in your view, if the doctors exercise the care which the court has a right to expect, they would take into account any implications now contained in "care and treatment" and therefore the requirement of a period of care and treatment would be redundant? (Chairman): You mean, there should be simply the test—is this man incurably insane?—without any specified period? (Sir Russell Brain): Yes. If medical evidence was adequate upon that point the other factors would be redundant?—Yes, I am inclined to accept that view but I would like, if I may, to make one proviso. It is the fact that in the early days, and I think I took all the cases for the first four or five years, I was a little disquieted by the impression that there was a feeling that it was necessary in each case to try every sort of experiment, shock treatment and so forth, sometimes with pain and discomfort to the patients. I would not like to lay down or to accept any principle which involved the suggestion that every conceivable form of treatment had to be tried before the court could accept the medical opinion that the case was incurable.

3480. There is one other factor. As the result of modern treatment, as you know, many patients are discharged from mental hospitals who would previously have had to be kept there and, although they may be sufficiently recovered, they may be far from well. The present law does not cover them at all because they are not under continuing care and treatment. If the provision of care and treatment was abrogated they would now be included and a petition might be brought for divorce from such a person. Would that be an advantage in your view?—Yes, I think it would be an advantage to get rid of anything which is merely arbitrary or artificial. I must say that sometimes one has been rather struck by the fact that a patient is discharged cured one month and is back again under a reception order the following month, and the Board of Control file shows that things from first to last have been getting progressively worse and worse; there has been an interruption in the period of care and treatment of a month or two months but I was not always sure that it was a very real interruption.

3481. Could I have your help on a practical problem? At present the patient is in a mental hospital under medical care, and everyone knows where he or she is. Supposing that that condition no longer had to be fulfilled. You would have actions brought against people who were living apart from their spouses and not in mental hospitals. How would the petitioner set about obtaining the necessary medical evidence, or would there be any means to require the respondent to be medically examined?—That is a very real difficulty. That of course is one of the advantages of having some arbitrary and artificial provision about care and treatment, that you have got a definite starting point.

3482. I do not think it would apply to many patients, but it would certainly apply to some. Might I suggest that if there were a short period of care and treatment, say a year, and it had to be a continuing period but might have occurred during the past five years, that would in effect, I think, cover the very large majority of such cases?—That is really what I am driving at in including the voluntary patient. Is there any real reason why in the case of a voluntary patient the same reports should not be demanded as in the case of a patient in respect of whom a reception order has been made? Putting it in another way, is it not a little unusual to make out that a voluntary patient is simply there of his or her volition and that the reason is unconnected with the question of insanity?

3483. Of course you appreciate that there is a distinction to which the authorities attach a good deal of importance, in that they wish to encourage as many patients as possible to go as voluntary patients?—I know.

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3486. (Chairman): Might I make a suggestion? It would be so helpful to us if the President and Sir Russell Brain could discuss this matter and give us their considered views for the assistance of the Commission. Could that be done, because the procedure by question and answer now, before you have had time to get together and thrash out all the pros and cons, is perhaps more difficult? What do you think, Lord Merriman?—Yes, I should be very grateful if I could have some practical suggestion in writing and then be allowed to hammer it out with Sir Russell if possible. (Chairman): Perhaps Sir Russell Brain could formulate other suggestions or questions and let the President consider them at his leisure and give us his views upon them?

3487. (Sir Russell Brain): I would be very pleased to do that.—It would be very kind if you would, because I think it is a very difficult question, and it would need very careful hammering out, as the original clause was very carefully hammered out between the doctors and the Ministry and the promoters of the Bill.

3488. (Sir Frederick Barrow): In matrimonial cases in the magistrates' court, should the magistrates give their decision without reasons or fortify their decision by giving reasons, as is done in other courts, bearing in mind of course that their decision might be right and their reasons all wrong?—Do not think I am hedging if I give this answer, which is one I gave to the whole body of magistrates when I had the pleasure of addressing them on a certain occasion. My view is, and we have said this often in court, that they ought, when they refuse to discuss the case, to formulate, if not on paper, at any rate in their own minds, what the reasons for their decision are. I think any person who is giving a decision ought to know why he

(The witness withdrew.)

(Adjourned to Monday, 21st July, 1952, at 2.0 p.m.)

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SUPPLEMENTARY NOTE SUBMITTED BY THE RT. HON. LORD MERRIMAN

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3489. That, if I may say so, is appreciated. The question was should the reason be stated in court?—No, I do not think it should be necessary to state it in court.

3490. (Lord Kerd): Might I just follow up that last question, Lord Merriman? I think the suggestion was that the losing party would feel less dissatisfied, less disgruntled, if he knew the reason why he had lost, and of course unless the reasons were stated by the magistrates in court he really would not know the grounds or the reasons that moved them to give the decision. I do not know whether that affects your answer in any way?—My answer to that is a practical one. It is the one which Sir Frederick indented himself. Over and over again one gets one side or the other saying, the Chairman said this, but look at the considered statement of the reasons, they are not the same. It may be right that they should state their reasons in court but it would be a very big break with tradition in connection with a court of summary jurisdiction.

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(Chairman): I have no further questions, but we are all most grateful to you for coming and helping us this morning.

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MINUTES OF EVIDENCE **16-17**
TAKEN BEFORE THE
ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

SIXTEENTH AND SEVENTEENTH DAYS

Monday, 21st July, 1952,

and

Tuesday, 22nd July, 1952.

WITNESSES

THE REVEREND DR. J. J. CROWLEY, P.D.	} representing the Catholic Union of Great Britain.
MR. RICHARD O'SULLIVAN, Q.C.	
MRS. KIMBALL, J.P.	
THE REVEREND R. C. GORMAN, S.J.	} representing the General Council of the Bar of England and Wales.
MRS. MOYA WOODSIDE and DR. ELMY SLATER, M.A., M.D., F.R.C.P.	
MR. H. A. H. CHRISTIE, Q.C.	
MR. R. J. A. TEMPLE, Q.C.	} representing the Haldane Society.
MR. J. B. LATEY, M.B.E.	
MAÎTRE F. E. J. ALLEMES	
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THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

SIXTEENTH DAY

Monday, 21st July, 1952

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Lady BRAGO

Sir WALTER RUSSELL BRAIN, D.M., F.R.C.P.

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Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 46

MEMORANDUM SUBMITTED BY THE CATHOLIC UNION OF GREAT BRITAIN
WITH THE APPROVAL OF THE CATHOLIC HIERARCHY
OF ENGLAND AND WALES

Preliminary note

The Catholic Union, as its full title implies, includes Scotland in the sphere of its activities and there is in existence a special Scottish Committee: but owing to the differences in the English and Scottish law it was considered wiser to confine the scope of this memorandum to England and Wales. A separate memorandum, sponsored by the Scottish Catholic Bishops, will also be submitted.

For the information of the Commission the Catholic Union is perhaps the oldest English Catholic Society: it was founded in 1872. It may claim to be a representative and broad-based body not only having regard to its actual list of members but also to the fact that it has fifteen Associated Catholic Societies, several of whom have been consulted in the preparation of this memorandum. In general it may be said that the Catholic Union covers fields which lie outside the scope of specialised Societies, and perhaps its chief activity lies in making representations to government departments, local authorities, and other public bodies where it appears that Catholic interests are specially affected.

1. Introduction

In submitting this memorandum we think it wise to state first of all our motive in offering evidence, since it may be considered an anomaly that Catholics, who do not accept the State's view of divorce, should wish to be heard on the matters with which the Royal Commission is concerned.

It is the firm belief of Catholics that according to the law of God Himself there is no power on earth, ecclesiastical or civil, which can dissolve the bond of a valid and consummated marriage between two baptised persons. We also believe that such a marriage, even between unbaptised or non-Christian persons, is essentially indissoluble according to the natural law: for it is of the very nature of marriage that it exists primarily for the procreation, education and welfare of offspring. To the indissolubility of this second class of marriage there are, indeed, exceptions which are dealt with in Scripture and our theological

works, but they are exceptions and do not alter the general principle. At any rate, as far as consummated marriage between Christians is concerned, there is no exception to the law of indissolubility. In certain cases, if no other legal course is available to protect their just interests, or those of their children, Catholics may use the civil matrimonial court in order to obtain relief limited to the civil effect consequent upon matrimonial proceedings. Nevertheless such Catholics are taught by the Church that no decree of the civil law can sever the sacramental bond of marriage. That bond lasts until the death of one of the parties. Catholics may also usefully avail themselves of civil proceedings for dissolution in order to regularise their civil status in a case where a matrimonial union into which they have entered has been found to be invalid and null according to the law of the Church.

It is, we consider, important to say this at the beginning lest anything we say in what follows should be taken to imply the surrender of a position which in fact we do, and must, take up as a matter of conscience. In spite of the possibility that some may think that any views we express on the matter before the Royal Commission are shaped and coloured by our religious beliefs, and by our assumption that divorce, even in a restricted form, is an evil thing, because forbidden by Christ, nevertheless we feel that we can usefully assist the Royal Commission, for we come forward not only as Catholics but also as loyal subjects anxious for the welfare of our country. We assume that even those of our fellow-countrymen (probably the majority) who believe that divorce is justified in certain circumstances will yet agree that the ideal for marriage is inconsistent with divorce; that the need for divorce arises from the failure of people to maintain that ideal; and that, although at times there seems to be no remedy but divorce, it is still something to deplore, and that it would be better if divorce could be only an exceptional thing. Similarly, in their desire to being relief to many unhappy people, who cannot compose their matrimonial difficulties, they may envisage an extension of the present facilities for obtaining divorce. But we assume that they will readily admit that the only justification for extending something which, in itself, is undesirable, is the fact that no other and more desirable way of dealing with the problem exists, and that the desperate remedy which they advise will, at least, accomplish its immediate purpose.

Now, it would be absurd for us to deny that in certain individual cases the remedy of divorce, through extended facilities for obtaining it, would—apart from the challenge of conscience—bring to some persons the only relief they desire. What we do assert is, that as far as society is

¹ Canon, 1081.

A valid contract of marriage is a contract, in due form, whereby a man and a woman, being competent parties, give and accept a perpetual and exclusive right over their bodies for the purpose of acts which are in themselves suitable for the generation of children.

Compare the definition in the English law: "Marriage is in essence the voluntary union for life of one man with one woman to the exclusion of all others."—*Ryle v. Ryle* (1865) L.R. 1 P. and D.

PAPER NO. 46.—MEMORANDUM SUBMITTED BY THE CATHOLIC UNION OF GREAT BRITAIN
WITH THE APPROVAL OF THE CATHOLIC HIERARCHY OF ENGLAND AND WALES

concerned, such extension, while favouring a few, will not accomplish the greater good of the whole but will only intensify an evil which threatens and may well wreck our civilisation. In other words, we believe, not simply on religious grounds, but also on social and genetic grounds, that the extension of facilities for divorce will make our society not better but worse. It is mainly in that light that we proffer our evidence and not in order to be obstructive or to proclaim what is already well-known, namely, that the Catholic Church condemns divorce.

We feel, moreover, that the Commission, conscious of the gravity of this question, will take into consideration the fact that the Catholic Church has ever been concerned, for close on twenty centuries, with marriage and matrimonial problems. It has a tremendously wide experience of human nature, arising from its dealings with hundreds of millions of persons of every nation, age and class; and this experience cannot lightly be dismissed. The principles of divine law do not change, but its conclusions have to be applied to individuals. There has undoubtedly been development in purely ecclesiastical laws and in the Church's matrimonial procedure in its courts. We have therefore thought well to add to our memorandum an Appendix in which is set forth the doctrine and practice of the Church concerning marriage, divorce and nullity. (*Note: this Appendix is not reproduced.*)

The family is the basis of society, and the only true basis of the family is marriage in the sense in which we Catholics use the word, that is to say, a union intended to be life-long and not temporary. Marriage is not merely an association of man and woman, but to be complete it is a society of parents and children, which, to fulfil its purpose, should be of an enduring nature. To weaken the bond of the family would inflict grievous harm on the whole nation.

Where family life is based on the principles of unselfishness, mutual love, fidelity and forbearance, and also obedience and virtue, the State will flourish. The spirit of unrest, the lack of heart for hard work, the prevalent dishonesty and the growth of mutual suspicion among the different sections of the nation are reflections of the many homes in which there is little idea of unity, discipline and duty, stability and permanence, and in which the above-mentioned evils show themselves to a greater or less degree.

Apart from the wrong he inflicts on the State a person contemplating divorce should consider that such action may bring terrible evil to his own circle; individual unhappiness; the misery of a broken home; the bewilderment of children deprived of their proper and stable background and so producing a condition of things which may, in our view, conduce to juvenile delinquency.

In the face of these considerations we do not feel justified in holding aloof from the present inquiry, even though we know that our main contention that divorce is evil in itself is not accepted by the majority of our fellow citizens. Indeed we feel impelled, and even bound, to advocate the retention of certain laws, and the amendment of others, as the only practicable means, in the state of contemporary thought, on limiting the injury to society which is wrought by divorce.

2. Propositions sought to be established

A. That there should be no extension of the legal grounds for divorce: that in particular mutual consent of the parties should never become a ground for divorce; that effect of time, coupled with separation, should never be a ground for divorce.

B. That, procedurally, the obtaining of a decree of dissolution of marriage should be made less speedy and easy, especially where there are children of the marriage, in order to allow time for reconciliatory influence to come into operation; that where there are children of the marriage which is sought to be dissolved the court should have power to direct that the children should be separately represented.

C. That some machinery for reconciliation should be devised analogous to that existing in courts of summary jurisdiction, and that the decree of dissolution should not be pronounced until the court has satisfied itself that all reasonable steps have been taken to effect a reconciliation between the parties.

D. That more encouragement, and financial aid from public funds, should be given to marriage advisory councils and other bodies with similar aims.

E. That the Commission should have special regard to the injuries caused to children by "broken homes" and to the connection between abnormal homes and juvenile delinquency; that these factors should be taken into particular account when considering proposals for the extension of grounds for divorce.

F. That the remedy of judicial separation should be preserved, with certain amendments.

G. That machinery should be devised to ensure that a wife, whether she be petitioner or respondent, should be informed that, under existing law, she can never, when divorced, be her husband's widow in law, and that apart from rights to maintenance she loses her welfare benefits as a wife as soon as her marriage is dissolved and also any pension rights to which otherwise she might become entitled in widowhood.

H. That hasty and ill-considered marriages especially among young persons are a potent cause of divorce; that the Commission should consider whether to impose a legal check on such marriages either by extending the period between the first application to a minister of religion or a registrar and the earliest date upon which the marriage ceremony can legally take place, or by some other means, that the present system whereby marriages by licence can take place at short notice should be reviewed so as to secure that such licences are granted only when the circumstances so justify.

I. That the period of three years after marriage, during which proceedings for dissolution may not normally be brought under existing law, should be extended.

3. Arguments in support of proposition A

Even those who regard divorce as a necessary evil would agree that the evil should be limited as much as possible. Divorce is now obtainable by the injured party for all the main matrimonial wrongs, adultery, desertion, cruelty, etc., and any extension of the grounds for divorce would inevitably lead, step by step, to divorce by mutual consent. Any such extension would increase the number of divorces, and if a right to divorce by mutual consent were ever conceded the number of divorces would increase enormously. Such increase, though doubtless reflecting the wishes of the parties concerned, cannot be on that ground defended for the evil of divorce is contagious. The more the number of divorces increases, the more divorce comes to be regarded as a normal feature of our society, and the more will young people, even at the time of their marriage, assume, consciously or unconsciously, that if the marriage does not appear at any time to be a happy one it can be readily dissolved. Thus when friction between the parties first begins—and some friction is inevitable in every marriage—the necessary effort to compose differences is not forthcoming and matters proceed from bad to worse. It is otherwise with those whose religion teaches them the indissolubility of marriage: since the marriage cannot be dissolved they are usually resolute that it must be made to work. But such a belief cannot readily be implanted. What can be implanted, both by the tenor of the laws and the procedure to be adopted, is the sense that divorce is abnormal, anti-social, and a matter greatly to be deplored.

4. Arguments in support of proposition B

This proposition largely speaks for itself. We recognise that once a petition for divorce has been filed matters may have gone too far for reconciliation but even so we believe that some marriages might be saved if a longer period were to elapse between the filing of the petition and the granting of the decree absolute. We believe that the recent shortening of this period was a grave mistake and that the position before that change should be restored.

We also believe that cases must often arise where, in the interests of the children, it is most important that the court should have full knowledge of the reactions, sympathies, and wishes of the children, especially when the question of their custody comes to be decided; and we think that the true position as to this might be more fully and frankly presented to the court if the children were separately represented.

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Such separate representation might also assist the court in issuing the directions as to the financial provision to be made for the children.

5. Arguments in support of proposition C

This proposition is closely linked with proposition B in as much as the time gained, if proposition B is conceded, could be more profitably employed if proposition C were also conceded.

6. Arguments in support of proposition D

The work done by the marriage advisory councils is of growing importance and their efforts to reconcile couples who are considering divorce have met with a large measure of success. We are particularly concerned with the Catholic Marriage Advisory Council. This body receives financial aid from both the Home Office and the London County Council and gratefully recognises the encouragement and co-operation it has received from both. It has operated up to date mostly in London but activities have now begun in Bristol, Liverpool, Birmingham and Leicester. Further activities in other parts of the country could be undertaken if further financial aid were forthcoming.

We ask permission of the Commission to introduce a representative of the Catholic Marriage Advisory Council to give oral evidence as to its activities and the success achieved.

7. Arguments in support of proposition E

When there are children of a marriage which is dissolved, it is inevitable that the children will suffer in many different ways. Both a father and mother are necessary for a full and happy family life, and the background of stability so necessary for the child's physical and mental health. After the divorce the child in most cases will be living only with one parent and will only occasionally see the other, and it may be that that other parent is the one for whom he feels the most affection. This unnatural severance may have a most unfortunate effect upon the child's mind. Moreover the child may perhaps unconsciously grow up with the feeling that, since his own parents are separated, marriage is an unstable institution and when he comes himself to be married this sense will colour his own outlook and, perhaps, affect his conduct in matrimony.

Again, if either of the parents re-marries, the child may be exposed to a strange and possibly hostile influence. The "step" relationship is not an easy one, even when divorce does not enter into the matter, and when there has been a divorce the difficulty is enhanced. The child may well resent the presence and authority of a step-mother or step-father all the more because he knows that he does possess a real father and a real mother. Further, if the step-parents have been cited in the proceedings the step-children will be constant reminders to them of the family which they have disrupted.

8. Arguments in support of proposition F

We do not know whether it will be suggested to the Commission by any person or body that the system of judicial separation should be abolished and replaced by divorce granted on much extended grounds, but we submit that the remedy of judicial separation is a valuable one and should be preserved; we consider, however, that the jurisdiction of the court as to alimony and maintenance, the application of settled property, and other ancillary relief, should be the same in cases of judicial separation as in other matrimonial causes. Judicial separation is particularly appropriate for persons who believe in the indissolubility of marriage and feel that they would give pain and scandal to their relatives and friends if they became involved in divorce proceedings. We consider it wrong that such persons should suffer financially because of this natural reluctance to give such pain and scandal.

9. Arguments in support of proposition G

It may often be the case that a wife is in real doubt as to whether or not she desires a divorce and is hesitating whether to continue proceedings herself or, if she is the respondent, whether to defend the suit. In such cases the clear knowledge that, under existing law, she will, when divorced, lose the benefits referred to in the proposition may well make her decide against divorce.

10. Arguments in support of proposition H

We believe that a potent cause of divorce is that too many marriages are entered into hastily and without adequate knowledge or preparation. The need to stress that marriage is a solemn and life-long contract entered into by two people who thereby accept the duties and responsibilities of that state cannot be over-emphasised. Many young couples who come to the magistrates' courts are completely unaware of their obligations in the married state. These obligations should be explained in detail to those about to be married. In Manchester and Liverpool successful experimental classes in marriage training have been held where young engaged couples have had the opportunity of discussing with experts in many fields the things that go to the building-up of a happy married life. But the training requires time, and if young persons can be married within three weeks of the application referred to above, time is not available before marriage. We submit for the consideration of the Commission that in the case of couples either of whom is under twenty-five a minimum period of six weeks should elapse between such application and marriage, whether the marriage is in a church or before a registrar. We submit that the whole system of marriage licences should be reviewed. Doubtless it is only a small minority of marriages which take place in accordance with these licences but they are undoubtedly an incentive to hasty marriages. A licence can be obtained almost immediately from a surrogate of the Church of England whether or not the applicant is a member of that Church. No reasons need be adduced for the application; the only condition is the payment of £2 or £30 according to the domicile of the applicant. The same procedure is followed at a registrar office except that in this case the marriage cannot take place until one clear day has elapsed since the day of application. In both cases there are of course dispensed with and the parents and friends of the parties have no means of knowing that a marriage is even contemplated so that there is no opportunity for advice or warning to be given. We recognise, of course, that good reasons may sometimes exist for a hasty marriage but we submit that these reasons should be given and proved and that the ordinary safeguards should not be dispensed with merely on payment of a sum of money.

As to ill-considered marriages the State, we recognise, cannot legislate without undue interference with the rights and liberty of the individual; but there is one category of ill-considered marriage as to which the State might well take action. Too often the young wife knows nothing of the domestic craft; she has not been taught to cook, sew or clean. The result is that, not through lack of adequate means, but through her own wastefulness and incompetence, the home becomes squalid and miserably uncomfortable. This the husband increasingly resents and the seeds of quarrels and disruption are duly sown. We would urge on the Commission the importance of giving preparation for family life a more prominent place in the national system of education. This was the conclusion reached by the Royal Commission on Population (see para. 594). We emphatically think that girls in their last year or two at school should receive more instruction in the domestic crafts in preference to other subjects less likely to be of value to them in married life.

We ask permission to present oral evidence as to certain of the matters dealt with in this paragraph.

11. Arguments in support of proposition I

We think that the extension of the above period would tend—

(1) to discourage unions which are, in law, marriages but which lack the element of permanence because the parties thereto have no firm intention that the marriage should be permanent;

(2) to stimulate the natural inclination of married persons to make the necessary effort to overcome the disruptive tendency of such feelings as may arise in early married life.

(Dated January, 1932.)

21 July, 1952]

THE REV. DR. J. J. CROWLEY, PH.D., MR. RICHARD O'SULLIVAN, Q.C.,
MRS. KEMBALL, J.P. AND THE REV. R. C. GORMAN, S.J.

EXAMINATION OF WITNESSES

(THE REV. DR. J. J. CROWLEY, PH.D., MR. RICHARD O'SULLIVAN, Q.C., MRS. KEMBALL, J.P. and
THE REV. R. C. GORMAN, S.J., representing the Catholic Union of Great Britain; called and examined.)

LT.-COL. THE HON. HENRY HOPE, K.C.S.G., Secretary to the Catholic Union of Great Britain, was in attendance.)

3482. (Chairman): We have here from the Catholic Union of Great Britain the Rev. Dr. Crowley. What office does he hold?—(Lt.-Col. Hope): He is a Doctor of Philosophy and is a theological witness. He is parish priest in Stratham.

3493. We have also Mr. Richard O'Sullivan, Q.C., Mrs. Kemball, who is a Justice of the Peace and comes from Manchester, and the Rev. R. C. Gorman, S.J., who is Chairman of the Catholic Marriage Advisory Council. The memorandum of the Catholic Union is admirably clear, and I want to ask first whether any of you wish to say anything by way of addition to it before we ask you any questions.—No, my Lord.

3494. I think you were not very anxious to give oral evidence but you have kindly come along to answer any questions that we may wish to put to you. From your preliminary note, I see that your memorandum is confined to England and Wales, and that a separate memorandum sponsored by the Scottish Catholic Bishops will be submitted. Then by way of introduction you say that you think it wise to state first of all your motive in offering evidence, since it may be considered, to quote your memorandum:—

"... an anomaly that Catholics, who do not accept the State's view of divorce, should wish to be heard on the matters with which the Royal Commission is concerned."

Then you point out that:—

"It is the belief of Catholics that according to the law of God Himself there is no power on earth, ecclesiastical or civil, which can dissolve the bond of a valid and consummated marriage between two baptised persons."

Then you go on to say that you come forward not only as Catholics but as loyal subjects anxious for the welfare of your country feeling that you will usefully assist the Commission. You say, after expressing your views about divorce:—

"In the face of these considerations we do not feel justified in holding aloof from the present inquiry, even though we know that our main contention that divorce is evil in itself is not accepted by the majority of our fellow citizens."

As I understand it, your view is that, notwithstanding these beliefs which you firmly hold, you can assist the Commission by expressing certain views on the footing that in this country there are laws regulating divorce?—(Dr. Crowley): Yes, my Lord, I think we might say that that is our contention.

3495. And, of course, as we know, Catholics, realising that this law has to be administered, give assistance in administering it in various capacities such as on the bench, at the Bar and as solicitors. You then say:—

"Indeed we feel impelled, and even bound, to advocate the retention of certain laws, and the amendment of others, as the only practicable means, in the state of contemporary thought, of limiting the injury to society which is wrought by divorce."

Then you set out your propositions, the first of which is:—

(A) "That there should be no extension of the legal grounds for divorce; that in particular mutual consent of the parties should never become a ground for divorce; that efflux of time, coupled with separation, should never be a ground for divorce."

Then proposition B reads as follows:—

"That, procedurally, the obtaining of a decree of dissolution of marriage should be made less speedy and easy, especially where there are children of the marriage, in order to allow time for reconciliatory influence to come into operation; that where there are children of the marriage which is sought to be dissolved the court should have power to direct that the children should be separately represented."

Now on that you say:—

"We recognise that once a petition for divorce has been filed matters may have gone too far for reconciliation but even so we believe that some marriages might be saved if a longer period were to elapse between the filing of the petition and the granting of the decree absolute."

Do you think that mere delay without some provision for reconciliation in the meantime will do good?—Not merely delay by itself, although it might to a certain extent enable friends and others to influence the parties to become reconciled and thus prevent the break-up of the marriage. I think that you will find that proposition B must be read with proposition C in which we suggest that perhaps some machinery could be envisaged which might bring about reconciliation before the proceedings have gone too far. We do know that in courts of summary jurisdiction officers such as the probation officers are able to intervene very often with great success. In many cases, especially with younger people, a marriage is endangered because certain points perhaps have not been put to the parties clearly, or the full consequences of their actions has not been appreciated. Again it may be that they are finding certain difficulties in the first years of their married life which they may not find to be so fearful later on. Therefore the Catholic Union is suggesting that some machinery might be envisaged with the object of bringing about a reconciliation. It is quite clear, I think, that when solicitors have been instructed and proceedings have been commenced, a rift between the parties has become visible to all and it is perhaps a rift which is far too deep to be cured very easily. One would therefore think that some procedure such as is used frequently in courts of summary jurisdiction might be made applicable to divorce proceedings. I think that is the suggestion which the Catholic Union wishes to put before the Commission for consideration.

3496. Would it be your view that there should be some compulsory reconciliation attempts before any divorce petition was filed?—It is difficult to see how a compulsory use of such machinery could be made effective. I am not myself a civil lawyer, therefore I cannot say, but I think that if solicitors themselves were aware of the existence of such machinery, and were aware that it was the wish of the court that such machinery should be used in far as possible, we might have there the means for this machinery to be put into operation without its use being compulsory. If your Lordship means that unless the petitioners did use the machinery their case could not be heard, then, of course, we did not mean that.

3497. Then you go on to say under "Arguments in support of proposition B":—

"We believe that the recent shortening of this period was a grave mistake and that the position before that change should be restored."

Were you thinking there of the shortening of the period between the decree nisi and decree absolute?—Yes.

3498. What good results do you think would follow from the extension of the period?—It is not impossible surely to envisage that reconciliation might come about in that period although it would obviously be very much more difficult to bring about; that is why we would like to see any attempt at reconciliation made as early as is consistent with the case.

3499. You think that if the period were to be extended to what it was until recently there would be more chances of reconciliation even at that stage?—Yes, I think so. (Mr. O'Sullivan): I think it is the experience of practising lawyers that after a decree has been made absolute, in a certain number of cases there is re-marriage between the original spouses. It is also the experience of practising lawyers that sometimes there is a reconciliation between decree nisi and absolute and that the decree nisi is not then made absolute. So we thought that if that intervening period were lengthened from six weeks to six months the parties would still remain married during that longer

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interval and it would be easier for reconciliation to take place in such circumstances than if the decree had been made absolute at an earlier date.

3500. Then in the same paragraph you say:—

"We also believe that cases must often arise where, in the interests of the children, it is most important that the court should have full knowledge of the reactions, sympathies, and wishes of the children, especially when the question of their custody comes to be decided; and we think that the true position as to this might be more fully and frankly presented to the court if the children were separately represented."

Are you making the suggestion that in every case where there is a divorce petition, whether it is defended or not defended, and there are children of the marriage, the children should at once be separately represented?—We would allow a discretion to the court.

3501. You think that the judge should have a discretion to say that in these cases someone, it might be the Official Solicitor, or it might be someone else, is to represent the child?—Yes.

3502. Perhaps I should say this as regards proposition H, which deals with hasty and ill-considered marriages. The Commission feels that notwithstanding its title, the Royal Commission on Marriage and Divorce, which I think has misled many people, that subject does not come within its terms of reference. But it has your views set out here and it takes note of them. Coming to proposition I, the suggestion is:—

"That the period of three years after marriage, during which proceedings for dissolution may not normally be brought under existing law, should be extended."

Would you commit yourselves to any particular period of extension?—(Dr. Crowley): We have made the proposition that we think that three years is perhaps a very short period indeed. We have come to that conclusion because at the present time in England there is a good deal of difficulty with regard to the early married life of young people. We know that there is the very great difficulty over housing and there are other economic difficulties which do not give young people at the present time perhaps the stability which might be wished for. It is clear therefore to us that a greater strain is placed upon the friendship of the two spouses during those early years of married life. It is possible that, were the period to be extended, it might be easier for these two to conquer their initial difficulties, perhaps by getting some more suitable dwelling, perhaps by the man finding some more stable employment. In many cases we find that seasonal service very shortly precedes marriage, and the young man on leaving the Army has not had time to settle down and get stable employment. Therefore we do feel that those first two, three or four years are very critical years indeed, and that it would be dangerous therefore to judge the whole of the future married life from the rather difficult experiences that young people may go through during that period. I would not care to say that the Catholic Union would wish to state formally that there should be a ban on proceedings for divorce for any particular period of years after marriage, but it suggests that three years seems to be too short, and that perhaps five years might be more acceptable. I do not wish to say that we are tying ourselves to three or five or any given number of years.

3503. You do not want the period to be reduced and you would rather lengthen it. You say as one of your reasons for an extension that this would tend "to stimulate the natural inclination of married persons to make the necessary effort to overcome the disruptive tendency of such frictions as may arise in early married life". That is in your view an instinct to be encouraged?—I think there, my Lord, some of us were thinking that a possible desire for children might bring the parties close together, and that during the first year or two of married life there is at the present time a certain reluctance to undertake the responsibilities of parenthood on the part of the man and woman. Were a certain time given for that reluctance to be overcome, the woman might be a very potent factor in wishing to have a child and therefore in making the marriage more permanent. We feel that when there is a child or children of the marriage there is much more chance of both husband and wife being willing to overcome difficulties which they would not be so willing to overcome if there were no children.

3504. Is it or is it not your view that nowadays young people are apt to enter upon marriage more hastily and with less consideration?—I think so. To what extent I could not say. I think that it is also true that there is perhaps a growing reluctance to undertake the responsibilities of parenthood immediately after married life begins, and that is due not merely to the psychological approach to marriage but also to the economic situation in which most young people find themselves at the present time.—(Mrs. Kimball): May I add a word about that? I do feel that even where a marriage takes place under the very best conditions and couples have a home of their own to start with, there is a period of adjustment, and that period does go on for a considerable time. Today there are a large number of very young married people who have not got a home of their own where they can carry out that re-adjustment. To re-adjust one's life, in the presence of "in laws" and numerous relations and in very limited physical space is an exceedingly difficult thing. We do hope that there will be a progressive change of young couples in a year or two getting a home of their own where they can go through that period of adjustment under conditions which are at present denied to them. Further, there is also of course the very high cost of producing a home, and therefore there is an inclination in the first years of married life for the young wife to continue to work outside the home; that is a disintegrating influence which does not allow a normal re-adjustment to take place readily. That is another reason why we really must plead for a longer period for this re-adjustment.

3505. I suppose you think that the longer the period the more likely it is that these desirable things will come to pass?—Yes.

(Chairman): These are all the questions I personally want to ask, but perhaps I should add this upon the matter which I have indicated may be outside our terms of reference. As I have said before, it may be that the Commission will form some views upon the important subject of pre-marital training and may possibly indulge in other dicta. I do not know.

3506. (Lord Kelt): Have you any experience that will enable you to say whether friction in marriage does not arise more frequently later than earlier in married life?—My own experience in the domestic courts in which I sit does lead me to think that friction occurs in the early days of married life, particularly when the couples have not got a normal home and when there is interference by one or other of the "in laws".

3507. Of course that is a difficulty which really arises largely out of the housing situation?—Yes, quite definitely that has a great bearing on it. (Dr. Crowley): One's own personal experience is, of course, necessarily very limited, but I have had quite a number of difficulties brought to me with regard to my own people, and I agree that perhaps friction is not necessarily confined only to the first years of married life; indeed friction at that period at the present time may be very great because of the peculiar situation in which we live. Friction is obviously possible later on in married life for a great number of reasons, and it would be stupid to deny the existence of such friction, but I do find that, as married people become older and in most cases assume greater responsibilities, they become more open to the arguments of logic, to the argument that after all they have made a bargain one with the other and, although in some cases the bargain may be difficult to keep, the best thing to do is to try and make that bargain a life-long one. I think here we are really approaching what strikes me as a very important consideration, and that is that if a man or a woman is what has been called divorce-minded then there will be less inclination to conquer difficulties. If a person thinks that the contract of marriage is indissoluble, he will quite obviously be more inclined to face his difficulties and overcome them. If there is a way out of a difficulty one will come them. If not so far in attempting to conquer the difficulty. If there is no way out of the difficulty, or only a very rarely used way, one will attempt to a much greater extent to overcome that difficulty. I think that that is a common attitude which is not confined to difficulties outside married life, which is not confined to difficulties outside married life. If persons understand that divorce and the subsequent freedom to marry again are, if not entirely removed, at least made very difficult to obtain they will therefore be

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able to overcome their difficulties. I think that point is a very important one, and I would like to say that that is my experience.

3508. Does the Catholic Marriage Advisory Council cover marriages between Catholics exclusively?—(Rev. R. Gorman): It would cover Catholic marriages and also marriages between a Catholic and a non-Catholic partner.

3509. But not marriages between parties neither of whom is a Catholic?—If the parties pressed, but naturally the National Marriage Guidance Council would cover that ground. There are a number of people who are not even Christians, overseas students for example, and who insist on coming to the Catholic Marriage Advisory Council for one reason or other; I have had Indo-Chinese Buddhists and others.

3510. Under proposition E in your memorandum you point to the suffering caused to children by broken homes. I suppose you recognise that broken homes are not confined to homes where there has been a divorce?—(Dr. Crowley): I think so, yes.

3511. And perhaps there are as many broken homes where there is no divorce as broken homes caused by divorce?—(Mr. O'Sullivan): In my experience, death breaks the home, or divorce or separation, and sometimes much more subtle things. I have had cases in court concerning boys recommended for Borstal, in which the home appeared to be a perfectly good home. I remember one case I was very puzzled about when I was sitting at the London Sessions; there was a report of a good home, the father and mother living together with four children, and then one boy went criminal. Eventually I discovered behind the appearance a broken home. The father was a railway worker on the night shift so that he was not in the home effectively as a father. There was another case, if I may add it to show the subtlety of the broken home, a case from Merseyside at the London Sessions. There was a Catholic home, five children, one an invalid, and the parents there, and one of the children went criminal. I was much puzzled, and it was only at the very last stage when the police officer, or probation officer, who had made enquiries was leaving the box that he said, "I told you that the father and mother were living together, Sir, and I feel I ought to explain that he left the home for some time and she took him back, but she took him back as a lodger". The sensitivity of the child, I imagine, responded to a situation in which psychologically there remained a broken home.

3512. This is really a much wider problem than the problem of the broken home brought about by divorce?—Yes.

3513. And, of course, where you have judicial separation you have got exactly the same problems arising?—I think so, so far as juvenile delinquency is concerned. (Dr. Crowley): May I point out that there is a difference between judicial separation and divorce which makes us recognise very reluctantly on certain occasions such separation, and that is that the parties are regarded as still married although separated, and every attempt is made whenever possible to bring an end to the separation. There is a finality about divorce which is not found in judicial separation.

3514. (Chairman): The home may be only temporarily broken in the one case and not in the other?—I have had cases in which we have managed to end separation.

3515. (Mr. Fletcher): In your arguments in support of proposition E, you talk about the home and the necessity for full and happy family life. Would you say that, by and large, an unhappy home is better for a child than no home at all, then, shall we say, an institution, or something of that sort? That is a point at which we have had rather conflicting evidence.—That question would need rather lengthy discussion because it has very many aspects. To say that a bad home is better than no home would, I think, depend upon the degree of badness in the home. One of the reasons we are reluctant to give up the home is because we feel that the home is an integrating influence upon the growing child, and we do very reluctantly, for the sake of the child, allow homes to break. We know only too well what happens when a father and mother have separated because of some offence committed by one or other spouse. There is very frequently indeed a playing off of the child by one party against the other,

and the child is made an instrument of revenge. Although if that home were kept together the child might suffer, in many cases it would not suffer, we think, so greatly as when the parties have separated and one spouse for revenge uses the child against the other. In my own experience I have a very painful case at present to which I can find no solution. The parties have separated and they have sought divorce. The fault is entirely on the side of the husband. Neither of them is a Catholic as it happens, but the case was brought to my knowledge because the child was at a Catholic school and the mother came to see me. There I saw one of the most patent examples I have seen in my experience of a child being used as an instrument of revenge. The father has the child once a fortnight; unfortunately, he does what he can to send the child back to the mother spoiled in every way, he is much richer than the mother; then the mother in her turn, very wrongly indeed, does what she can to poison the child's mind against the father. Now, we wish to avoid in every possible way that conflict of loyalties which is in the child's mind when it finds that there is a very basic division between the two persons whom it should love most and admire most. A child in its early years has not the logic and experience which would enable it to overcome that difficulty. It is born into a world of seeming confusion, and it grows up in very many cases without that integrity of personality which is so necessary to the man and woman of the present time. Moreover, in very many cases where a home is broken by divorce, it would be found that perhaps neither the father nor mother was really capable of having the custody of the child. There would, therefore, be placed upon the already overburdened national assistance a further number of children to be cared for; I think that is a very serious question indeed, because at the present time there are well over 50,000, I think the last figure I can quote is 55,000, children in this country who are being cared for in institutions of various types. As a result of the Curtis Report, the Home Office very wisely wishes to break down the institution and to get children together in smaller buildings where they can have the real influence of home life.

We know only too well how unsuccessful the Home Office has been, not through want of desire for such an improvement, or through want of trying, but due to the economic situation in which we are now placed. If one gives a further number of children over to institutional care we are nullifying the effect of the Curtis Report. I am afraid I have not answered directly the question which was asked me, because I do not think I can with a yes or no, the question is too complex, but I would say that we wish to avoid under all possible circumstances the breaking up of the home by the voluntary action of divorce. When a home is broken up by illness or death, these are natural events over which we have no control, but when a home is broken up by such a thing as divorce that is an event over which we have control. Therefore we really wish to try and lessen the number of broken homes, not to abolish them, because unfortunately we cannot do that. (Mrs. Kimball): I think the question was directed towards whether it is better to leave the child in a bad home. I think it has been the experience of all of us who have been engaged on work in connection with children under care that children from what we should regard as a bad home have an attachment to that home which certainly does cause us a certain amount of wonderment. If you remove a child from even a bad home it takes a very long period indeed for that child to become re-adjusted; that is now the experience of the child psychologists who would have been all for moving the child ten or fifteen years ago but who are now very anxious to maintain the mental stability of the child by keeping it with the parents. This point has been brought out in the Mental Care and Mental Health report of the World Health Organisation by Dr. E. J. M. Bowley, namely, how the child living in a bad home is incomparably better from the point of view of stability and affection than it is in a substitute home however good that is.

3516. (Sir Frederick Barrow): In the Introduction to your memorandum you state that:—

"... such extension, while favouring a few, will not accomplish the greater good of the whole but will only intensify an evil which threatens and may well wreck our civilisation."

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You say you believe, on social and patriotic grounds, that the extension of facilities for divorce will make our society not better but worse. What evidence have you that the extension of divorce facilities during these last fifteen years has made society worse?—(Dr. Crowley): We have seen during these last two generations a very steep curve indeed in the number of divorces. If we come to the state where our civilization is not based upon family life, I suppose no harm will be done, but at present each divorce is in some way a threat to family life and the stability of family life. One knows at the present time that what has been well called *divorce-mindedness* is on the increase. The more divorce-mindedness increases the more the family is threatened, and I think that what we have in mind is that the civilization which we have in this country and which has been based for very many generations upon family life is seriously threatened by the increased number of divorces and the fact that divorce-mindedness seems to be increasing.

3517. By proposition II you are advocating that marriage by licence should not usually take place at such short notice as at present. That seems rather a reflection against the action of the Church of England in allowing these special licences to be obtained so readily. Why do you think that it would prevent this wreck of civilization if the period were lengthened?—(Mr. O'Sullivan): We do not say that it is the only thing that would operate to prevent the wreck of civilization, but it is my experience, and that of many of my colleagues at the Bar, that it is too easy nowadays to enter into marriage. Some of my colleagues, and I agree with them, are of the opinion that it would be better that there should be a longer period than the present three weeks, so as to give more opportunity to think about the duties and the responsibilities of the new life. With regard to the practice of the Church of England, I think that it has been the practice from long ago that one can have an ordinary licence on three weeks' notice and a special licence immediately. That happens to be the way in which the law allows a licence to be issued, and it costs £2 or £20 according to the occasion. There is no compulsion intended with the Church of England. We say that as the situation is, it is too easy for young people to get married. Three weeks is a normal period of notice; we say six weeks would be better because it would give more opportunity for thought. We have in mind what is recommended elsewhere, that there should be some preparation for marriage and family life, on the part particularly of the women, and that lectures should be given to young people by competent persons on the duties and responsibilities of marriage. We make a series of proposals which converge to one thing, namely, to impress the young people with the duties and responsibilities of married life together, and that is one of the minor proposals, namely, that it should be less easy to enter into marriage, and that a longer period of mental preparation should be required.

3518. But it is not the fact that the majority of people have rather prolonged preparation for marriage and a prolonged courtship? When they decide to get married, they have probably known one another for three or four years. How would it help to extend the period by only three weeks?—Such an extension might not assist greatly, but it would be an indication of public opinion that a longer period of preparation was needed. (Rev. R. Goodman): The cases envisaged were those where the parties would not have been engaged for three or four years but for less than three weeks. Our proposal is quite consonant with the Archbishop of Canterbury's very interesting remarks in Appendix E of his memorandum submitted to this Commission, in which he stresses the importance of direct education before marriage, and that certain measures should be taken in regard to marriage by registers. (See Paper No. 16, *Minutes of Evidence for the Sixth Day*.)

3519. I fully understand the sincerity of your reasons for advocating this, but would three weeks make any great difference?—I have sometimes found that in the very shortest time, three hours, one can draw people's attention to things, and it is much better if one has the longer time of three weeks. There are obvious elementary points which may never have been thought of by the parties and which are very liable afterwards to cause great friction if they have not been discussed.

3520. (Mr. Beloe): Would you feel that sometimes it might be better for a child to be with one parent who

was a good parent rather than with a good parent and a thoroughly bad parent?—(Dr. Crowley): I think we, yes. I might prefer the answer to that question by saying that it is impossible to generalize in these cases, and one does not wish to generalize. It is obvious that in putting forward certain propositions in this form the proposition itself is very badly stated, and leaves room for a good deal of discussion. I think I can answer by saying that if there is a case of a good parent and a thoroughly bad parent who is undoubtedly doing a great deal of damage to the child and the home in general, we, equally with anybody else, would advocate the separation of that unworthy parent from the home; indeed, we do so. As I have said already, we reluctantly advise our own people to seek judicial separation; the case Mr. Beloe has given, I think, would be a case in which the average parish priest would recommend the woman or man, whichever it might be, to have recourse to the law so that the unworthy partner would be restrained from interfering with the well-being of the home.

3521. Take this case; a man is deserted by his wife and has three children. What do you think would be the best thing for him to do?—I would say in that case all he could do would be to get those children taken care of by an institution of some description.

3522. You would not advise him to take a housekeeper, because he probably could not afford it?—He probably could not afford a housekeeper. If he could afford to have a woman to look after these three children, he should do so. The individual case is, I think, what one must look to. It may be that his relatives would be able to help, perhaps his mother or an unmarried sister. I do not think that we could agree that the difficult case which has been cited is sufficient reason to break down what we regard as the only, the contract which is made between one man and one woman for life, and although necessarily in the individual cases the husband or wife and the children must suffer, we think it is necessary that the individual should suffer under these unfortunate circumstances rather than sacrifice what we regard as one of the greatest safeguards of society.

3523. The representative of the Church in Wales suggested that the National Assistance Board should assist the man to pay the housekeeper. Does that suggestion attract you?—I do not see why that should not be so. (Mrs. Kerrall): As a matter of fact, I should imagine that there is a good deal to be said for that suggestion for two reasons; firstly, it would preserve the children in contact with the home, and secondly, from the point of view of economy, it would be much more economic for the State to do that than to take three children into care. All this does show that children are indeed handicapped and severely punished by divorce. I am dealing with a case at the moment, it does not happen to be a Catholic case, where there are no financial difficulties and where the husband and wife are both equally fond of the child, nevertheless they are pressing for divorce. The child spends some time with each, the longest period with the father, and the question that that child recently asked was one which it is very difficult to answer, "Why can't we all live together?" Instability has developed in that child as a result of its loyalties being divided.

3524. You have suggested that the child should be separately represented, at the discretion of the judge. I wondered if you had thought about this. How would the judge know in an undefended case in which there was no question of custody whether the child ought to be represented or not?—(Mr. O'Sullivan): The judge would be in a difficulty, I should have thought, in such a case unless there had been a previous attempt at reconciliation by a reconciliation officer, and then he might have a report, or he might choose to ask the welfare officer of the court to make enquiries.

3525. It would be pure hit and miss, would it not?—Judicial intuition.

3526. You would not go so far as to say that there should be a representative of the children in every case, whether undefended or not?—I have not got the judicial experience to enable me to give an answer. I think that would be a matter for the experienced judge to answer.

3527. Could you say what is done in the Church courts in respect of the children in cases of nullity?—(Dr. Crowley): In most cases we wish, if possible, the women to be responsible for the children and to take custody of

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them. That, I think, is our usual practice whenever possible. If neither father nor mother could take charge of the children, we would be placed in exactly the same situation as in the event of death of the parent or parents, and we would then have to make such arrangements as we could with the assistance of the Home Office and State institutions. We would use our institutions to see that these children got the best that we could give them.

3528. I was really asking whether you had somebody representing the children in such cases?—Yes, we have. We always have a member of the Rescue Society in our diocese, the same society goes under various names throughout the various dioceses in the whole of England.

3529. (Chairman): The question and the answer relate only to the courts of your Church?—Yes. As perhaps Mr. Belse is aware, the cases of adultery which occur, even in a large diocese, in any given year are very few indeed.

3530. (Mr. Belse): So it is not difficult?—It is not really what we would call a very pressing difficulty.

3531. Would you tell me a little more about your Marriage Advisory Council? Is its work mainly pre-marital or post-marital?—(Rev. R. C. Gorman): It is a combination of both. If I may refer back to an earlier question you put concerning separation, is a case where both the mother and father would do well to separate and re-establish themselves for a short time before coming together again, the children would be taken into the excellent Crusade and Rescue Homes and part of the work of the Catholic Marriage Advisory Council would be to help those parents, if they had any measure of goodwill, to re-establish themselves and re-form the home. The Catholic Marriage Advisory Council has about 900 cases a year in London, and others in other large provincial towns, Manchester, Liverpool and so on. Of 500 cases, three-quarters would relate to post-marriage problems. We are developing on a very large scale the pre-marriage training for the very poor in the East End, Mile End, Stepney and so on, and for those in the more residential suburbs; we have in fact the whole social range.

3532. Is the work carried out by lay men and women?—Yes. The counselling is done by a team of married men and women working voluntarily at the London centre and in Liverpool and Manchester and so on. Naturally they refer cases that have as important medical factor in them to our medical consultants of whom we have a panel of ten or eleven, and religious problems are referred to the priest, but the counsellors deal with the cases substantially themselves.

3533. Can you tell me what the cost of the service was last year?—It was approximately £2,700.

3534. Did you have any government grant?—We had a grant from the London County Council which helps us to do largely pre-marriage training. We had a diminished grant from the Home Office, £750. On that, I would like to remark that the National Marriage Guidance Council and His Grace the Lord Archbishop of Canterbury have both pointed out the extraordinary differences between the amount given to legal aid for divorce and that given for pre-marriage training, taking all the associations, Catholic and others, into consideration.

3535. And that £750 is the grant you are getting this year?—We got it for this year and we are hoping that next year it may be restored to the very minimal figure of £1,500, which it was originally; it has been cut owing to recent difficulties.

3536. You speak of hasty and ill-considered marriages as being a potent cause of divorce. Have you any evidence to that effect or is it merely from general observation?—(Dr. Crowley): It is from general observation. I think. In very many cases we do find people, especially younger people, marrying without full consideration of the responsibilities they are undertaking, so that it is difficult to get them to adjust themselves to a situation they had not fully envisaged.

3537. I notice that you have not suggested any alteration in the age of consent. An alteration has been suggested by some witnesses; have you any views on that?—We have not put our views forward because we wished to keep our memorandum within certain limits, but I think we would welcome a slight increase in the age.

3538. For full consent?—For full consents, yes. As you are perhaps aware, in canon law the age is much lower at which a boy and girl may contract marriage, mainly because canon law in itself whenever possible fits in with the civil law of the countries in which it is being administered. Canon law puts the age as low as twelve and fourteen for essential consent. That is in view of the fact that certain countries, not this country, have a much lower legal age limit.

3539. (Mr. Young): If two Catholics marry outside your Church, that is, in a registry office, and are then divorced, and one of them wishes to marry a Catholic and to get married in the Church, do you marry them?—Yes; may I explain why? (Chairman): You can if you really wish to, but it seems to me it is rather outside our province. I think perhaps it is fair to let you explain as you have been asked the question.

3540. (Mr. Young): I understood that the attitude of the Catholic Church was that it did not recognise the marriage at all unless it had taken place in the Church?—I think there is a slight confusion there. With your permission I should like to say a word about it. We recognise every marriage which has the necessary conditions demanded by what we consider to be the nature of the case or the natural law. In the case of a Catholic marriage we think that because there is a sacramental character added to the actual contract, that marriage should therefore be performed before a witness of the Church. This is the meaning of the impediment known as that of clandestinity. The impediment of clandestinity was formally imposed by the Tametli Decree of the Council of Trent. The Tridentine Decree was not fully promulgated in certain countries, Scandinavia, parts of Germany, England, and North America, and was finally universally promulgated only by the No Tenens Decree of 1508 which lays down that it is an invalid marriage for Catholics to marry except before the lawful witnesses. Canon law permits that when it is anticipated that there will be a month's delay before a marriage can take place before the parish priest, then the marriage may take place without a priest. It is therefore quite incorrect to say that we recognise as valid only Catholic marriages. (Mr. O'Sullivan): I think in canon law all marriages which are Christian according to the regular mode of celebration of marriage are recognised as valid, therefore marriages of Anglicans and Nonconformists are valid if celebrated in the way normal and proper to them.

3541. I could not follow why you recognised a divorce between spouses married outside the Church, but not between those married in the Church?—(Dr. Crowley): We regard the marriage of Catholics outside the Church as void *ab initio* and there would be a declaration of nullity. (Mr. O'Sullivan): As in England marriage must conform to certain requirements in the way of celebration, and if the marriage does not conform to those requirements it is null and void, so for the Catholic marriage must conform to certain requirements of celebration. If it does not conform to those requirements, it is not a marriage. (Chairman): Speaking for myself I do not think this Royal Commission is concerned to comment upon or criticise in any way the law of the Catholic Church, nor are we concerned to make any suggestions in regard to it.

3542. (Sheriff Walker): You said something about the evil of divorce breaking up homes. Supposing that the law were so changed that divorce would only be granted where the home had already been broken up in fact, would you approve such a change? Might I make it clearer? Supposing that the whole of the present law of divorce with all its complexity was repealed and one and one only ground of divorce was allowed, namely, that the home should already have been broken up irrevocably, would that be in agreement with your ideas?—(Dr. Crowley): The meaning of the question is not quite clear because you are aware that our teaching does not admit that a divorce can give freedom to contract another marriage. But if, once legal divorce is admitted in a country, you mean that the only ground of divorce should be that the home has broken up irrevocably, then I say "yes", because I think that would make divorce much less frequent.

3543. Suppose it was enacted that where the parties had been living separately for say X years and there was no hope of them coming together, then and then only should the marriage be dissolved. Would you be prepared

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to accept that?—Again "yes" in so far as by the law of this country divorce would be a legal procedure. I think that is answered in the same way as the previous question, namely, we would welcome any legal change which made divorce less frequent and I think this again would do so.

3544. What do you say to this next proposition, that where these two facts are established, namely, that the parties have lived apart for X years and there is no hope of them coming together again, then either party to the marriage should be entitled to sue for divorce? Have you any views about that?—Quite distinct views. To sue for divorce in order to re-marry, no. To sue for divorce in order to obtain certain civil effects which would come from the legal dissolution of the marriage, yes.

3545. I meant sue for divorce so as to dissolve the marriage?—In so far as our teaching is concerned, we admit a civil divorce in cases where it is necessary to ensure certain civil effects being guaranteed, as in the case Mr. Young instanced where we have a marriage which is null as far as our law is concerned but not null as far as the law of the land is concerned. It might be that those parties would wish from a declaration of nullity; we would give it, but clearly we could not dissolve the civil marriage, therefore we would allow the use of divorce in that case so that the parties could be free of the contract of civil marriage.

3546. I was assuming, of course, that the Catholic Church regards marriage as indissoluble, but the problem rather is to make the law so that it is less contrary to that conception.—Yes, I agree.

3547. Very well. Would you have any objection from the point of view of the civil law, that either spouse should be allowed to sue for dissolution of the marriage where there has been a long separation and no hope of them coming together again?—I think so, if we could possibly avoid it. It would put a premium upon mere separation.

3548. Is that because you regard an offence as being an essential prerequisite to divorce?—Not necessarily, but I think in the case given by Sheriff Walker one might find that the innocent party would be more prejudiced than the guilty party. Mere separation of itself is simply a means. One has then to work backwards. If separation is to be a means of divorce then let us establish the separation and we will have the divorce. It is an incitement to further divorce.

3549. You think it is necessary to work back to what is the real cause of the separation?—I think so.

3550. Then you would not approve the simple statement that divorce should be possible where there is a separation plus no hope of reconciliation?—No, that is making the content residuable at the will of the parties.

3551. (Chairman): Arising out of that, there is nothing, as far as I can see, approaching consideration of that matter in your memorandum. May we take it that your answers represent the answer of the Catholic Union of Great Britain on a matter which they have considered or do they represent the views of the Rev. Dr. Crowley?—I think they must be taken as representing my views.

3552. And again I am not quite sure if I understood your earlier answers. The suggestion was, I think, that the only ground for divorce should be that a home was broken up. Would you regard that as a good or a bad thing? I want you to give your answer again. I am not quite sure if you understood the implications of your quite sure?—In order to procure certain civil effects of a legal divorce we admit a divorce, but not in any sense of the word do we admit divorce to give freedom to re-marry. It throws us back on our own doctrine. It is asking me in my position as priest to say whether I agree with divorce. I do not agree with divorce.

3553. What puzzled me was that you seemed to think the suggestion made by Sheriff Walker would make divorce less easy. I cannot follow that for the moment at all. If people say "We cannot get on, this marriage really is impossible", would you think it a good idea that there should be a divorce?—No, my Lord. I intended it in this way. Granting the existence of divorce, the more difficult it is made for a person to have a divorce the better we regard it. I understood that Sheriff Walker was suggesting that divorce should be granted only when extreme cases of incompatibility occur. I would say that the more extreme the case demanded, the better we regard it

from the point of view of society. (Mr. O'Sullivan): May I add one word on this liberty to re-marry, the dissolution of the void marriage. I merely desire to call attention to a letter in *The Times* of the 17th March, 1951, from Sir Stephen Hearn Collins. May I hand it in? (Chairman): I think it would be better.

3554. (Sheriff Walker): I quite follow that the Catholic Church believes in the indissolubility of marriage and I am proceeding on that assumption. The question you could help us on, I think, is how the civil law could allow dissolution of marriage so as to be less injurious to the conception of marriage as a life-long union. I understand you are prepared to express a view about that?—Yes.

3555. As the law stands at present, I understand that parties can get a divorce for a single act of adultery. Would you regard that as an easy way or a hard way?—According to the moral standing of the person who commits the adultery, an easy way.

3556. At the present time there is a social sanction against the man who commits adultery in order to give his wife her liberty?—Very little, if any.

3557. Do you approve of that method of divorce for a single act of adultery or do you not?—No, I do not.

3558. It has been suggested by other witnesses that if divorce could only be obtained in the case of a marriage that has been absolutely broken up and where the parties are living separately with no hope of coming together again, that would limit a great deal the evil you set out in your memorandum?—I think so, yes.

3559. You could not then say, could you, that divorce had broken up a happy home?—No.

3560. I wondered if it was in agreement with the Catholic Union's view of marriage that divorce should only be allowed where the marriage had already been broken up?—I think so, yes, but I would not care to make that statement. I make it on my own authority and not on the authority of the Catholic Union.

3561. (Chairman): I should like to know whether or not that is also the view of the other four persons before us.—(Rev. R. Gorman): I still think there is some ambiguity. Catholics cannot be divorced in any circumstances, but taking the civil law as it is, if we could rather answer a general proposition than your specific presentation of the case, anything that would make divorce less easy would naturally appeal to us, as the acceptance of any lesser evil rather than the greater one would appeal to any person of good sense.

3562. (Dr. Roberts): With regard to the children in broken homes, would you feel it to be an advantage if probation officers and children's officers were to have special training in reconciliation in matrimonial disputes?—(Dr. Crowley): Most decidedly, we would welcome that. (Mrs. Kemball): I should welcome it very much.

3563. In the large centres do you endeavor to have children from Catholic homes placed under probation officers of their own religion?—(Dr. Crowley): Yes, we do. In all these juvenile courts we generally have one of our own officers present if possible; if not, we are warned immediately.

3564. That is only possible in the large cities?—We would not have the personnel in every place, but I think the normal procedure is to warn the society in the diocese in which the case is coming forward. We normally call those societies Crusade or Rescue Societies. They have different names, but their function is the same.

3565. Where children are placed in the care of a local authority do you find it difficult to find a sufficient number of Catholic foster-parents for such children?—(Mrs. Kemball): It is a very difficult, but through our Rescue Societies and through our Union of Catholic Mothers we work in very close association with the children's officers and endeavor to find homes for the children, and very often we are successful, especially through the Union of Catholic Mothers. Mothers who have already a small family are the people who are normally glad to have another child to care for.

3566. At the moment it is a considerable difficulty?—We find plenty of goodwill, but one of the greatest difficulties is the physical incapacity to house a child in the home. Here again housing is a difficulty.

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3597. So often children are sent to institutions who might preferably go to a foster home?—Yes, for that reason.

3598. (Mr. Maddocks): Could Father Gorman tell me what purpose it is to be served from our point of view in comparing the amount of money which the State spends through the Legal Aid and Advice Act on divorce with the amount of money which the State contributes to marriage guidance councils and bodies of that kind?—(Rev. R. Gorman). Superficially, at least, it would seem that the Commission is interested in marriage and divorce, and anything that would help to preserve marriage or to encourage stable marriage would, one might say, merit greater help than a process which would terminate a marriage.

3599. Over the money which is spent under the Legal Aid and Advice Act the State has absolutely no control

but in respect of the amount granted to marriage guidance councils, the State has a say in how much that is to be. Is the suggestion that we as a Commission ought to recommend that far greater sums should be spent than are spent at the moment on the work of the marriage guidance councils—I should rather put it this way, there should not be any diminution. Such a diminution has actually taken place in the course of the last month. (Dr. Crowley): I think Father Gorman made that reply in answer to a question by Mr. Baloe. He did not ask the Commission to consider an increase in the money given or allotted and I should like that to go on the record. That is my own understanding of what Father Gorman said.

(Chairman): Thank you very much for your memorandum and for your assistance today.

(The witnesses withdrew.)

PAPER No. 47

MEMORANDUM SUBMITTED BY MRS. MOYA WOODSIDE

(NOTE:—A copy of the book "Patterns of Marriage" was also submitted for consideration by the Commission.)

Neither healthy and happy married life, nor the well-being of children, are promoted by the unwilling continuance of a relationship which, through serious temperamental incompatibility and/or individual personality maladjustment, has brought only unhappiness to both partners.

It is therefore recommended that the ending of such unsuccessful marriages should be allowed and procedure made easier. This would involve, presumably, the introduction of divorce by consent, and/or divorce after a period of continuous separation. Where there are children, it would also involve improved arrangements for maintenance and the enforcement of maintenance orders.

1. In the years 1943 to 1946, Dr. Eliot Slater and myself undertook a scientific study of marriage among working class men and women living in London. The findings have now been published, under the title *Patterns of Marriage* (Cassell and Company, 1951). The entire interviewing of the 400 husbands and wives who co-operated, and the giving of a temperament test, were carried out by me. What follows embodies this first-hand experience.

2. Our original interest was to discover whether or not people of similar nervous or neurotic constitution tended to marry each other, and if so, what effect this may have on the incidence of nervous disorders in the general population. To this end, we selected one group of patients, all serving soldiers, from a neurotic hospital, and a control or "control" group of soldiers from a general hospital. We believe that our sample is fairly representative of average working class Londoners, married, and aged at that time between twenty-two and forty-seven.

3. In the course of the study, incidental to its main purpose, a great number of facts were collected about the causes of unhappiness in marriage, both among the members of our sample and among their parents. Facts were also collected about physical and mental health, happiness and unhappiness in childhood, choice of marriage partner, expectations from marriage, desired size of family, plans for children, etc. The most important of these findings, from the point of the Commission's inquiry, are as follows:—

- causes of parental unhappiness;
- effect of unhappy home life on children;
- haphazard choice of partner;
- factors making for happiness, and for unhappiness;
- neurotic marriage, and mental health;
- changing views of marriage.

(a) Causes of parental unhappiness

4. 114 of the 400 homes from which the men and women of our study (hereinafter referred to as "subjects") had come were adjudged by them unhappy. Chief causes of

parental discord, as listed by children, were drink, bad temper, violence, cruelty, and difficulties over money. This referred to a time thirty to thirty-five years ago, when drinking was heavier, unemployment common, and social services less well developed. Present-day causes of unhappiness (to be discussed later) are differently assigned. Many of the parents from these 114 unhappy homes appear to have been severely maladjusted or psychopathic individuals, quite unsuited to bring up their own children. It appeared that qualities of temperament (kindness, cheerfulness, stability, warm-heartedness, etc.) were the most important factors associated with parental happiness.

(b) Effect of unhappy home life on children

5. Standards of childhood happiness among our subjects were low; yet even so, thirty per cent. described an unhappy childhood. Quarrelling between parents was mentioned by fifty-two subjects; violence, cruelty, poverty, neglect, all were frequent experiences. There was early acquaintance with sexuality, especially in overcrowded homes. Unwanted children (often brutally so inflicted by an exasperated parent) of large families suffered particularly.

6. We found a marked association of childhood unhappiness with neurosis in later life, and, to a lesser extent, with neurotic symptoms in childhood. No association was observed between happiness and size of family; i.e. large families were not necessarily happier than small ones. It appeared that the personality of the parents, especially the mother, and the parental relationship, were of most significance for the happiness of the child.

7. This is a highly important finding. Where one or both parents are neurotic, maladjusted or psychopathic, and if their married life is only productive of misery for themselves and their children, we feel strongly that attempts to keep such people together "for the sake of the children" are mistaken. There is also the welfare of potential as well as existing children to be considered: if a husband and wife, however in dispute, go on living together, the chances are that more unwanted and handicapped children will be born. (Successful contraception requires both co-operation and persistence.)

(c) Haphazard choice of partner

8. The selection of marriage partner, among the subjects of our study, was governed largely by chance and within a very limited range. They were often attracted to each other by irrelevances, by personal needs such as loneliness or desire for a home of their own. Among women, this led to the attitude of "taking a chance" and hopes of "changing" the partner. At the time of the ceremony, many were insufficiently aware of the other's fundamental character and ordinary every-day (i.e., non-courtship)

behaviour. Under the influence of ideas of "romantic" love, there was little or no attempt at objective and rational assessment of future probabilities of adjustment. Consequently, many mistakes were made, and marriages undertaken which had no chance of success.

9. In the circumstances, it is encouraging to find that the great majority of these haphazard unions turn out as well as they do. But for the few whose choice of partner has been a serious error, we feel they should not be penalised for the rest of their lives by compelling them to remain legally united, and thus deferred from the possibility of happiness with a more suitable mate.

10. On this point, it also seems to us that marriage guidance services could perform a more useful function in advising prospective partners, rather than attempting to patch up marriages where things have gone seriously wrong.

(d) Factors making for happiness and for unhappiness

11. The criteria by which we assessed the happiness or unhappiness of the 200 couples in our sample were described on pages 138-140 of *Patterns of Marriage*; and the rating into four categories, positively happy, average or satisfactory, unsatisfactory, positively unhappy, is shown in Table Xa (page 200). It will be seen that the neurotic group are much less successful in marriage than the control group. We should point out that, in general, the entire sample is probably biased in the direction of happiness, as couples on bad terms with each other, perhaps with divorce or separation in the air, were usually unwilling to co-operate in the study.

12. The main findings relative to happiness are discussed in Chapter IX, *Happiness and Harmony in Marriage*. Since they are of considerable importance, we quote the summary in full:—

"In the Control group 45 per cent. of marriages were positively happy, 36 per cent. satisfactory, 10 per cent. unsatisfactory and 9 per cent. positively unhappy. In the Neurotic group the proportion of positively happy marriages was lower, and that of unsatisfactory marriages higher. The differences were significant.

In the opinion of the subjects, children rank highest as a cause of happiness in marriage, and after them such psychological factors as co-operation and mutual help, trust and faith, security and the economic situation.

Subjected to objective analysis, the findings show that the following factors are associated with happiness in marriage, arranged in order of diminishing degree: clinical rating of personality, economic status, intelligence, orgasm adequacy of the female, pre-marital chastity, good looks, duration of marriage, stature, rating of personality by test, similarities between husband and wife and test responses. Negatively associated with happiness of marriage are frequency of sex relations and youth.

Closer investigation of the unsatisfactory and unhappy marriages in the parental and the present generation show that personality factors predominate; social, physical and sexual, and economic factors took lower places. As causes of trouble, the first place goes to those forms of instability which lead to sulks and aggressive ill-humour; such qualities in the male may show themselves in drink and violence, in the female in persistent nagging. Next in order come the hysterical traits which cause selfishness, unreliability and the tendency to make impossible demands on life. The third place is taken by depressive traits. Anxiety tendencies have comparatively little effect. A universal quality of the seriously unhappy marriages was the inability of the spouses to discuss the situation with one another, or to make allowances for the other's point of view."

In brief, compatibility, stability, and emotional maturity appear the prerequisites of a successful relationship. It will also be noted that although children were popularly thought essential to married happiness, such opinion was not borne out by the observed facts.

13. The detailed analysis of the unsatisfactory and positively unhappy marriages has a direct bearing on the proposition of this memorandum. More than any other

factor, it will be seen that unfavourable traits of temperament and character are destructive of married happiness and have a deleterious effect on the well-being and normal emotional development of children. In many of these marriages it was obvious that the partners would do better to separate, generally because one or the other was too unstable ever to make a satisfactory adjustment.

(e) Neurosis, marriage, and mental health

14. It is assumed that the Commission's interest in "healthy married life" includes mental as well as physical health, and the consequent promotion of an atmosphere which favours normal and healthy psychological development in both parents and children.

15. Reference has already been made (para. 6) to the close association which was found between childhood unhappiness and adult neurosis among the subjects of our study, and the outstanding importance of parental stability for childhood happiness. Even more striking and significant were the facts which confirmed our original hypothesis of *assortative mating* (that is, the tendency of like to marry like). We found a much greater incidence of neurosis, neurotic traits, and instability among the wives and their parents in the neurotic than in the control group. In other words, if a man is already neurotic, he is likely to be attracted by a woman of similar nervous predisposition.

It is difficult enough to make a success of marriage where one partner is stable and the other neurotic. And the stress of an unhappy marriage may even precipitate neurotic illness in the unaffected spouse. But when both partners are neurotic and unstable, the outlook can only hold disaster.

16. More often than not, the neurotic individual comes from a neurotic family, and similar undesirable traits appear in his or her children. Neurotic people do not make good parents; nor, as is commonly believed, is parenthood any remedy for their disorder and maladjustment. All evidence suggests that for both social and organic reasons, they should be discouraged from having children. If two such neurotic spouses wish to separate, we therefore feel it is in the general interest that no obstacle be put in their way.

(f) Changing views on marriage

17. Young working class people entering on marriage today are no longer content with the patterns of the past. Their standards are higher, they are better educated, new worlds of experience have been presented to them through cinema and radio. The emancipation of women, accelerated by the demands of two major wars, has meant the opening of many new occupations and opportunities alternative or additional to marriage; while the spread of contraceptive knowledge has enabled family size to be controlled. Expanding State services for mother and child welfare (extension of clinics, provision of crèches and day nurseries, family allowances, free milk and vitamins, etc.) have lessened total dependence on a husband's earnings. No such assistance was available a generation ago; and, as was seen from some of the accounts of parental homes we received, the unhappily married mother with children generally had to endure whatever misery came her way. Yet another important factor is the decline of religious influence and practice (very apparent among the members of our sample) and the growth of a more tolerant public attitude to divorce.

18. Marriage and a home of one's own are still the desired and predominant goals. But expectations are higher: the more thoughtful young men and women today see marriage as a partnership and a sharing of aims and activities in every sphere of life. Their sex relationship is intended to be satisfying to both. They set an increased rating on the needs and welfare of children, and the small planned family is a general ideal. If they are disappointed, they are less willing to go on with a hopeless or even unsatisfactory mating than were their parents.

Conclusion

19. We live in an era of rapid social change. The advance of science, not alone in technology but in the fields of sociology and psychology, has led to new modes of living and new ways of thought. The institutions and values

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PAPER No. 47.—MEMORANDUM SUBMITTED BY MRS. MOYA WOODSIDE
MRS. MOYA WOODSIDE AND DR. ELIOT SLATER, M.A., M.D., F.R.C.P.

of the past are no longer unquestioningly accepted, and the sanctions of revealed religion are subject to critical examination. As always, a time lag exists between the occurrence of changes in culture and the recognition and embodiment of these changes in law. As this memorandum attempts to show, divorce can be constructive in

terms of individual and general welfare; it is not always to be deplored. The introduction, under suitable safeguards, of divorce by consent would be a reform bringing the law more in accord with the social realities and scientific knowledge of today.

(Dated January, 1952.)

EXAMINATION OF WITNESSES

(MRS. MOYA WOODSIDE and DR. ELIOT SLATER, M.A., M.D., F.R.C.P.; called and examined)

3570. (Chairman): Mrs. Woodside and Dr. Eliot Slater, you are the joint authors of *Patterns of Marriage*, which you were kind enough to send us and which I have studied. Mrs. Woodside is a research psychiatric social worker at the Department of Psychological Medicine at Guy's Hospital, S.E.1, and Dr. Slater is at the National Hospital for Nervous Diseases, W.C.1. Before I ask you any questions, would you wish to add anything to your joint memorandum, which of course we have read with care?—(Dr. Slater): Yes, Sir, if I may. This memorandum is Mrs. Woodside's, not mine. I agree with a large part of it in many important ways, but there are some differences, perhaps you may think of a minor character, between my views and those in the memorandum which has been put before you; however, Mrs. Woodside and I have collaborated in a piece of social psychiatric research which resulted in the book you have seen and we thought it useful that we should both attend.

3571. If there are any specific points or any recommendations that appear in the memorandum on which you differ, will you say so, and then we shall know where we stand?—I think they are mainly points of emphasis. Perhaps the single significant point is in regard to the suggestion made about divorce by consent. My own attitude would be that divorce by consent is perfectly proper in limited circumstances, but the circumstances would be of a very limited kind. One has to guard against the idea that the marriage undertaking is in any way frivolous. One could not suggest a situation such as existed in Russia at one time when marriages could be terminated just as easily as they could be contracted.

3572. Is there anything else you wish to say about the memorandum? I am going to ask Mrs. Woodside one or two questions on that very subject, but I do not know whether you wish to add anything before we start?—No. We have collaborated, we are in very substantial agreement. You can perhaps deal with us together.

3573. What I wanted to ask questions upon particularly are paragraphs 17 and 18 under the heading "Changing views on marriage" because I think they lead up to the suggestion in the introductory paragraphs which I shall now read:—

"Neither healthy and happy married life, nor the well-being of children, are promoted by the unwilling continuance of a relationship which, through serious temperamental incompatibility and/or individual personality maladjustment, has brought only unhappiness to both partners.

It is therefore recommended that the ending of such unsuccessful marriages should be allowed and procedure made easier. This would involve, presumably, the introduction of divorce by consent, and/or divorce after a period of continuous separation. Where there are children, it would also involve improved arrangements for maintenance and the enforcement of maintenance orders."

The emphasis there is perhaps rather on the wishes and feelings of the two parties to the marriage, is it not?—(Mrs. Woodside): I really have in mind two kinds of divorce, divorce between two people who have children and divorce between people who have no children. In divorce proceedings where there are children, there need to be greater safeguards; that is what I was trying to convey in that paragraph.

3574. Do you think there should be two divorce laws, one for people with children and another one for people without children?—I do not think that you should have two laws, but that you should look at the position of the parties differently. You do not have to assume that there are children in all divorce cases as so often is done,

3575. Will you turn to paragraph 17, where you say:—

"Young working class people entering on marriage today are no longer content with the patterns of the past. Their standards are higher, they are better educated, new worlds of experience have been presented to them through cinema and radio."

When you say "their standards are higher", are you speaking of the standard of comfort and enjoyment which they expect from life or their standards of duty and conduct?—I think it applies to both. That was derived from my experience when doing this interviewing. I got the picture of the life of their parents told to me by these people and then they told me about their own lives and it was such a contrast. They would say, "That might have been all right for our parents, but we are not going to bring up our children like that."

3576. At the end of that paragraph, after mentioning other changes that have come about in recent years, you say:—

"Yet another important factor is the decline of religious influence and practice (very apparent among the members of our sample) and the growth of a more tolerant public attitude to divorce."

First of all, in your view, is the decline of religious influence and practice a good thing or a bad thing for the United Kingdom?—That is rather a large question.

3577. You have put in this "factor" at the end of a list of things which you appear to regard as being in the nature of progress. I would like to know whether you regarded it as a good thing or a bad thing?—I was trying to give an objective picture of what I found and the way those people lived and thought. It seemed to me that they no longer laid the emphasis on religion that their parental generation did. I have not specifically said whether it was a good thing or a bad thing.

3578. You have not, but the object of questioning is to test the views expressed by a witness and to know on what they are based. It was for that purpose I asked the question. If you do not wish to answer it, you need not. Do you think that the decline of religious influence and practice is a good thing or a bad thing for the country?—That is the sort of question people say they want notice of. In some cases it might be a good thing; in others it might be a bad thing.

3579. Might I pass to the other change you specify, "the growth of a more tolerant attitude to divorce"? Is that, in your view, a good or a bad thing for the country?—Very definitely a good thing I should say, when one sees the unhappiness that arises in people unable to get a divorce who on every rational ground should be able to get one.

3580. What are the good results of a more tolerant public attitude towards divorce? I do not quite follow what you say are the good results. If people regarded divorce with rather less favour or were less tolerant, would that be a bad thing for the country in your view?—That is what happened in the past; fifty years ago it was extremely difficult to get a divorce and people who got a divorce were socially stigmatised. That attitude has changed and I think it makes for more happiness, assuming that one regards the happiness of the individual as important.

3581. In the next paragraph you speak of the attitude of thoughtful young men and women today and you say:—

"... they are less willing to go on with a hopeless or even unsatisfactory mating than were their parents."

What is your view should happen if one partner thinks that the marriage is hopeless or unsatisfactory and the other does not? Supposing that one wants to go on with the marriage but the other is attracted by a third party,

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[Continued]

what do you say should happen then?—I think one should set a period of time, possibly they should separate, and they should certainly take some professional advice and guidance in order to help them understand what they both want. So many people do not understand what they want from the marriage and the other partner.

3582. Then the last sentence of paragraph 19 comes back to the suggestion of divorce by consent:—

"The introduction, under suitable safeguards, of divorce by consent would be a reform bringing the law more in accord with the social realities and scientific knowledge of today."

Can you expand that a little? What are the "social realities" with which the law should accord more closely? Are they the changes which you have set out in paragraphs 17 and 18?—In my experience of interviewing these 400 men and women I got a fairly good impression as to how they felt about marriage, how they felt in regard to its success and what they should do if it was not successful, and I gained a very firm impression that they went into marriage with a desire to make a success of it but if they did not make a success of it then they would try again elsewhere. They did not regard it as final. That is my experience from these interviews.

3583. Do you think that that is a good attitude to adopt towards marriage, that you marry with the hope that it will be a success and the thought that if not you can have another chance? Do you think that that is a good or a regrettable attitude?—I think it is a realistic one.

3584. That was not quite the question. I will pass from that. Tell me lastly, what is the "scientific knowledge of today" with which the divorce law should accord more closely?—I think we understand a lot more about personality and personality development. We understand a lot more about the development of children and how emotions and maladjustment are likely to be created and we know that one of the things that creates maladjustment is discord and tension in the home. Therefore, it seems a mistake from the scientific point of view to insist upon keeping parents together who do not get on for the sake of the children because scientifically that is not a good thing for the children.

3585. (Lady Bragg): How did you choose your 400 people, quite at random?—(Dr. Slater): They were chosen at random from the admission book of the hospital on the basis of having an address in Greater London which was accessible.

3586. What about the others who were not in hospital?—All the men from whom we started were hospital patients.

3587. And you investigated the wives too?—Yes.

3588. (Sir Russell Smith): Dr. Slater, a good deal of this memorandum is about neurotic persons. Most members of the Commission have no medical knowledge. Can you tell us briefly what is meant by a neurotic person?—What I mean by a neurotic person is a man or woman who differs from the general run of humanity in being more sensitive than most or more emotionally unstable or in having some other trait of personality which causes difficulty in his life and leads him to have symptoms of illness needing medical attention.

3589. From a popular point of view some of those symptoms at least could be put down to lack of self-control. Would you say that so far as that is true the patient suffers from some illness which prevents him from exercising self-control?—I would, Sir, yes.

3590. Have you any idea what percentage of the adult population falls into this group?—It is commonly assessed at ten per cent. of the population.

3591. I gather from the memorandum that you feel that a marriage of two of those persons is very unlikely to be a success and a marriage involving one has considerable prospects of failure?—There are prospects of failure in the marriage of a normal individual and a neurotic or psychopathic person, particularly if the personality of the less normal partner is markedly abnormal or abnormal in certain sorts of ways; for instance, if he is aggressive or touchy, whereas if he is abnormal in other ways, merely or rather anxious, then the chances of failure are not so great. Say we assess the abnormal personalities of the population as ten per cent., then approximately one per

cent. of marriages would be between two neurotic individuals. The chances of success in such circumstances must be rather small. It is difficult to estimate but it seems to be definitely small.

3592. Would you agree that such persons among other features tend to lack consideration for others?—I think that on the whole neurotics do tend to lack consideration but a neurotic can be highly considerate; certainly lack of consideration for others is a bad trait of personality for marriage.

3593. If such persons could easily become divorced, do you think that there would be a danger that they would then readily set themselves to break up some other marriage?—I think very few set about to break up somebody else's marriage. It must be a very strange type of person who would try to do that.

3594. But would they not in such a way for their own satisfaction or would lead to the breaking up of some other marriage?—I think they might, but I do not think that they are greatly deterred by being married already. One does not have to be single in order to break up somebody else's marriage.

3595. If it was easier for neurotics to obtain a divorce, would that encourage such a tendency to break up marriages, or not?—I would not regard that as a realistic thing to be afraid of, not a real danger. No doubt it exists, but I should not give much weight to it.

3596. I gather from the memorandum that you feel on the whole that making divorce easier would not increase unhappiness in other ways; in other words, it would not prevent people from making a success of their marriage who would otherwise do so if they had not got the obvious escape?—I think that is clear. The attitude of the public is one hundred per cent. for marriage. If in a particular case the spouses develop a different point of view the cause is a very real one, personal to themselves.

3597. (Sir Frederick Burrows): You mention that you have conducted a survey among working class men and women living in London. Do you think that is a proper guide upon which to base your conclusions, because conditions would probably differ entirely from those in, say, a market town of 20,000 to 30,000 people?—(Mrs. Woodside): These were the findings of this particular study but I think there are psychological factors which can be drawn from it which would apply to any class of society, not necessarily the working classes.

3598. You maintain that this is a proper study and that it could be made applicable to the whole of England?—(Dr. Slater): We have no idea at all what the patterns of marriage and courtship and such things are in rural districts and in market towns such as you have mentioned. They may be completely different and it would be very nice to get evidence about them. All we could do was to provide you with evidence of the attitude of mind in what, I think, is still a considerable section of the community and one of some importance, the urban working class population.

3599. (Mrs. Jones-Roberts): In paragraph 17 on the changing views on marriage, you instance certain new factors which have had an influence on society and in the family. I think you mentioned three—emancipation of women accompanied by the opening of many new occupations; secondly, the spread of contraceptive knowledge leading to the planned family; and thirdly, expanding State services for mother and child. I wonder whether as a result of your investigations you were able to come to any conclusions as to whether these factors were leading to greater stability in the family. I should very much like to hear about your experience.—(Mrs. Woodside): I think this is a problem of the times in which we live. It is an element in the change in the social scheme. I do not think there is anything we can do about it one way or the other. As a result of two world wars women have had to go to work, they have been and are today being encouraged to go to work; the children have to be provided for, hence the establishment of crèches and nursery schools, but I think that is a good thing. It is not necessarily the case that the best mother is the one who spends twenty-four hours with her children. I think it is much better if she goes out to work and keeps her independence.

3600. I wondered whether you had found that the homes in which such conditions obtained were more stable and

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MR. H. A. H. CHURCH, Q.C., MR. R. J. A. TEMPLE, Q.C.,
MR. J. B. LATY, M.B.E., AND MRS. J. ALLEN.

[Continued]

that that opinion could be given whether or not there was a requirement for a period of care and treatment. The question of whether insanity is incurable is a question of fact. There would clearly be cases where if the requirement of care and treatment for a number of years were to be abandoned one spouse might bring a petition against the other spouse in respect of insanity which had only lasted for a year. That would be a difficult case generally to prove, but if it could not be proved then the answer is there is no case for relief. Apart from that we do not find that there would be any difficulty in the adducing of the evidence. The abandonment of the present requirement as to care and treatment would, for instance, allow a spouse to bring a petition for relief where the unfortunate respondent was, in fact, abroad. The evidence of the medical man abroad could be adduced either by way of commission or by affidavit, and, indeed, in the vast majority of these cases the medical evidence is adduced by affidavit, so on the whole we do not think that there would be any difficulty in proceeding to prove cases in the same way as that in which they are now proved.

3634. You would still require a limitation of a period of years?—No, as a pure question of fact the granting of a decree would depend on the evidence. If in a suit against a spouse it could be proved in fact that the spouse had become insane and had been insane for two years or three years, then we would leave it open to be done. That, I think, in practice would be the rare case. I think the court would tend obviously to be very conservative in the matter and would require to be satisfied by the most cogent evidence. Possibly abandonment of the requirement of care and treatment would have the effect of making doctors extremely cautious, and one would therefore have some control over the situation in that way.

3635. Do you think that any good purpose is served under English law by the court having to know if the petitioner has in fact committed a matrimonial offence himself or herself?—Yes, I do, for this reason. I think it most important that the court, if it is to do justice to the parties, should not only know the truth but should know the whole truth. I do not think that it is possible for the interplay of human emotion, one spouse *vis-à-vis* the other, adequately to be explored or dealt with and for blame to be apportioned where it truly is unless the court knows the whole facts. I would take the view that if one spouse has, in fact, committed adultery, even though it is unknown to the other spouse at the time, it is a most cogent piece of evidence which explains actions which otherwise might be inexplicable. As far as the ancillary matters are concerned, namely custody, access and maintenance, the court would find it, I think, quite an impossible situation if it had to deal with those ancillary matters and to take the conduct of the parties into account, as under the statutory rules it ought to do, if the fact were that one spouse was guilty of such a matrimonial offence of adultery and the court knew nothing at all about it. I think Mr. Laty agrees with me entirely on that. (Mr. Laty): Yes, I do.

3636. The next question has been decided in English law, but I want to know whether it is your view that there should be a right to divorce on the ground of cruelty irrespective of whether or not the cruel spouse wants to return?—(Mr. Temple): Cruelty and adultery, unlike desertion, at any rate unlike desertion according to one view, are consolidated offences. In proceedings for cruelty it does not at the moment avail the respondent saying to say, "I am sorry I hurt my wife by flinging her down the stairs, but I will not do it again". That makes no difference, and I think it would be improper that it should make a difference.

3637. You know the Scottish system of giving a wife a share of the husband's estate after divorce instead of alimony?—Yes.

3638. Which system do you prefer?—Personally I prefer the English system with the amendment which we have suggested in regard to the power of the court to give a lump sum. I am not in favour of giving the wife a share in the estate. (Mr. Laty): As I understand it, in Scotland at the point of divorce the wife has a right to a certain proportion of her husband's capital and, of course, under the law as it now stands the wife in England

has no such right. She has a right either to periodical payments, a monthly allowance during their joint lives, or if the husband has capital to a certain secured provision on his capital for her life, or to a combination of the two, but the court has no power to order a lump sum payment. We are proposing that the court should continue to make the orders which it can make now, and at the same time in proper cases should be given the power to order a lump sum payment to be made in favour of the wife. We had particularly in mind the case, which we have all met so often, of the home being broken up and the wife being left on a divorce with young or youngish children. She may get quite a substantial periodical allowance, but her main immediate need may be a home, and if she has no capital, no lump sum of any sort, and the court cannot order one to be given to her, it is extremely difficult for her to set up a home for herself and the children. That is an illustration of the kind of case for which we think the court should have power to give relief. Our proposal really amounts to combining both the Scottish and the English systems and giving the court an almost unlimited power on divorce to do what it thinks is the right thing for the parties and the children.

3639. What would be your views if the proposals in Mrs. White's Bill were amended so as to give the innocent spouse a right to put forward as a defence the commission of a matrimonial offence by the petitioner, which would not act as a bar unless put forward as a defence in this manner?—(Mr. Temple): I think that before answering that, one really must arrive at what exactly is meant by defence. If the defence is to be a matter which can be raised in bar, then it can be raised either as a matter of discretion for the court, or the court can be given no discretion and then if the objectionable matter is raised there would be no decree. I understand from your qualification that what you have in mind is that if a spouse against whom the petition is brought raises one of the three matters you have referred to, adultery, desertion or cruelty, there would in fact be no divorce. Now if that is so, that is really a system of divorce by default which personally I am against. I think also that that would open the door very widely to collusion. I understand the Scottish attitude towards collusion differs from that of the English court, but I should have thought that it was leaving the collective decree so that, for instance, the husband petitioner or the wife petitioner would merely say to the other spouse, "If you raise this matter then there will be no decree, do not raise it and there will be a consideration", and then as a result the matter would not be raised. I think that in those circumstances there would be not only a collusive decree but there would probably be a fraud on the court. I think also that if adultery, desertion and cruelty were added as bars or defences, one would also have to deal with supplementary bars, such as wife separation or possibly wife neglect to provide reasonable maintenance. In effect, if that were so, one would be legislating possibly for a rather small number of cases, but in as much as I have an objection personally to the Bill in principle I would equally not agree with your suggested amendment of it.

3640. Is this also Mr. Laty's view?—(Mr. Laty): In substance. I would like to add this, that I think that the view of the committee which prepared the memorandum on behalf of the Bar Council was that whether or not the respondent was given a right to raise as defences the matrimonial offences of the petitioner, Mrs. White's Bill is objectionable because it does import the new principle of divorce by consent, or indeed divorce at the unilateral will of the guilty party. Your proposed amendment, I think, would have this effect, that it would probably remove the objection that it would be at the unilateral will of the offending party because, in fact, it would then be left for the innocent party to use the offending party's offence as a good defence, but it would still import the principle of divorce by consent which, rightly or wrongly, we feel would so much undermine the institutions of the family and marriage. I think, speaking for myself, that if the provisions of the Bill were to become law it would be essential to introduce the right of the respondent to the petition to defend himself or herself by raising those defences, but it would be better not to have any Bill at all.

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[Continued]

3644. I wonder if your French colleague would help the Commission by telling us about the French procedure on reconciliation. In particular, I would like to know (a) whether it is compulsory, and (b) his comments as to whether it is successful.—(Mairie Allienes): I would like to say that the process of reconciliation as we know it in France is not peculiar to divorce proceedings, but is applied in every kind of case, whether civil or commercial. Generally it is quite an informal kind of proceeding which takes place before the justice of the peace, and therefore when applying these proceedings to divorce the French legislators have not created something new, but have only complied with the ordinary and general rule, although they have slightly altered the formalities in the sense that the reconciliation proceedings, instead of taking place in front of the justice of the peace, take place in front of the president of the court in his own room, and without the presence of the parties' lawyers. The preliminary reconciliation proceedings have under French law a twofold aim: the first and main one is to try to reconcile the parties; the other aim is to give the parties time to think over the position. In order to fulfil the first aim, as I have said, the parties must come before the judge in his chambers, and the judge has to try to reconcile them if possible. Both parties must appear in person, although the respondent is not compelled to do so; it is only the petitioner who is bound to appear. If both parties are there the judge will ask the petitioner whether he intends to go on with the proceedings, and then he will turn round to the respondent and ask her what she may have to say. If the petitioner answers that he intends to go on with these proceedings, or the respondent does not appear, then the judge makes an order to the effect that he has been unable to effect reconciliation between the parties and allows the petitioner to proceed with his petition.

3645. May I stop you there and ask if the judge at any time endeavours to persuade the parties to become reconciled?—I was going to deal with that point when answering the second part of your question, but I may say at once that whilst the judge puts questions to the parties as to whether they intend to go on with their proceedings, as a rule, he never tries to reconcile them for the very good reason that he has not sufficient time to do it. Reconciliation between parties to divorce proceedings is extremely difficult, and may take quite a long time, and, particularly in Paris, the judges have to deal with ten or twelve cases in the morning, so they are faced with practical impossibilities in this respect.

Now, in order to fulfil the second aim of these proceedings, that is, to give time to the parties to think things over, the law allows the judge, if he thinks that there is a possibility of bringing the parties together, to order an adjournment of the proceedings. Up to 1941, he could grant an adjournment for twenty days. Since 1941 the law has been altered, and now the judge can adjourn the proceedings for a year, and if when the parties come back before him he still thinks that there is a possibility of bringing them together, then he can order another adjournment for a further year, but after this second year the divorce proceedings must go on.

3643. Must he order an adjournment for a year or can he order it for any period up to a year?—Any period up to a year. And the second time, again for any period up to a year.

3644. Do these proceedings in fact bring about reconciliation in France to any appreciable extent?—I can only answer this question so far as my practical experience goes, and I may say that in thirty-two years of experience in which I have seen a good many divorce cases in France, I cannot remember one case in which a reconciliation was effected by the judge, nor one case where the judge has granted an adjournment either for twenty days before the war or for a year or two years since the war.

3645. (Chairman): Did you mention the date on which this reconciliation procedure was introduced?—The original reconciliation proceedings were introduced when the Code Civil was promulgated in 1803. The only change which has taken place is in connection with the length of the adjournment which the judge can order and which was increased from twenty days to a period of two years in 1941.

3646. (Mr. Young): If I understand you right this reconciliation procedure applies to all proceedings?—To all proceedings whether civil or commercial.

3647. Do you still have in France a waiting period of a year between the decree nisi and the decree absolute before a person can get married again?—We have never had a period of this kind. There are not two kinds of decrees in France. There is one decree which is the immediately final decree.

3648. Perhaps I used the wrong expression, but am I not right in saying that in France, a matter of twenty years ago at any rate, a divorced person could not marry before the lapse of one year after the decree?—I see what you mean. It is a provision which only applies to the wife. The wife cannot re-marry before a period of ten months has elapsed either since the date of the decree of divorce or since the date of the order made by the judge at the time of the preliminary reconciliation proceedings allowing husband and wife to live separately. This provision is purely in connection with the question of children and is still in force.

3649. There is merely a bar on the wife re-marrying?—It does not affect the husband.

3650. (Chairman): With regard to Mrs. White's Bill, it occurs to me that the occasions on which a case would arise under that Bill, if it became law, would always be occasions on which a divorce was being sought against someone who had not committed a matrimonial offence; because if that person were guilty of a matrimonial offence there would be no need to resort to that procedure. That is right so far, is it not?—(Mr. Temple): Yes.

3651. Supposing there were introduced the safeguards, which Mr. Young enumerated, that the respondent could plead as a bar or as a defence a matrimonial offence on the part of the petitioner, or could set up as a bar or defence a plea that the petitioner was himself or herself responsible for the break-up, for the separation. Supposing those defences or bars were open to the respondent, do you think there would be many cases in which the jurisdiction would be invoked?—Personally I think there would be hardly any. (Mr. Laney): I agree.

3652. (Mr. Beloe): Mr. Temple, I have been looking at the Civil Judicial Statistics, and I see there that in the year 1951 some 31,000 suits relating to dissolution of marriage, judicial separation and annulment of marriage were disposed of, and I also see that some 28,000 of those were undefended. Could you tell me what connection a barrister has with the 28,000 undefended cases?—(Mr. Temple): If your question is directed to the work that he does in regard to those cases, he would possibly advise before the suit was launched, he would probably settle the petition, if the solicitor is wise, counsel would have advised on evidence, and ultimately he would have presented the case in court. Thereafter he might be called upon to represent his client in maintenance proceedings, which probably would be contested.

3653. And is it necessary that a barrister should appear in every one of those 28,000 undefended cases?—It is not necessary that the barrister should do any more than appear in court to conduct the case. The rest of the matter may be done by solicitors.

3654. Unless the petitioner is conducting his own case, a barrister must appear?—At the hearing, yes.

3655. How many undefended cases are dealt with by a judge in a morning?—I think the average day's list now contains about twenty-four to twenty-five. The list is generally divided into two, and the five or six cases at the bottom of the list are generally marked, "Not before two o'clock", but it does not follow that the first batch of the morning's list, that is the first twenty cases on the list, are all disposed of in the morning. Very often there is a carry-over of four or five or even more into the afternoon.

3656. It would be fair to say that not less than twenty undefended cases are dealt with in a day?—Yes.

3657. And would you say that the barrister really knows all the background of the case in an undefended petition?—He cannot know all because manifestly one cannot present the whole of the married life of at least three years in fifteen or twenty minutes to any court.

3658. I mean does the barrister know?—It depends on the case.

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3659. Presumably in order that he may present the case to the court he has studied a great many papers and has had a long meeting with the petitioner and so on?—What generally happens is that if the barrister settles the petition he may be given short or medium length instructions to do that, with a sufficiency of information to allow him to comply with the rules in drafting the petition. If he advises on evidence, which is a prudent thing to ask him to do, he then would ask such questions as he wants to know in order to present an epitome of the married life concentrating on the important aspects of it. When he gets his brief he is given a proof of the petitioner's evidence which should, in fact, tell him all he wants to know. Sometimes it does not. In that event he either has a conference with the solicitor or meets the petitioner with the solicitor at some convenient place, his chambers or elsewhere, and supplements the information which the solicitor has given him by what he extracts from his client through the conference.

3660. So it would be fair to say, would it, that the barrister knows only what his client tells him?—He knows what the solicitor's client tells him, and what he finds out by asking questions himself.

3661. Now what does a barrister know about the children in the case? Does he see the children?—No, except if the children are of an age to express a view as to which spouse they want to go to. In most circumstances the counsel might see them in the sense of seeing them visually but he would not interview them and would not speak to them. It would merely be an occasion when the children were brought up to court possibly in the hope that the judge might wish to see them.

3662. From what source does he draw his information about the children?—He draws his information about the children from the same source as he draws all instructions, that is, through the solicitor from his client.

3663. So that he is virtually instructed as to what he may say, though he may not, of course, choose to say all that he is instructed to?—I would not put it quite that way myself. If there is a contested matter in relation to the children, and a decree has not yet been pronounced, the first thing that might happen is that interim custody is sought by one or other of the spouses. That matter would be decided by a judge, generally on affidavit evidence provided by each side. If counsel is asked to settle the affidavit, the information that he gets on which he settles the affidavit is provided by the solicitor in the form of proofs, statements of evidence or instructions as to what the facts are, and as to what so-and-so can say. On that counsel would prepare the affidavits which would be sworn, affidavits would be exchanged, then a day would be fixed for the summons to be heard and counsel on each side would put in the matter as argued and the judge would give his decision. Mr. Lacey reminds me that in an appropriate case oral evidence can be given, that is to say, both the witnesses who have sworn affidavits in the custody proceedings and the parties themselves can attend, and sometimes do, before the judge, who would permit them to be cross-examined by the opposite side, and then make his decision.

3664. In a case where the question of custody is not raised, does the barrister have any information at all about the children?—He is bound to have some, because if there are children the first thing one looks for in instructions to settle the petition is to see whether one is instructed to claim custody. If one is instructed to claim custody, and one is told that there will be no defence, one is obviously told the names of the children, their dates of birth and where they are, because plainly it would be very difficult to claim custody if the children were over sixteen or indeed if they had lived with the other spouse for years. It is not so much a question of "custody" as the *de facto* control of bodies which is the real thing that matters. So counsel generally knows where the children are or where they are at school; if he is wise, and he has not been given that information before he puts his client into the box, he will generally say, "Now, are the children living with you; do you look after them; where are they at school; how do they spend their holidays?" That information is given to the court to lay the foundation of the order for custody.

3665. It has been suggested to us that very often custody is part of the bargain in an undefended suit, and I

wondered if really the barrister had any means of checking the position?—He could not check it unless of course there is something that puts him on enquiry. If there is anything in any set of instructions which sets counsel on enquiry, his duty being to disclose it to the court, he must know something about it.

3666. But if that is withheld from him clearly he has no information?—I agree.

3667. (Mr. Flecker): You said it was difficult to claim custody if the child was over sixteen?—Yes.

3668. I did not understand quite what you meant by that?—What I mean is this; the court, as a matter of practice, will not make an order for custody in the Divorce Division if the child is over sixteen at the date when the petition is heard.

3669. (Chairman): Might I add that as a matter of practice in the Chancery Division it is very rare to make an order as to the custody of a child over sixteen? The court is not inclined to order a child of sixteen to go to his father if he wants to be with his mother, or vice versa. May I ask also a supplementary question? Is this right, that about ninety per cent., or at any rate a very large proportion, of the undefended cases do contain a prayer for custody?—In appropriate cases, yes.

3670. Where there are children?—Yes, that is so.

3671. (Lord Kenny): Would you agree with the percentage? I am not quite clear what is the proportion of undefended cases in which there is a prayer for custody. (Chairman): I suggested ninety per cent., but I may be quite wrong. It came from a very good source, not from me—I think that is about right. If there are children, and, with the restriction on the presentation of petitions in the first three years of marriage, there is usually one child of the marriage, I think the petitioner generally asks for custody. (Mr. Lacey): To make the position quite plain, out of that ninety per cent. in which there are prayers for custody, one does in point of fact quite often find that the prayer for custody itself is contested while the main petition is not.

3672. (Mr. Bole): What percentage of the prayers for custody are contested?—I think we would both agree, and this is merely an estimate, somewhere in the neighbourhood of ten to fifteen per cent.

3673. In London and the provinces?—I should see no reason to suppose that there would be any difference, but our experience is mainly in London.

3674. In paragraph 10 (c) of your first Memorandum (Paper No. 4) you suggest that divorce carries in its wake grave material disadvantages and injury to children. It is, in fact, the breaking of the home that causes the trouble, is it not, and divorce follows the breaking of the home?—(Mr. Temple): Yes, I would agree that divorce follows, because the home has already broken up if that step is taken, but I think that what we have in mind is directed to emphasising the irrevocable nature and the gravity of the step.

3675. I understand. There is, of course, the child of the illegitimate union which may have occurred if the deserted party has not obtained a divorce. Do you consider that that child should be given some consideration?—I am not quite certain in what respect you are using the word "consideration". If it were to be said that the fact that there was such a child ought to be a reason for allowing the divorce against the wish of the innocent party to the marriage, I would say no such consideration should be given.

3676. Even if there were not a child of the marriage?—I personally would say not. It is a very difficult problem because, as I see it, one has to weigh the rights of, or the sense of obligation of the community in respect of, a child who has got to live his life, against the obligation of the community to keep a marriage on foot and preserve the rights of the innocent spouse of the marriage. I think that that is a question which is really incapable of solution. One either has a view on it or not.

3677. But somebody has to weigh this up and decide whether the balance shall be in favour of the child or the adult. You would prefer not to come down on either side?—I would remain neutral. If I had a bias, I think I should be in favour of keeping the marriage on foot because I would not be certain in my own mind that

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I was even doing the best for such a child. I might be doing a certain amount of good for it socially, but whether in the long run I should be doing the right thing I would not know, and until I was convinced that it was the right thing to come down in favour of the child as against the innocent spouse, I would prefer to let things remain as they are. (Chairman): May I take up a point which is obscure to me. I am not quite sure what exactly is going to be done for the illegitimate child by granting a divorce. In the first place, *ex hypothesi* the husband has already set up a home with another woman together with the illegitimate child. In the second place, by granting a divorce you will not be a step nearer making the illegitimate child legitimate as far as the present law is concerned. Unless a benefit is to be obtained for that child by making a smaller provision for the innocent spouse, I do not quite see what advantage granting a divorce is going to give him. (Mr. Beloe): My intention was to suggest that granting a divorce would enable the guilty spouse to marry, and therefore the child would get a more permanent father or mother.

3678. Is there not a case for thinking that it would be to the national advantage that that child should have a secure home life than that the innocent party of the first marriage should be able to keep his or her status?—I think myself that that would not be so. I think that it begs the question to say that the illegitimate child is thus going to get a secure home, for this reason: that you have to consider what is going to be the view of the woman with whom the husband is living. It very often happens that if there is anything in the nature of a subsequent forced marriage, which may be the case in certain circumstances, the foundation of that particular home is not going to be a particularly secure one. On the other hand, *vis-à-vis* the innocent spouse, you have imposed upon her without her consent or against her will a dissolution of that marriage, and the only effect is that probably the financial situation of both homes is going to suffer. I would concede from the way that you put your argument that there is a case, but the weight that I would attach to your argument for it would not be very great.

3679. You have, of course, assumed that it would be a forced second marriage? That is very unlikely, is it not?—I do not assume that it must be so in all cases. I think in certain cases the second marriage might be forced because, in my experience, there are lots of married men who live quite happily with women other than their wives. The one thing that such a man does not particularly want, and I am afraid this sounds rather cynical but it is a fact, is to be set free. He may or may not have thrown in his lot for good and all with the woman with whom he is living, or he may have told her he has, contrary to the fact. It is sometimes for that sort of man a very convenient thing to say, "I should like to marry you but my wife will not divorce me". Therefore, in that sort of case if the stimulus for the divorce has come from the woman with whom he is living, and he has to marry her because he is set free, I would not say that that marriage was one that was going to last.

3680. In those circumstances it is rather likely that he would shelter behind the suggested amendments to Mrs. White's Bill which Mr. Young has described to you?—That may be so. (Mr. Lane): Perhaps I might add one thing. We recognise, I think, in the view that we have put forward, that there are bound to be a certain number of hard cases and our view is based on the idea that one has to do the best one can for the majority. We have taken the view that if the institution of marriage is maintained and supported, then the hard cases will ultimately become less.

3681. In paragraph 10 (d) of your first memorandum (Paper No. 4) you say:—

"A halt should be called to easier, cheaper and quicker divorce."

Do you think that if divorce is necessary it is wrong to make it as cheap as possible?—(Mr. Temple): Yes, in certain cases. It depends how it is made cheaper. There are certain steps which ought to be taken, affidavits to be filed, time to be allowed to elapse, court fees to pay for this, that or the other. The effect of making the procedure as cheap as possible is generally to simplify it; then if it is simplified, there is taken out of the purview of the court certain evidence which the court really

ought to have. I think the approach to divorce is a divergent one depending from which point one starts. If one starts with the point of view that marriage is really after all nothing more than a contract, that it has nothing to do with anybody else except the two parties primarily concerned, then one's train of thought goes in one particular direction. If, on the other hand, one takes the view that marriage and divorce are both concerns of the State and that the State ought to retain control not only over marriage and its incidence but over the dissolution of it, then one's line of thought goes in another direction. Then there comes the time when, if the procedure is oversimplified, logically one must say, why not allow people to go for a dissolution of marriage with as little formality as they go to change their food ration books.

3682. Am I right in thinking that the fees in the High Court are higher than the fees in the county court?—Yes, they are.

3683. So that if divorce jurisdiction were transferred to the county court, there would be less expense?—From the point of view of fees taken, yes, possibly.

3684. Everybody would charge less all round, except perhaps the solicitor?—I do not know that that would inevitably happen. (Mr. Christie): I think there is one point you have to bear in mind in relation to the county court. At present the Legal Aid and Advice Act applies to proceedings in the High Court but not to proceedings in the county court. The result is that while divorce is a matter for the High Court, anybody, however poor, if he has a proper case, can obtain a divorce with the necessary legal assistance at the expense of the State. In fact, people are obliged to contribute as much as in the view of the National Assistance Board they are able to do without ruining themselves, so they are compelled to make some sacrifice, but even if they have no money at all, they can still take proceedings. In the county court—I would not like to make an estimate—the cost they would probably have to incur is a sum of between £50 and £60, and that might in many cases be beyond their means altogether.

3685. Unless, of course, the Legal Aid and Advice Act was extended to the county court.—Unless it was extended, I agree. There are many reasons for desiring extension but there are financial reasons against it at the moment.

3686. If the divorce jurisdiction were transferred to the county court and legal aid were available in the county court for divorce proceedings, the cost to the State would be less?—I should doubt it myself. I feel that one would require to go through the same steps in the proceedings in the county court, which is not nearly such a convenient tribunal because the county court judges have their other work to do. They do not sit continuously in the same court day after day. They have a circuit where they sit in different courts, the result of which I should have thought would be to make it very much more difficult to adjust the work satisfactorily.

3687. (Mr. Lane): With regard to Mr. Beloe's question about counsel seeing the client, it may still not be clear as to what really happens. Of course, first of all the client sees a solicitor. Would you agree that there would usually be conferences of some hours between the client and the solicitor?—(Mr. Temple): Yes, I agree.

3688. In which all matters would be discussed, questions of custody of the children and the whole family story?—I agree.

3689. If the brief to counsel is fully and properly prepared by the solicitor there is really no necessity for counsel to see the client except to reassure the client, which is often very necessary?—Yes, I agree.

3690. Often in practice the brief is not complete and counsel has a conference with the solicitor?—Yes, I agree with that.

3691. And there the missing parts of the story in the brief are discussed between counsel and solicitor?—Yes.

3692. And the solicitor says frankly, "I did not ask", or "I did not find out", or "Yes, I did find out and I am sorry I did not put it in your brief"?—Oh, "I did not think it important".

3693. Or, "I did not think it important", and then it is decided whether counsel sees the client direct to obtain the information or the solicitor sees the client again?—Yes.

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3694. The practice which has existed for so many years between the two branches of the profession, would you agree, works ideally?—Yes, I would.

3695. And it is the solicitor's duty to see the client and get the information, counsel's duty generally to advise and conduct the case?—Yes, the duty of preparation for the one and the duty of presentation for the other.

3696. The other point is regarding fees in the county court. First of all, let us find out what we mean by fees. The county court scale of fees, that is money paid to the court, is cheaper than the High Court scale of fees at the moment?—Yes.

3697. But if divorce jurisdiction were given to the county court we do not know what scale of fees the Treasury would impose upon the presentation of petitions in the county court. Do you think it would be cheaper?—No, I do not.

3698. In regard to counsel's fees, payment is required for work done and in the majority of cases that takes place now a case in the county court requires less work than a case in the High Court and, therefore, counsel's fees are cheaper in the county court?—Yes.

3699. If divorce work were to be transferred to the county court, would you agree that counsel would have to do the same amount of work in the county court as he does in the High Court?—He would.

3700. (Mr. Byles): Does counsel have to appear in the county court?—No.

3701. (Mr. Mace): Not at the moment, but if divorce work were given to the county court, of course, we do not know whether solicitors would be given the right of audience?—No, we do not.

3702. Assume that counsel retained a right of audience in the county court, do you think that there would be any reduction in the fees for counsel appearing in the county court, as against appearing in the High Court?—No, I do not.

3703. Let us come to solicitors' charges. The county court has a scale of solicitors' charges?—Yes.

3704. That scale does not apply to divorce work so we do not know what scale would be given to solicitors if they conducted divorce cases in the county court?—No, we do not.

3705. So we cannot say whether it would be very much cheaper to employ a solicitor alone and not counsel?—It is quite impossible to say at the moment.

3706. It may be imagined that the solicitors' profession, if given the right of audience, would request remuneration in consideration of the responsibility of the work it was doing?—Certainly.

3707. (Mr. Maddocks): In paragraph 31 of your second memorandum (Paper No. 5) you recommend the setting up of special matrimonial courts, and you say that "Any case would then be tried to a finish from day to day". You will appreciate that this raises a point which presents difficulty to every magistrate and every Master in the High Court. A magistrate cannot adjourn proceedings which are started by a summons on complaint from day to day because his next day's list is always full—I should have thought myself that the solicitors or the applicants starting the matter by way of summons on complaint ought to be able to give some estimate of the length of the case, if it were to be contested, at the time when the list was being made up.

3708. Do you remember the new procedure which was introduced into the King's Bench Division about 1931?—Yes, very well.

3709. Do you remember that the idea of that procedure was that at the hearing of the summons for directions the day of trial was fixed?—Yes.

3710. Do you remember that that procedure broke down completely because the estimates as to the length of hearing which were given did not enable the courts to go on from day to day?—I quite agree.

3711. That was in the High Court where things can be done in a much more orderly fashion. Do you think that it would be possible in a magistrates' court to adjourn a hearing from day to day?—I do not think that the fact that such a procedure was tried in the High Court and did not work particularly well would be a sufficient reason,

if I may say so, for not trying the scheme in the magistrates' court. Even if the magistrates were left without work to do for half a day, or indeed, if after the case had proceeded for an hour, he came to the conclusion that he would not be able to reach the next one in the list and sent the parties in that case away, I still think the scheme would have advantages.

3712. (Chairman): As I understand your scheme, the magistrate would be dealing with nothing but matrimonial cases?—That is so.

3713. So that he would not have the interruption of other work?—No.

3714. (Mr. Maddocks): What you suggest is done in, I think, every magistrates' court, that is to say, when the warrant officer puts the return day on his summons, he always finds out, if there are solicitors in the case, about how long the case is going to take so that he can make up a list?—If it is a case which is not finished in the day, one has sometimes to wait for six weeks before one can get another day fixed to finish off the case.

3715. Surely a fortnight or three weeks in a metropolitan court?—Some period of that sort.

3716. Your idea is the old idea that one should ascertain the probable length of the case before making up the list?—It would be that. The court would sit in sessions and a list would be made up with, say, twenty or thirty contested matrimonial cases in respect of each of which there was some sort of an estimate as to the probable length.

3717. One cannot get an estimate of the length of the cases where the parties are in person?—Agreed. All one sees is the summons on complaint for desertion or cruelty, as the case may be, and that is all one knows.

3718. And to hear a cruelty case may take a few minutes or three or four hours?—Supposing the cases are listed in order: Smith v. Smith; Brown v. Brown; Jones v. Jones: those three cases are put into the list for the day and there are a couple more for the next day; if Jones v. Jones has not finished on the Monday, is there any reason why it should not go on on Tuesday?

3719. There is every reason in a magistrates' court. One cannot bring very poor people to the court and send them away again with the case unheard. If the last case does not finish, it cannot be put over to the next day because if one does do so and the case takes, say, two hours the next day the people who are concerned in that day's list will have to be put off: one cannot get in touch with the people in the cases in the next day's list to tell them not to come.—That I also appreciate. It is not like the High Court. Does not that suggest there is a tendency to overload the lists? Suppose one approaches it from a different angle and says that it is better that occasionally the magistrates should be unoccupied? (Mr. Maddocks): That very often happens on the matrimonial court day.

3720. (Mr. Jones-Roberts): I should like to make sure that I heard Master Allenes correctly. When he dealt with reconciliation proceedings before the judge I thought he said that the respondent may not appear.—(Master Allenes): That is correct. I said the respondent may not appear. He cannot be compelled by the judge to attend the preliminary proceedings. It is obligatory on the petitioner to appear but not on the respondent.

3721. Are there any officers specially appointed to do reconciliation work, or is it satirically in the hands of the judge?—It is entirely in the hands of the judge, the president of the court.

3722. (Mr. Justice Pearce): I wanted to ask you a question on insanity. Will you dissent if you think the assumptions I put to you are unreasonable? Firstly, in 1937 it was felt that the medical profession required that a patient should have had five years' care and treatment before they could pronounce so grave an opinion that he was incurable. Secondly, since then that period has been greatly shortened by such things as the leucotomy operation and treatment by insulin coma; also since that time there has been an increasing practice of allowing patients to go out on leave and taking people as voluntary patients rather than as certified patients. Thirdly, will you assume that there seems to be universal

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Mr. H. A. H. CHRISTIE, Q.C., Mr. R. J. A. TEMPLE, Q.C.,
Mrs. J. B. LATEY, M.B.E., AND MRS. ALLAN.

[Continued]

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agreement that the Act as at present is capable of improvement? Fourthly, suppose that doctors felt that something like two years' case and treatment was still necessary in order for them to make so grave a pronouncement, and suppose that that two-year period were to include any form of treatment such as treatment as a voluntary patient and treatment abroad. Supposing all those things, would that go some way to removing what you feel is the hardship at the moment?—(Mr. Temple): Yes, personally I would agree with that. (Mr. Laty): I would agree with that, subject just to this one point. One of the difficulties which we were trying to get over in our suggestion of removing the requirement of care and treatment was the tremendous difficulty in doling care and treatment in such a way as to cover all the cases one wants to cover.

3723. I quite appreciate that difficulty. That, I think, is probably too long a matter to go into, but supposing one could define it satisfactorily so as to include voluntary treatment, treatment abroad, treatment by licensed houses, that would probably go most of the way to removing your objection to the present state of affairs?—(Mr. Temple): I think it would.

3724. Now in deciding whether one would go all the way and provide that no period of care and treatment shall be necessary, one would have to strike a balance, would one not, between the conveniences you have put forward as arising if there is no period of treatment and the necessity for a doctor having certain evidence before he can truthfully make so grave a pronouncement as that a patient is incurable?—Yes.

3725. On your proposal the doctor might be in great difficulty about providing an opinion for the psychiatrist, because the patient could not be made to undergo a compulsory examination. Do you agree?—Yes, I agree with that.

3726. Would one really be conferring much benefit on a petitioner if there were to be no requirement as to care and treatment when one comes to think of the difficulty of getting a conscientious doctor to persuade the court that a man was incurably insane who had not been under any treatment whatever? I will add just this, that a person might be liable to be divorced because he was insane though he had never been treated.—I think that with an extended definition of treatment there would be no objection. That really marches in with the line of thought

(The witnesses withdrew)

PAPER No. 48

MEMORANDUM SUBMITTED BY THE HALDANE SOCIETY

The views of the Society on this subject, as determined in August, 1948, are incorporated in Chapter IX of *The Reform of the Law* edited by Professor Glanville Williams (Gollancz). (See Paper No. 48.)

Since that time the experience of our members, in both branches of the profession, has tended to confirm the opinions then formulated and, except in one respect, we find no reason to modify the proposals then made. We do not consider that we can improve upon the language used by the learned editor nor materially strengthen the arguments there advanced.

We therefore support the proposals for the reform of the law of marriage and divorce set out in that work, and recommend their implementation as of immediate urgency, with the following exception.

In the work in question it is recommended that the matrimonial jurisdiction at present exercised by both the High Court and the county courts should be transferred to the county courts. We do not now consider that in the present financial situation of the country it would be practicable to transfer the jurisdiction at present exercised by magistrates to the county courts.

While not necessarily abandoning the long-term view that there should be one "Family Court", and that the county court, we do not at the present advocate the transference of summary jurisdiction in matrimonial cases to the county courts. Our support for the proposals contained in the above work is qualified in this respect only.

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we were suggesting in regard to the abolition of treatment altogether. With that extended definition of treatment it is difficult to imagine any case where one could prove to the satisfaction of the court that a person was incurably of unsound mind when he or she had not had any form of treatment.

3727. That is the difficulty I foresee. One would never persuade the judge if there had been no treatment. Do you think that the balance of convenience is on the side of your proposal, or on the side of the proposal I have put to you on the supposition that one could get a satisfactory definition of care and treatment?—I should say that it is on the side of your proposal on that supposition.

3728. (Lord Keith): I wish to clear up one possible misconception. In answer to Mr. Young you said something about the law of collusion in Scotland. Now I would ask you to assume from me that collusion in Scotland includes an agreement between the parties to withhold a just defence. If certain defences were introduced into Mrs. White's Bill then, of course, if they were withheld, that would be collusion. You agree with that?—If they were withheld as a result of a bargain between the spouses I would agree it would be collusion.

3729. And in that respect the law of Scotland and England would be the same?—I accept that.

3730. (Mrs. Allen): We have had questions raised on collusion. Does not the fact that a single act of adultery is a ground of divorce tend to open the way to collusion?—But the court has to be satisfied of the commission of the offence and personally I see no alternative. The offence is adultery and as far as the offence is concerned it does not make any difference whether it is a course of conduct or an isolated act. I do not think one could possibly have legislation in which if a single act of adultery was committed one would withhold the right to a divorce from the innocent party who chose to complain of it.

3731. (Chairman): The vital point, I think, emerges in your last answer, the innocent party is not by any means bound to ask for a divorce for a single act, or indeed for a number of acts of adultery.—I know, and very often a single, isolated act is followed by condonation and forgiveness.

(Chairman): Thank you very much, we are much obliged to you.

Our objections to the present handling of matrimonial cases by courts of summary jurisdiction are these:—

1. The trial of the issue between husband and wife takes place in a "police court" atmosphere with the husband too often treated by the court and its officers rather like the accused in a criminal case.

2. So long are the lists of matrimonial cases (especially in the metropolitan area) that cases frequently have to be hurried. Matters, particularly in cases of cruelty and "constructive desertion", which in the High Court would take perhaps two days to try, are dealt with in two hours by stipendiary or lay magistrates.

3. In too many courts of summary jurisdiction there appears to be an inherent prejudice against the husband. This may be to some extent due to the fact that the husbands are constantly before the court as being in arrears with maintenance orders. The clerk to the court who is charged with the duty of enforcing these orders may perhaps develop an unconscious prejudice against husbands appearing in his court.

4. The procedure in courts of summary jurisdiction makes no effective provision for obtaining particulars of allegations of matrimonial offences, nor for discovery. Here, again, the system tends to operate against the husband, who in many cases comes to court without knowing the nature of the wife's case in more than the barest outline.

C

Until such time as the establishment of a single "Family Court" may be possible, we urge that in matrimonial causes in courts of summary jurisdiction legal aid be granted under the provisions of the Legal Aid and Advice Act, so that both husband and wife may have the benefit of professional advice and their cases properly conducted within the limitations of summary jurisdiction.

If our proposal be adopted that the matrimonial jurisdiction at present exercised by the High Court be transferred to the county courts, it will be necessary to extend the operation of the Legal Aid and Advice Act, 1949, to those courts.

(Dated 15th January, 1952.)

PAPER No. 49

CHAPTER IX. THE REFORM OF THE LAW

(Edited by PROFESSOR GLANVILLE WILLIAMS and reproduced by kind permission of the Editor and Messrs. VICTOR GOLLANCZ, LTD.)

(NOTE—Those parts of the chapter referring to matters which are clearly outside the terms of reference of the Commission have not been reproduced.)

FAMILY LAW

I

MARRIAGE BARS

1. At present marriage is prohibited with many members of one's deceased or divorced spouse's family. The principle has been reduced by Acts like the Deceased Wife's Sister's Marriage Act, 1907, but it is still forbidden for a man to marry, e.g., his divorced wife's sister. Thus if his wife dies he can marry her sister, but if his wife runs off with another man and he has to divorce her, he can never marry her sister as long as his previous wife is alive. In the same way he cannot marry his brother's divorced wife. The only valid reasons for restrictions of this sort are biological, and there is no biological reason for maintaining any prohibition on marriage with any member of the other spouse's family or with any relatives by marriage of members of one's own family.

2. In passing it may be observed that a scientifically devised legal system would prohibit marriage with a double first cousin. Such marriage is biologically as bad as marriage with a brother or sister, and much worse than marriage with a half-brother or half-sister, yet it is allowed by law and public opinion while marriage with a half-brother or half-sister is condemned.

II

THE LAW OF HUSBAND AND WIFE

3. In present-day society the married woman is generally, though not necessarily correctly, regarded from the legal and economic point of view as the dependant of her husband. The particular laws intended to give her protection, provision and sometimes advantage are based on the fundamental assumption of her economic dependency. Hence she possesses rights of shelter and maintenance enforceable against her husband, has certain powers of pledging his credit, and is generally identified with him in domestic. There are, however, no rights in law deriving from her contribution to the home by way of services as housewife and mother, although such is the very full-time occupation of the vast majority of married women. This attitude of the law is undoubtedly a reflection on a society which is all too slowly coming to recognise that the services of housewife and mother are a vital contribution to national wealth. Indeed, so ingrained is the notion of dependency that it even extends to the case of the married woman who acts as the unpaid helper in her husband's business—usually a "one-man" affair; her work is no more recognised as giving her title to any property than that of the married woman engaged solely in domestic duties.

4. The married woman's work in the home being in its nature wageless, though not necessarily less arduous than that of her husband, she finds herself in a continuous state of economic disadvantage, with no savings she can call her own, very little guarantee of security in old age, and increasingly out of touch with practically any form of remunerative employment. The home and the money

income being usually the property of the husband, he inevitably enjoys a superior economic and legal status. While this situation is largely mitigated by the husband refraining from abuse of legal right, it leaves the woman who is unfortunate in choice of husband open to unjustifiable hardship and humiliation, more often than not reflected on the children of the marriage.

5. While there are in theory rights of maintenance enjoyed by women and children, in practice the value of these rights depends largely on the social status and some of mental responsibility of the husband—quite apart from his financial resources. As is well known by those familiar with the magistrates' courts, there is many a slip 'twixt order and payment. And the working class woman who seeks to pledge her husband's credit at the Co-operative Society or the gas company will not get very far. Her rich sister when visiting Worth or Molyneux for "necessaries" may fare better.

6. Our existing laws by merely giving dependency rights tend to perpetuate the married woman's dependant and sex-like status. It does therefore appear a matter of importance and urgency that property rights should be more equal as between husband and wife. It is, moreover, believed that such legal recognition of the wife's rights would tend to lessen the number of matrimonial disputes.

7. The husband is not without a grievance at the present state of the law, for he is assessable in respect of the income tax and surtax of his wife living with him. No assessment can be made upon the wife, and consequently the penal provisions of the tax laws can be directed only against the husband. The rule is clearly capable of working injustice, particularly where a man of small means marries a rich woman who is unwilling or unable to put him in funds to meet the tax demands. The injustice is aggravated by a judicial ruling that, since no liability is imposed upon the wife, a husband who has paid tax in respect of his wife's income has no right of indemnity against her. Also, if she has died, leaving her property elsewhere, he has no right of indemnity against her executors.

8. It is proposed that the following steps should be taken:—

(i) Separate assessment of married women

A married man should be entitled to require the revenue authorities to assess his wife separately to tax, and in such a case the wife should be treated as though she were unmarried.

(ii) Disclosure of property

If equality of rights in the home is to become a practical matter one essential preliminary must first be satisfied. Both spouses must know of what the family property and income consists, and there should accordingly be mutual disclosure of property and income. For this purpose either spouse should be entitled at any time to obtain at a charge of 2s. 6d. each from the appropriate Inspector of Income Tax a copy of his or her spouse's last three annual income tax returns or P.A.Y.E. certificates.

(iii) Property rights

On application under Section 17 of the Married Women's Property Act, 1882, the court should have an absolute discretion to divide the furniture and other

¹ A Bill to allow such material was introduced into the House of Lords by Lord Mincroft in 1949. It received much support, but was withdrawn when it was made clear that it could not receive Government time. The existing law was consolidated in the Marriage Act, 1949, Section I.

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conditions of the home between the parties, subject to the rights of creditors. The wife's savings from house-keeping money should be presumed to be the joint property of the spouses in the absence of proof to the contrary. The court's determination of these questions should be taken into account in any claim by the wife for maintenance.

(iv) Actions between spouses

Injustice is frequently occasioned by the rule that husband and wife cannot, in general, sue each other in tort. This rule should be reversed, though for the sake both of the future relations of the parties and of the children, the court should in this instance be given a discretion to hear the case *in camera*.

III

DIVORCE

Good marriage or its absence

9. In any community the family is the unit, and it is of vital importance that family life should be preserved and strengthened. It is in the public interest that good marriages should be achieved, and that children should be desired and welcome in them. Good marriage is achieved when the separate individuality of the spouses grows into a community of body, mind and soul, when children are desired, loved and brought up by joint effort.

What the law can do

10. The law cannot make people love one another, or make them live together if they do not do so of their own free will. This truism would not have to be stated were it not so often ignored in connection with divorce. To force people who do not love one another to remain together is often the apparent intention of our present divorce law when it denies divorce to couples who are unable to achieve or maintain a good marriage. The results are misery to the spouses, an unhappy home for the children, contempt for the law and a danger to society. It should be recognised that the law can only do the following things for such couples:—

- (a) decide whether they should have the legal status of being married;
- (b) protect a party who does not desire cohabitation against the allegations of the one who does;
- (c) make and enforce orders as to the custody of children;
- (d) make and enforce financial arrangements.

There can be genuine disputes about (c) and (d), and such disputes can be fit subjects for decision by the court.

11. In the case of (a) and (b), the function of the law should be mainly declaratory—to give public recognition to an already accomplished change in the private relations of the parties.

The present position in England

12. In 1946 some 25,000 orders were made by magistrates effectively separating spouses without any right to re-marry. These figures can be compared with some 30,000 magistrates' orders in 1939. This means that at present on every weekday throughout the year an average of over 160 men and women whose marriages have broken down are separated by order of the court, although they have no right to re-marry, because neither of them has done one of the acts, like adultery, which alone provide legal cause for divorce, or because the so-called "innocent" party does not wish to have a divorce, or because they cannot afford a divorce.

13. Those denied a divorce have a choice of life-long cohabitation or a non-marital union, and it is perhaps not surprising that many of them choose the latter. Married women in such circumstances frequently change their names by deed poll at a cost of two or three guineas and pretend to be married. Their children are, of course, in the eyes of the law illegitimate, but sometimes the parents' natural desire to protect the children leads to falsification of the register of births or to bigamy. It can therefore be seen that the effect of the present marriage and divorce laws is to encourage non-marital unions, and both in and out of court to lead to lying and evasion.

14. This state of things lowers rather than increases respect for the institution of marriage, and is the result

partly of the ecclesiastical basis of our divorce law and the view that divorce is a crime to be obtained only if certain rigid conditions are fulfilled, and partly of the excessive cost of divorce proceedings.

15. It is therefore desirable so to alter the grounds of divorce that the law will afford legal recognition to the end of any marriage which has in fact clearly broken down, and will do so at a cost which does not prevent ordinary people from exercising their legal rights.

Grounds for nullity and divorce

16. In addition to the present grounds for nullity and divorce there should be recognised as grounds for divorce: habitual drunkenness or drug-taking, having spent an aggregate period of three out of the preceding five years in prison, a sentence of imprisonment for five years or more (even though the sentence has not yet been served), unjustifiable refusal to have any children at all, two years' desertion, and cruelty re-defined so that injury to health ceases to be a necessary ingredient. Unjustifiable refusal of sexual intercourse should be treated as desertion, and it might be considered whether time spent in prison should be treated in the same way. It might also be considered whether persistent insanity should be added as a ground for divorce. Divorce on the ground of insanity should be extended: at present there is a right to divorce after five years where the respondent has been certified as of unsound mind, but not where he or she has been a voluntary patient in a mental hospital without being certified. The test should be one of incurable insanity.

17. This leaves us to consider two more radical suggestions: divorce by consent, and divorce for long separation.

18. The absurdity of the present divorce law is most clearly seen in cases where neither spouse can fairly be blamed for the failure to achieve or maintain a good marriage. They are compelled, if they want a divorce, to fabricate collusive evidence. The only alternative is to agree to separate while remaining married. Divorce can then only be obtained as the result of subsequent adultery. If ultimately the marriage is dissolved on this ground, all concerned feel disgruntled with the law because it has made an ass of itself—it acted as if the adultery had caused the break-up of the marriage, whereas in fact the break-up of the marriage caused the adultery.

19. In these circumstances most civilised adults feel that they themselves are in the best position to decide whether their marriage is a good one and whether it can continue. They desire a permanent and good marriage, and if in spite of all they can do they do not succeed, they resent having to take part in an elaborate ritual based on a legal fiction to have their marriage dissolved. They rightly feel that they should be able to come to the court to have their marriage dissolved with dignity. All affection towards one another may have died, but some degree of loyalty very often survives. Such loyalty, good manners and common humanity are of social value, and should not be outraged by a public trial.

20. It is therefore suggested that divorce by consent should be directly introduced, and that the spouses should be able to make a joint application for divorce to be heard in the judge's private room. The judge, if satisfied that the consent of both spouses was freely given, that no undue pressure has been exercised, that the services of the marriage guidance officers have been made available to both parties, and that the position of any children of the marriage (including unborn children) has been duly safeguarded, would make a decree *ad hoc* for six months. At the expiration of the six months the final application would be heard in open court and a decree absolute pronounced. The necessity for two applications separated by six months gives the parties plenty of time for further reflection, and the fact that a first application has been refused would be no bar to reconciliation. The proposal made would be no bar to reconciliation. The proposal avoids the squallor now found in the Divorce Court and the collision and perjury that are now found there. It may be added that divorce by consent is found in other countries, particularly Protestant countries of the North like Norway and Sweden, and is found to work well.

21. It often happens that, although one spouse has committed a matrimonial offence and it is obvious to all concerned that cohabitation will not be resumed, the other spouse refuses to file a petition. The motives for

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MR. W. HARVEY MOORE, Q.C. AND MR. STUART SHIELDSIX
LEGITIMATION

49. It is in the public interest that children should be born in wedlock, or appear to be, so as not to feel social outcasts. It is therefore recommended that marriage between parents should always confer upon a child born before marriage the status of legitimacy, whether at the time of birth either parent was free to marry or not.

50. When at the hearing of a divorce case all the following conditions are satisfied:—

(a) paternity of a child born in wedlock is denied by its legal father;

- (b) paternity is admitted by another man;
(c) such admission is confirmed by the mother;
(d) the report of the court welfare officer is in favour of the proposed change;

the court should have power by order to adjudge the child to be the legitimate issue of its biological parents, such order to take effect conditional upon the marriage of the biological parents.

51. Legitimacy cases should be heard, like adoption cases, in chambers*.

* See the criticism of the present publicity by Judge Tudor Rees reported in *The Times*, November 9th, 1948.

EXAMINATION OF WITNESSES

(MR. W. HARVEY MOORE, Q.C. and MR. STUART SHIELDS, representing the Haldane Society; called and examined.)

3732. (Chairman): Mr. Harvey Moore, you are here to represent the Haldane Society?—(Mr. Harvey Moore): I have come here really out of respect to this Royal Commission, rather than myself to give evidence. Unfortunately, the Vice-Chairman, Mr. John Hilton, who was the Secretary of the Haldane Society for many years, has found it quite impossible to attend this morning. May I just say this? The Haldane Society is a society of some 300 members, and the evidence which I have already put before you is based upon discussions in regard to divorce which took place before there was a division in the membership of the Haldane Society. There is a book called *The Reform of the Law* published by Collins and edited by Professor Glenville Williams.

3733. We have all read the relevant chapter.—The point I wish to make is this, that there was a split in the membership of the Haldane Society and another body was formed called the Society of Labour Lawyers which, because of its closer affiliation with the Labour Party, found, I think, some difficulty in expressing views on contentious matters. Now the Haldane Society, which I am representing here today, is the other portion of that once united Haldane Society which produced the book. Therefore, though I can speak of course only for the Haldane Society as it now exists, I think it would probably be right to say that the members of the two bodies, which in a united form produced that book, are, by and large, likely to support the proposals that have actually been put before you today in the name of the Haldane Society.

3734. I am not sure that I followed that. You are speaking for the Haldane Society?—Yes.

3735. Do I understand you to say that you are speaking for any larger part of the community?—No, I have no authority to do so at all. What I was suggesting was that, seeing that that book was produced by men who now are to be found in the Haldane Society or the Society of Labour Lawyers, there are probably a number of other individuals outside the 300 members of the Haldane Society, who would support these proposals.

3736. Approximately how many members of the Haldane Society were there before the split occurred?—About 450.

3737. There were about 450, and when the split took place the Haldane Society was reduced to the present 300?—Something of that sort.

3738. Can you tell us what is the distinction between the two bodies; on what rock did the split occur?—It occurred on this rock. At that time the Haldane Society was affiliated to the Labour Party and there were members of the Haldane Society who were Communists or fellow travellers and who were not eligible for membership of the Labour Party. A very great colleague of ours, the President of the Society and he felt that the non-Labour Party element was getting too strong a hand in the organisation of the Society. Therefore proposals were made that, in the future, membership should be confined to those persons who were eligible to become members of the Labour Party. That would have made it more a political lawyers' society than it had been up to that time, because, though it contained Labour Party members,

Communists and some fellow travellers, it also in fact contained, I think, two Conservatives and quite a number of Liberals, and, as is only right and proper among lawyers, some persons who had not any declared political principles at all. Anybody who was not eligible as a Labour supporter was, according to these new proposals, automatically debarred from membership of the Society. The two-thirds majority necessary to alter the rules was not obtained and therefore it became necessary for the, shall we say, defeated Labour Party personnel to leave the Society, which they did, and to form another Society, which I may say I also joined as a founder member.

3739. So it is now clear, I think, what the Haldane Society as at present constituted consists of. Does it include only barristers and solicitors, or anybody else?—Anybody connected with the law, that is to say, barristers, solicitors and solicitors' clerks.

3740. And students?—And students, a few of them.

3741. I would be glad if Mr. Stuart Shields could tell me how many members are (a) barristers, (b) solicitors, (c) solicitors' clerks and (d) others? Can you supply that information?—(Mr. Shields): Taking a membership of something like 300, one could say that approximately forty per cent. were barristers and forty per cent. were solicitors, and then the rest would be either managing clerks, students or possibly university teachers of law or legal civil servants.

3742. Do you wish to add anything else before we ask you questions?—(Mr. Harvey Moore): Just this in case members of the Commission should think it is within their terms of reference. I respectfully suggest that some consideration might be given to the way in which the divorce commissioners are appointed and remunerated. In my submission it is very desirable in any matrimonial proceedings that the person before whom such proceedings take place should be fully qualified, as of course the present commissioners are, but also I suggest that this Commission, if it thought proper, might make some representation to the effect that persons taking divorce business should be fully employed judges under the Crown. I think that there are some people who feel that if their case is being heard by a commissioner they have not quite the respect and gravity they would have got if the hearing had been by a judge of the High Court.

3743. It comes to this, you think persons who try divorce cases should either be judges of the High Court or county court judges appointed to act as commissioners?—Whoever is appointed should be regularly appointed as part of the judicial personnel of the State.

3744. You think that commissioners who try divorce cases should not be members of the Bar?—No.

3745. In your memorandum you refer to the work *The Reform of the Law*, edited by Professor Glenville Williams, and you say "The views of the Society on this subject, as determined in August, 1948,"—that is before the split—"are incorporated in Chapter IX of *The Reform of the Law*". Then you go on to say that except in one respect you do not find any reason today to modify the proposals contained in that chapter. The one respect in which you do not support these proposals is this. You

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[Continued]

think that at the moment, in the present financial situation of the country, it would not be practicable to transfer the jurisdiction at present exercised by magistrates to the county courts, and you set out your reasons. With that one exception the views you wish to put before the Commission are set out in Chapter IX of the book *The Reform of the Law*?—That is right.

3746. As these views are set forth largely by members of the Magistrates Bar, I shall first ask Mr. Lawrence to put any questions that he may desire to ask on this chapter and your memorandum.—On this matter may my friend, Mr. Shields, reply because he has studied the matter and knows the views of the Society?

3747. (Mr. Lawrence): Before I proceed to an examination of some of your proposals, I would just ask one question in regard to the present situation of your Society. I gather that the present constitution of the Haldane Society still includes those persons whose political views disqualify them from being members of the Labour Party?—(Mr. Shields): Yes.

3748. I think, as my Lord Chairman has said, it is quite clear that the memorandum which was submitted to this Commission in 1952, incorporating Chapter IX of Professor Glanville Williams' book, represents the views of the whole Haldane Society before the scheme, and also represents the present views of a large part of that original Society?—That is so.

3749. Thank you; I wanted to get that clear. Now to come to the matters which are more obviously within our terms of reference, I want to elucidate with you, if I may, some of the implications of your recommendations under the heading "Divorce". It is said (paragraph 9, Paper No. 49):—

"In any community the family is the unit, and it is of vital importance that family life should be preserved and strengthened. It is in the public interest that good marriages should be achieved, and that children should be desired and welcome in them."

and then it goes on to define what is meant by a "good marriage". I want to understand that. The definition is:—

"Good marriage is achieved when the separate individuality of the spouses grows into a community of body, mind and soul, when children are desired, loved and brought up by joint effort."

Is one of the qualifications of a good marriage in that sense its durability?—Certainly, yes.

3750. And I suppose the optimum is in the view of your Society a life-long durability?—Certainly.

3751. There is no suggestion here, is there, that it is in the public interest that there should be a succession of good marriages, within the definition here, with a series of different partners?—No, I do not think it ever crossed the minds of anybody who composed the evidence.

3752. We can reject at once any suggestion of that sort, can we?—Most certainly you can.

3753. In the next paragraph "What the law can do", it is said:—

"The law cannot make people love one another, or make them live together if they do not do so of their own free will."

Now without embarking on questions of theoretical jurisprudence, the law as you speak of it there is the expression by the community of the rules by which it desires to live and by which it desires to see its standards of conduct measured, is it not?—Yes.

3754. It may be true to say, "The law cannot make people live together if they do not do so of their own free will", but do you think, or do you not think, that the law can supply, if wisely framed, a fortification or external bulwark to keep people together and help them to achieve that life-long durability of association which is the optimum?—Quite frankly, I am not quite sure that it can. It may be that there are other factors, among them education, of course, which may bring about the position of people desiring to live together in permanent union, but I do not think that the setting up of a machinery of law can in fact provide a bulwark. There may be what some people may call a coercive prison. I do not think the law can provide a bulwark which will make for the happy and durable marriage of parties who do not wish to keep together.

3755. Of course, there are many other factors, but we were dealing with the law here. Having regard to what you told me was the ideal optimum in the view of your members, you would not subscribe to any alteration in the law which tended to reduce the possibility of achieving that optimum of durable life-long marriage?—Certainly not.

3756. That is putting it negatively. I was trying to see if we could proceed positively, but at least you would subscribe to the negative view?—Yes.

3757. Then the chapter goes on to set out the limitations in the law and the first one is that the law can "decide whether they should have the legal status of being married". That is a recognition, is it not, of the fact that by entering into the state of matrimony people do acquire a legal status?—Certainly, yes.

3758. That status is something above and beyond the results flowing from the form of an ordinary simple contract?—I quite agree.

3759. In other words, it is a recognition that the community or the State, whatever you like to call it, is a participant in the engagement of matrimony?—Yes.

3760. And therefore is a participant, or probably a participant, in any attempt to dissolve it?—Yes.

3761. You agree with that, do you?—Yes.

3762. The statement in paragraph 10 is summarised in paragraph 11, as follows:—

"In the case of (a) and (b), the function of the law should be mainly declaratory—to give public recognition to an already accomplished change in the private relations of the parties."

That is another way of saying, is it not, that when the State is called upon to play its part, whatever that may be, in the dissolution of a marriage all that it is required to do is to place a rubber stamp upon a document embodying the wishes of the parties themselves?—Taking, for example, the question of divorce by consent, which is dealt with later in the chapter, the State has to make it quite clear that the parties are genuinely consenting and that there is no coercion of one party by the other.

3763. I will deal with that, if I may, when I come to it. I quite understand what you mean, but when you say the function of the law should be mainly declaratory to give public recognition to an already accomplished change, that is putting it very much on the level of inserting an advertisement in the *Gazette* of dissolution of partnership?—I should not have thought that it was putting it quite on that level. The court has to satisfy itself either that a matrimonial offence has been committed, or alternatively, in the case of divorce by consent, that the parties are genuinely consenting. That is not something one can achieve by inserting an advertisement in the *London Gazette*.

3764. That is really the only difference, that the court has to be satisfied about the matters which you call safeguards?—Yes, quite.

3765. Then, although we proceed from the hypothesis that the community is a participant in the matter, the community has no effective interest in the matter other than satisfying itself as to the facts?—That is what I tried to make clear when I said that, apart from the law, there are other factors. We say that one cannot by the legal machinery ensure that people are going to live together in a happy married life; there are other factors, such as education, which the community obviously will attempt to bring in to help people in their efforts to achieve a happier, life-long marriage. That is rather a different thing from saying that one can achieve such a result by the machinery of the law.

3766. I think we are a little bit at cross-purposes. I was not suggesting to you that you could achieve such a result by legal machinery alone. Of course, there are a number of other contributory factors. Do you agree that legal machinery can itself be a contributory factor to life-long happiness and the durability of marriage?—No, I do not think it can, frankly.

3767. Not by setting a standard either explicitly or implicitly in the code?—No, with respect, I should have thought that the standard would be set by other factors and that it is very difficult for the law in the case of marriage to set a standard. I think that, as the paragraph suggests, the function of the law is to make a declaration of what the status of the parties is.

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3763. Let me put this illustration of what I mean. Supposing it was the law that a party could have a divorce for any reason that he or she liked to put forward, there would not be very much of a leap in such a law to the durability of the marriage relationship, would there?—No.

3769. If the law were such that the marriage could only be dissolved for very serious offences committed by one party against the other, is that not a leap, as I put it, an external bulwark, to the maintenance of marriage?—I should not have thought so.

3770. Why not?—For the simple reason that if the parties have reasons for not wanting to live together, they are not going to be made, or induced, to live together by the fact that the law says that they should.

3771. That is a question of degree, is not it?—To some extent, yes.

3772. And if the door of divorce is not open at all levels but only at certain remote levels, then, would you not agree, there would be a tendency to make people work out their own destinies together, to try to get on and to make a success of their marriage instead of rushing through the door of divorce at its lowest level?—Frankly, I do not. I feel that people fix their relations with one another without having regard to the divorce law.

3773. We shall have to examine that aspect with your help when I come to the matter of divorce by consent. Then, it is said in paragraph 14:—

"This state of things lowers rather than increases respect for the institution of marriage, and is the result partly of the ecclesiastical basis of our divorce law and the view that divorce is a prize to be obtained only if certain rigid conditions are fulfilled, and partly of the excessive cost of divorce proceedings."

Leaving out the aspect of cost for the moment, is it suggested that the view that divorce is a prize to be obtained only if certain rigid conditions are fulfilled is either a prevalent view or an accurate view of the present state of the law?—I think that that statement puts it in rather coloured language, but I do not think it is unfair to say this, that the divorce law is tied up so much with the question of guilt that in the eyes of a large number of people it is equated to some extent with the criminal law.

3774. I do not follow that that has anything to do with the metaphor of a prize to be obtained. Can you help me, because this conception that divorce is a prize to be obtained if you go through certain formalities is a conception which is rather fundamental to the whole of the submission here, is not it?—Yes, I think so. I think the submission is that unless certain grounds for divorce exist, however intolerable the married life of the parties may be, they are not entitled to be free from each other. I think that is what the learned author probably means.

3775. Can we pass from it with the comment that the statement is so much coloured as to be a wholly inaccurate presentation of the present state of affairs?—No, hardly; I would not agree to that. This general conception is to be found among a large number of people and is borne out by the fact that, as far as matrimonial orders are concerned, one has to go to the police court to get an order. The fact that one has to go to a place where the whole court is run by the police, where the man in charge of the list is the warrant officer, does reinforce this general feeling that one has to go through a sort of formula, not completely unconnected with criminal matters, before one can get a divorce or a matrimonial order.

3776. In fact, as I think you would agree, the true conception at the base of our divorce law, at any rate in England, is that the granting of a decree is a remedy granted by the court by reason of a matrimonial wrong committed against the petitioner?—Yes.

(At this stage the Commission adjourned for a short period.)

3777. The last paragraph in the passage headed "The present position in England" begins (paragraph 15, Paper No. 40):

"It is therefore desirable so to alter the grounds of divorce that the law will afford legal recognition to the end of any marriage which has in fact clearly broken down."

That is another way of saying, is it not, that the law should be altered to extend the grounds of divorce in the way which is later suggested, namely divorce by consent or divorce after a *de facto* period of separation?—Yes, that is so.

3778. The next paragraph is headed "Grounds for nullity and divorce". Without at the moment going into any details, it is plain that that paragraph also contains a suggestion that the grounds of divorce should be extended beyond what they at present are.—Yes.

3779. I will come back to those specifically if necessary later. Then the next paragraph says this:—

"This leaves us to consider two more radical suggestions, divorce by consent, and divorce for long separation."

Is it suggested that the jurisdiction to grant divorces at the request of both parties and after a long separation should run parallel with the extended jurisdiction to grant divorce for specific matters of complaint?—Yes, it is.

3780. So that it would not be wrong, would it, to say that what your Society is proposing is a very substantial extension of facilities for divorce?—No, it would not be wrong.

3781. May I ask you to help me about your suggestion that that extension of facilities should include divorce by consent and divorce for long separation? I will deal first of all with divorce by consent. Divorce by consent of the parties completely puts upon one side two aspects of the nature of marriage to which a large number of people give their allegiance, does it not? First of all, it completely ignores what I may call the sacramental view of marriage, the religious view?—Yes.

3782. And secondly, and subject to what you describe as safeguards, it completely ignores the participation as an interested party of the community?—Subject to the proviso that you mentioned, yes. Of course, if I may make that point, as far as the sacramental aspect of the matter is concerned, there already is provision for people becoming married and changing their status in that way without the intervention of any religious aspect, by their going round the corner to Caxton Hall, for example, and being married in a registry office. It is so revolutionary an innovation that one should change one's stance by such methods.

3783. I was only trying to analyse the bare bones of it, pointing out—I think it is obvious—that the question of divorce by consent must essentially neglect any sacramental aspect of the marriage union.—I quite agree.

3784. The institution of a system of divorce by consent would also involve this, would it not? It would involve the permission of a marriage at the mere whim or caprice of the two parties to it?—Yes, I think that language is a little coloured. After all, if I may make the point again about entering into marriage, one might equally say that marriage in a registry office is marriage at the mere whim of the parties on payment of a fee of 7s. 6d.

3785. But we are concerned in this chapter with divorce. I was wondering whether you object to the word "whim" or the word "caprice" or to both of them; that is in fact the result, is it not? Let me put it this way, suppose both parties after a period of matrimonial cohabitation desired merely a change of partners. If they could obtain a divorce by consent that reason would be sufficient ground for obtaining a divorce, would it not?—I think in the absence of children it would be, yes.

3786. Not only would such a couple be able to obtain a divorce for that reason, but they would be able to marry the second partner of their choice with the possibility that after a short period of matrimonial cohabitation with that partner they could again change partners?—These are all possibilities.

3787. That is all I want to get from you, that they are possibilities.—Once having accepted that the present law allows one to get married very easily, I do not find it very difficult to take the step of saying that if people cannot live together they should be able to divorce each other in no less difficult way.

3788. I follow that, but are you not begging the issue by assuming that they cannot live together? They may not wish to because they have a desire to exchange partners. That is not the same thing as saying they cannot live together as man and wife, is it, in a durable

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relationship?—No, I should have thought that most people who are so irresponsible as the parties whom you are postulating probably would not have bothered to enter into matrimony at all.

3789. That is rather a large assumption, is it not?—I do not think it is any larger than the assumption you are making about the whims and caprices of the parties.

3790. All I am trying to get from you is if I can say that that is a possibility flowing from the institution of divorce by consent.—Certainly.

3791. Do you regard that possibility as being consistent with what you told me before the adjournment was the ideal of a good marriage in the sense of a durable and, if possible, life-long association?—I consider it a possibility one should be prepared to face, taking into account the evils which are the result of the alternative system.

3792. At any rate, with the door open to divorce by consent, the law is not providing much of a fortification against passing fancies, is it?—It is not providing fortification against passing fancies any more than the law is now providing fortification against unhappy marriages.

3793. Would you agree that another possibility of divorce by consent is the dissolution of a marriage on quite insufficient grounds as between the two parties?—It depends upon the criterion of "insufficient".

3794. Let me give you an instance that I have in mind. You might very well find an application made for the termination of a marriage by mutual consent as a result of the first serious quarrel that occurs after two young people have thrown in their lot together.—It is suggested in our proposals that, first of all, there should be proceedings before the court in order that divorce by consent may be implemented and, secondly, that the judge should have the opportunity of seeing the parties, that he should be satisfied that marriage guidance advice is available to them and that there should be a delay of six months. All these factors, I should have thought, would enable the parties to get over their first tiff.

3795. That is an attempt, is it not, to hedge about with restrictions the obvious possibilities of opening the door so wide?—Yes, quite.

3796. If that is so, do you think that there is really sufficient justification for opening the door at all in that way?—I should have thought that there was.

3797. What is the view of your Society upon the position of children that are begotten of a marriage which could be terminated by the consent of both parties for any one of the reasons I have suggested, or for other reasons?—I think this is one of the questions one has to weigh in the balance. One is trying to avoid the situation where, because the parties are tied together legally, there is a completely unhappy home background for children. On the whole, I think the members of my Society have come to the conclusion that as between the two evils of an unhappy marriage with the children tied to unhappy parents, or of easier divorce, the latter is the better solution. One agrees that neither solution is the best one, the best one is a happy marriage, but in the circumstances one may have to make a difficult choice.

3798. Do you agree upon reflection that if the facilities for divorce were so much extended as to enable parties to terminate their union by mutual consent, you would be liable to bring about the very thing which I gathered from my first questions you do not wish to see brought about, namely, a succession of marriages with different partners?—It is a theoretical possibility, but I do not think I would put it any higher than that.

3799. You are asking us to recommend changes in the law which apparently admit possibilities, theoretical or otherwise, of that sort?—Yes, but hard cases make bad law and I do not think it is necessarily a criticism of the law that it cannot cater for every single case. I do not envisage that with easier divorce there is going to be a rash of people who will enter into one matrimonial alliance after another.

3800. I am sure you understand that I am only testing the value of this memorandum and not administering in any way a personal point of view. You spoke a moment ago about marriage being very easy to enter into. I gather you rather thought that it might be a good thing if the entry into marriage were made more difficult?—I do not

think it would be a good thing. It might be logical to make it so if divorce were made extremely difficult.

3801. Do you think that if it was universally known that marriage could be terminated by mutual consent of the parties, that would tend to make people enter upon marriage in the first place in a more light-hearted way than they otherwise would?—I do not think so. I take the view that most people, when they are thinking of marrying, or when they are getting married, or when they are married, are not continually thinking about the law of divorce and how to get rid of each other. When they have started thinking about that, the marriage is on the rocks anyway.

3802. I am not suggesting that they should think about the law of divorce. All I was suggesting for your consideration is this, that if the law was altered as you suggest it should be, it would be well known by every young couple that went through a marriage service: "Well, if we do not get on and we both agree we do not get on after a few years (or however long it would be) we can always get a divorce". That would be inevitable, would it not?—It would be known, certainly.

3803. And it would be inevitable that that reflection would be at the back of their minds when they got married?—If we do not like it and we both agree we do not like it, we can get a divorce?—It might be.

3804. Do you think that would be a good thing or not?—I am not so sure that a lot of people who get married may not have that consideration in mind now.

3805. Do you think that would be a good thing or not?—I do not think it would be a good thing but, as I tried to explain, in considering this matter one has to weigh up a whole host of good and bad things, and it might be better to have that situation rather than the other situation.

3806. Now may I ask you a few questions about the safeguards? First of all, I gather it is suggested that the application for a decree of divorce founded upon consent of the parties should be made privately in the judge's room?—In the first place, yes.

3807. You say in the first place; all that would happen in the second place would be a formal pronouncement of the decree absolute?—I think the court would want to know what the situation was at the end of six months, and as to whether any attempt had been made by the parties to effect a reconciliation, and to hear any reports there may be on that aspect of the matter.

3808. Is that part of the application to be heard in open court?—I should have thought so, yes.

3809. Then why not hear the initial application in open court?—For these reasons: the initial application not being a final one, there is still the theoretical hope that the parties may become reconciled as the result of the proceedings to be taken or the delay of six months to be imposed. Therefore, in the hope that the parties will not finally be divorced, there is no reason why they should have to go through a public hearing first.

3810. Except this—I do not know whether you subscribe to the proposition or not that generally speaking it is undesirable that judicial proceedings should be carried on behind closed doors?—I agree with the proposition in general, but of course the same considerations have been outweighed as matters like custody applications and so forth.

3811. Then I see you suggest that the judge, if satisfied that the consent of both spouses was freely given and that no undue pressure has been exercised—that is a way of saying the same thing—should make a decree nisi. How do you suggest that on a joint application by both parties founded upon their consent for the termination of a marriage the judge could possibly be satisfied even in his private room of matters of that sort?—The judges of the courts have experience in listening to witnesses and occasionally interposing questions of their own.

3812. But my difficulty is this: the foundation of this proposal, to put it graphically, is that both parties should go hand in hand to the court and say: "We want a decree and we have both agreed we should have one"; that is all it would be necessary for them to say?—No, I think not. I think the judge would have to be satisfied as to the matters which are set out, and he would probably only be satisfied by asking questions of the parties.

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3813. On the basis that both of them want a decree and can only get it on the basis of consent freely given, do you think that such questioning by the court is going to elicit any valuable information?—I should have thought that if there is anything to hide, questions by the judge are quite often the best way of bringing it out. I can think of no better way.

3814. That is what I thought. At any rate, it does admit the possibility that in any such change of the law you might get cases where consent had not been freely given or had been given as the result of a bargain?—You might, in exactly the same way as you may under the present law get cases of collusion which the court sometimes takes upon itself to discover.

3815. That is not much improvement on the present situation?—No, I think that is not quite fair. One is not suggesting that there cannot be improper pressure under the new system. The difference between the two systems is that in one the grounds for divorce are limited and in the other the grounds for divorce are widened providing the court is satisfied that the parties are coming to it bona fide with a marriage that has broken down. There seems to me all the difference in the world. Because there may be the odd case of collusion in one, and undue pressure in the other, does not seem to be a necessary criticism.

3816. Then the last part of paragraph 20 reads as follows:—

"The proposal avoids the squalor now found in the Divorce Court and the collusion and perjury that are now found there."

Taking that sentence in isolation, does your Society subscribe to that as a statement of fact about the present Divorce Court?—I do not want to be held to the editor's words, but I should say that collusion of course does exist and people do perjure themselves. As I say, it is very difficult to do oneself to something one has not oneself written.

3817. Would you like to say that we could ignore that sentence?—No, I would not say that at all. I would say that the learned author has expressed it in a way in which perhaps I would not and in which perhaps many members of the Society would not have expressed it.

3818. You mean because it is exaggerated?—Because the language is coloured and I do not think really coloured language should be presented in that way before the Commission. "Squalor" is the word which I find difficulty in accepting, but the fact that there is collusion and perjury is, I think, a fact which exists.

3819. Now may I pass to the second main suggestion, that there should be divorce after a period of separation? Suppose we do not have divorce by consent, let us examine this second proposal by itself. It plainly involves the possibility of divorce by consent, does it not?—Yes, it does.

3820. All the parties have to do is to go through the qualifying period of separation.—Certainly, but I am not sure that that possibility is involved any more than in the present law of desertion.

3821. I do not know that I quite follow that. A decree under the present law is granted as a relief for the wrong of desertion and not as the result of the factual separation?—Yes, but I should say that in undefended divorces brought on the ground of desertion, the court does not really get the full picture of the marriage because all that happens is that the petitioner comes to the court and says, as may well be true, that the respondent has left the matrimonial home, and then gives his account of the marriage and, not unreasonably, gives a slightly gilded account from his point of view; it may very well be that, had the matter been defended, the decree would not have been granted.

3822. The ground of the application is desertion and it is necessary to satisfy the court by evidence that desertion has taken place.—Certainly.

3823. You are not suggesting that in these cases, or in a substantial number of these cases, an entirely false case is presented to the court?—No, I am suggesting that in a large number of these cases the marriage has broken down, the parties have ceased to live with one another and there are perhaps faults on both sides. Neither party really wants to continue the marriage and one party comes

to the court with a petition on the ground of desertion, and his evidence if unimpaired would be sufficient, as the law stands, for a decree to be awarded to him. I think, from my limited experience and from that of people with whom I have talked, that that is quite often what happens.

3824. But that is not the same thing as admitting divorce after a *de facto* period of separation?—It has the same result as the case you postulated. If it is possible on your basis that, were this proposal introduced, all that is to happen is that one party should come along and say, "We have not lived together for seven years, can I please have a divorce?"—that is not very different from the situation where one party comes along and says, "He left me three years ago, that is desertion, can I have a divorce?" It is not very different.

3825. With all respect, I should have thought it was as different as chalk from cheese. In the one case, if I may put it for your consideration, all that is stated to the court is that the spouses have in fact been living apart for a year; in the other case the party complains of a specific matrimonial offence. It is different, is it not?—Yes, I quite agree, from a technical point of view it is different, but from a practical point of view it is not so different.

3826. I think I understand your answer. I only want to get it quite clear that this proposal to institute divorce as the result of a period of separation must inevitably bring with it, even if not separately enacted, the possibility of divorce by consent?—Yes, of course it does.

3827. With whatever objections or advantages there may be to that?—May I put it in this way? The advantages of divorce by consent, one of which is at any rate frankness before the court, would not be attained were this measure introduced on its own, because divorce would be by consent only as the result of some sort of collusion or bargain, the possibility of which you envisage.

3828. Again I do not want to over-emphasise this point, but this second proposal of yours certainly involves this, does it not, that a party wishing for a change of partner can qualify to be in a position to marry a second time merely by bringing about a factual state of separation?—Yes.

3829. And that means this, does it not, that on your proposal an application for divorce can be made against the wish of the party who does not wish for a change of status?—That is so, yes.

3830. In other words, to put it quite crudely, a man or a woman under this proposal could deliberately by his or her own wrong bring cohabitation to an end and then, after the period of separation, whether it be two, three, four, five or seven years, could apply to the court for a divorce founded upon the very wrong that he or she has already committed?—Yes, I quite agree with that, but you see, if I may qualify my answer in this way, in all these points one is faced with the choice of evils. I quite admit that what you postulate is a possibility, but it must be weighed against the other possibility which is set out in the memorandum, that for reasons, sometimes of sheer spite, although the marriage has been completely broken down over a long period of years, the parties are legally tied together with all the attendant consequences. One has to weigh those two evils, one cannot take one of them in isolation.

3831. I hope you do not feel that I am being unfair to you taking these matters in isolation?—No, not in the least.

3832. I want to see exactly what is involved. To put it in legal language, it is a proposal which would enable spouses to take advantage of their own wrong?—I quite agree.

3833. Do you know of any other branch of jurisdiction where the law of England has admitted that principle?—I should have thought that where a man puts up a building without a licence and then refuses to pay is an example, but I am not trying to equate the two proposals.

3834. I was going to say let us compare like with like. It is not a principle which, generally speaking, has found favour in the law of England?—No, I quite agree, but then there is the question of guilt or non-guilt; the fact that two parties cannot necessarily make a success of their married life and the fact of separation do not necessarily imply guilt on the part of either party; on the other hand, possibly the guilt might have been that of both parties.

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3835. At any rate, those are the possibilities of the suggestion. I can only suggest this generally for your consideration: reviewing the content of all these possibilities flowing from the suggestions, do you or do you not think that they would militate against the establishment of a durable lasting relationship which is said to be the ideal of your Society in these matters?—No, I do not.

3836. May I pass now to one or two smaller matters? In paragraph 26 headed "Discretion statements" it is said:—

"Discretion statements in which a petitioner has to disclose his own adultery should be abolished. Responsibility for obtaining this information rests on the petitioner's solicitor."

I gather that what I am now reading are the grounds for the suggestion that the discretion statement should be abolished, is that right?—Yes.

3837. Continuing:—

"... who is under the distasteful obligation of questioning his own client and disclosing to the court answers given to him in professional confidence. It is anomalous that a solicitor should be under an obligation to disclose his client's adultery when he is under no such obligation relating to a murder confessed to him by his client."

As a member of the Bar, Mr. Shields, with some knowledge of the practice in these matters, you do not regard that as being in any way an accurate statement of what occurs, do you?—No.

3838. The disclosure is not made by the solicitor as a breach of privilege, the disclosure is made by the client himself in his duty to be frank with the court, is it not?—Yes, if I may put it in this way. This is purely a personal view, I do not quite accept the reasons for the statement here that discretion statements should be abolished. I personally think they are anomalous, but I would not put it on the grounds that have been put here by the author.

3839. Then in paragraph 27, which is headed "The court", it is said:—

"The main objections to the matrimonial jurisdiction of the High Court are:—

(a) The procedure is involved and expensive." How do you suggest that the procedure is "involved" in the High Court?—I think probably that is a reference to the fact that the procedure does give the impression of being involved. There are quite often interlocutory matters, but I do not think it is of tremendous importance as a criticism, the fact that the procedure is involved.

3840. The paragraph continues:—

"(b) The divorce and nullity courts are distant and unfamiliar places to most people."

The Divorce Court of course is situated in London in the main building of the Royal Courts of Justice and the nullity courts are in country towns where the sessions are held.—Yes, but they are still unfamiliar to most people.

3841. But they are resorted to, are they not, by those whose business takes them there in civil cases?—Yes, but I think that the people who litigate in the High Court are a very small percentage of the population. I think the point made is quite a valid one in connection with proposals for setting up a Matrimonial Court. It would be more satisfactory if the Matrimonial Court were on a more local basis such as the county court, and I think the county court is a tribunal which is probably much closer to the average man than the High Court or the sittings.

3842. I understand that point if it is part of the proposal to transfer divorce jurisdiction to the county court, and that depends upon the view which is taken of the degree of importance and solemnity with which the dissolution of a marriage should be invested, does it not?—Quite, but I do not think that one should criticize the county courts for not observing the correct atmosphere or procedure in trying a case.

3843. Then it is said:—

"(c) The atmosphere of the old ecclesiastical courts still lingers in the divorce courts."

The law administered there derives from and still bears traces of the ecclesiastical courts?—Yes.

3844. In paragraph 32, under the heading "Maintenance of the spouses", it is said:—

"It is contrary to public policy that persons who are able to work should be free to live idly on maintenance provided by the other party to a marriage. Moreover, the faults contributing to the break-up of a marriage are rarely to be found on one side only."

Am I not right in thinking that the court on maintenance applications can and does frequently take into account the earning capacity of the petitioner?—Yes, I think it does. I speak subject to correction here, but I would say that the court has possibly tended to do so more within very recent years than it did formerly, although I am not apologising for the fact that we have relied on this previous publication, it was written five years ago.

3845. Let me test the knowledge of these matters of the writer by the next paragraph:—

"It is therefore suggested that it should be provided that in making an order for the maintenance of a spouse the county court should consider the following:—

(a) Whether cohabitation was terminated wholly or partly by reason of the conduct of one or other party."

That is already in the statute that governs these matters, is it not?—Yes.

3846. And that is a statute that has been on the statute book in its present form for some years, certainly before this book was written, that is so, is it not?—Yes I think so. (Mr. Lawrence): I am obliged, Mr. Shields. That I think is all I have to ask you.

3847. (Lord Keith): I see, Mr. Shields, that there is a reference in this book which you are adopting to the law of countries like Norway and Sweden. I only want to know if you yourself have any personal experience of the law in these countries or as to how they work?—No, I am afraid not.

3848. (Mrs. Jones-Roberts): Would you turn, Mr. Shields, to paragraph 12, headed "The present position in England"? I am a little puzzled by the way in which magistrates' orders are dealt with here. The writer says that some 25,000 orders were made in 1946 effectively separating spouses without any right to re-marry. I wonder if the writer has sufficiently distinguished between maintenance orders and separation orders. You are, I am sure, well acquainted with the position that it is only a separation order that has a non-cohabitation clause, and we have had evidence earlier that whereas maintenance orders do in fact reach something like the figures given, the number of separation orders made is very small. I think the figure I have in my mind is about 500 in a year. I wonder exactly what the writer had in mind there when he says "effectively separating spouses"?—I should have thought that he probably had in mind that once there is a maintenance order, even if there is no non-cohabitation clause, the parties are in fact separated; usually the reason for not inserting a non-cohabitation clause is that, if inserted, it may bar a wife's remedy in divorce on the ground of desertion. But I think the effect of a maintenance order is to separate the parties; I am reminded that if the parties do in fact come together the maintenance order goes.

3849. I was going to make that point, that really there is nothing inevitable about a maintenance order, the parties can come together at any time they like, and what the magistrates do presumably is to deal with the situation as it then exists; would you agree?—Yes.

3850. And when grounds do present themselves there is nothing to prevent the parties from going forward for a divorce, would you agree to that?—Yes.

3851. Do you agree that that paragraph is not quite clear?—I quite agree.

3852. Then, in your memorandum (Paper No. 48) you say that you agree entirely with the recommendations made in Chapter IX of *The Reform of the Law* but you put in a qualification in respect of the removal of the jurisdiction from magistrates' courts based merely on financial grounds. I take it therefore that you agree with the main recommendation in principle but you simply envisage difficulties for the time being?—Yes.

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[Continued]

3853. It is said (paragraph 29, Paper No. 49) that "The magistrates' court is not, on the whole, the proper tribunal to deal with such cases". I suggest to you that when the writer recommends the transfer of these cases to the county court, he is perhaps being a little hard on the magistrates' courts. Concerning the points mentioned in your memorandum as to the speed with which cases are heard, although that is to some extent limited to London, the prejudice against the husband and the "police court" atmosphere, what evidence really exists that that is the situation in courts throughout the country?—I would say that the majority of members of my Society practise in and around London. I think that the points you have mentioned constitute a criticism which probably most cogently applies to busy courts in London and possibly the bigger courts in other cities. I think that magistrates' courts in country districts usually have more time—I say this with great trepidation—to consider the cases, and it is certainly true that the criticism applies more to stipendiary courts than to lay courts.

3854. I am quite sure that you will be familiar with the procedure that now obtains in magistrates' courts of setting up special domestic courts which sit privately and are composed of three magistrates who hear these cases?—Yes.

3855. So that the suggestion that the court is overloaded with "police court" atmosphere is perhaps, to use your own phrase, a little coloured?—In most magistrates' courts, at any rate in my experience, the functionaries on the whole are police officers; they are usually in charge of the list, they usually introduce the parties into the court, the husband stands where the prisoner stands and the wife stands where the complainant stands. That atmosphere does not obtain in all courts, I quite appreciate, but it does in a good many courts.

3856. Again, on this question of transferring the jurisdiction, I cannot speak for stipendiary magistrates who are appointed for their legal qualifications, but I think you would agree that lay magistrates as a rule have a very long experience of social work?—Yes.

3857. And they would make on the whole a rather more sympathetic tribunal?—I appreciate that point, but there is another point which I am not sure is made in the memorandum. I think we had in mind the setting up of matrimonial courts which would deal not only with matters of separation and divorce but also with property questions between husband and wife as well. If a matrimonial court is set up to deal with everything concerning husband and wife, maybe there is something to be said for having the county courts to deal with these cases because they quite often involve very intricate points of law, not simply the question as to whose fault it was that the marriage went on the rocks.

3858. So really your proposal is based more on the need for bringing all these matters concerning husband and wife before the same tribunal rather than on the suggestion that magistrates' courts are not the proper tribunal?—With the modification I made about courts in busy centres; at least in my experience and that of members of my Society, matters do rather inevitably tend to get rushed through, and there is to some extent a "police court" atmosphere.

3859. (Mr. Flecker): I was a little puzzled by your memorandum. It seems to me that you give up, temporarily, the idea of transferring matrimonial jurisdiction to the county courts on the grounds of the present financial situation of the country. Then you say that you want legal aid to be granted in respect of matrimonial causes in courts of summary jurisdiction at the earliest possible moment. Are these proposals not slightly contradictory?—I do not think so, with respect. I think that transferring the jurisdiction to the county court, which would involve the training and setting up of a separate probation service, would be a much more costly matter than giving legal aid in matrimonial causes in the magistrates' court. Presumably any scheme for giving legal aid in the magistrates' court would be on the same sort of basis, with an investigation by the National Assistance Board, as the present Legal Aid Scheme, which has not, as far as I am aware, proved a very heavy drain on the financial resources of the country.

3860. There is one other point about which I wanted to ask you concerning the custody of children. The writer says (paragraphs 37 and 38, Paper No. 49):—

"At present children may be used to gratify feelings of vengeance, or custody may be agreed to on the condition that a case is not defended. Problems relating to children should always be determined by the trial judge, who should see and hear the parents in person."

A court welfare officer as defined in the Denning Report should be appointed to every court of matrimonial jurisdiction. His duty should be to represent the interests of the children independently of their parents. He should report to the court as required or of his own volition, and generally perform for the Divorce Court the work which probation officers do for the magistrates. The wishes of the children themselves should be given due weight."

I was not quite sure whether this was a list of things which were not done now and ought to be done, or which were done now and ought to be done more extensively. I also wanted to ask whether the wishes of the children themselves were now given due weight or not?—I do not personally accept the last line of that paragraph, it is obviously a matter of degree. You cannot take into account the wishes of a child of four.

3861. Obviously, but take a child of thirteen. Is it the opinion of your Society that the wishes of a child of thirteen are not now given due weight?—No, I do not think so.

3862. (Chairman): Arising out of that question, where is your own practice?—My own practice is in London.

3863. And is it a Divorce Court practice?—I would not call myself a member of the Divorce Bar, I have a common law practice and I suppose do a normal amount of divorce work in the course of my general practice.

3864. In the course of your general practice have you been often before the magistrates in London?—Yes.

3865. (Lady Bragg): Would you explain what you have in mind when you say in your memorandum, "In too many courts of summary jurisdiction there appears to be an inherent prejudice against the husband"? How is this prejudice shown?—I think in the magistrates' court the complainant under the Summary Jurisdiction Acts is invariably the wife who comes along and says "He is not maintaining me, I want a separation". The husband as the defendant quite often, in one's experience, gets short shrift.

3866. From the clerk?—From the clerk quite often.

3867. Then you say in your memorandum:—

"The procedure in courts of summary jurisdiction makes no effective provision for obtaining particulars of allegations of matrimonial offences, nor for discovery."

Are you referring to cruelty there?—Cruelty, and of course the difficulty may arise in matters of desertion.

3868. Would you agree that, where a husband is charged with cruelty and from particulars are given at the hearing, the court would adjourn so that he could consider the facts against him?—Yes, I think most courts would, but of course boxed up with the question of adjournment are other factors, as I think was mentioned earlier on this morning. The parties are often working people who find it very difficult to get away from their jobs and adjournments make for difficulties; quite often there is the tendency for the magistrates to say, "We must get it settled today". Therefore, it is not always a satisfactory solution to say that the court will adjourn. It would be a more satisfactory solution if the husband could have some idea of the charges which were going to be made against him before he appeared at the hearing.

3869. Would you agree that if divorce by consent became part of the law of England the majority of divorces would probably be by consent, because, I imagine, it would be cheaper—there would be small need for solicitors or barristers, as I see it, to do very much?—As regards the first point, I would not like to hazard an answer.

3870. And would you tell me whether you would consider such a divorce would be very much cheaper for the parties?—I think it probably would be. I do not think it would necessarily be cheaper than the present undefended case, but of course it would be cheaper than any defended action.

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PAPER No. 50—MEMORANDUM SUBMITTED BY MR. T. K. P. BARRETT

[Continued]

3871. (Mr. Beale): May we assume for the purposes of these questions that the state of the law does have some effect upon the attitude of people entering marriage, and during marriage?—We make that assumption, yes.

3872. Would you feel that it is the duty of the State to protect marriage, in the interests of children?—Yes.

3873. Would you feel therefore that it should be more difficult to get a divorce if the parties have children?—What we suggest is that divorce by consent should be a discretionary matter, and that the court should investigate the position as regards the children. We say (paragraph 20, Paper No. 49):—

"The judge, if satisfied that the consent of both spouses was freely given, that no undue pressure has been exercised, that the services of the marriage guidance officers have been made available to both parties, and that the position of any children of the marriage . . . has been duly safeguarded . . ."

3874. Yes, but that is presumably providing for the children's future outside the union?—Yes, for their custody.

3875. What I am asking is whether you should make it more difficult, in the interests of the children, for parties who have children to get a divorce?—I do not think so, but if I were to go on the basis of your assumption, then my answer would probably be, yes.

3876. (Mr. Young): In the interests of accuracy I want to get you to correct this error: in Chapter IX of the book, it is stated (paragraph 23, Paper No. 49) that the Denning Committee recommended divorce after separation for a period of years. I cannot find that anywhere in the Report of the Denning Committee. Have you checked to see whether that is right or wrong?—Thank you very much, I have checked that statement and I have no apology to make to the Commission. The proposal does appear in the Final Report of the Denning Committee as one of the suggestions which were made to it. It certainly was not a recommendation of that Committee. In so far as it is an inaccuracy in the book I do not take responsibility for it; in so far as we have adopted this chapter of the book as our memorandum, I must of course concede that that point was not checked.

3877. (Sheriff Walker): Under the heading "Grounds for nullity and divorce" it is said (paragraph 18, Paper No. 49):—

"They are compelled, if they want a divorce, to fabricate collective evidence."

What compels them?—Presumably what an earlier witness to this Commission has called deadly hatred, I suppose.

3878. Assuming that A and B are both seriously desirous of having their marriage dissolved, B, without letting A know, commits adultery and then tells A, whereupon A raises divorce proceedings. Is that in your view fabricated evidence and a collusive divorce?—No.

3879. Then in your view, in the circumstances I have given you, would A be entitled to have the marriage dissolved?—Yes, but B might not want to commit adultery and still might want to have a divorce.

3880. If B committed adultery, then the divorce would go through?—Yes.

3881. If it is in the power of A and B to get a divorce provided they want it, why do you want the law to be

(The witness withdrew.)

altered to introduce divorce by consent?—Because your suggestion postulates that it is only where B has committed adultery that it is possible for A easily to get a divorce; B might not wish to commit adultery.

3882. Are you suggesting seriously that, assuming that A and B want to have their marriage dissolved, there is any real practical difficulty in the way of one or other of them committing adultery?—No practical difficulty, but I should have thought it highly undesirable that for the purpose of legal proceedings adultery should be committed. If it is necessary in order to get an easy divorce that one or other of the parties should commit adultery, I would respectfully submit that there is something wrong with the divorce law.

3883. (Mr. Maddocks): I gather that the criticisms of magistrates' courts which appear in your memorandum are really directed against the metropolitan magistrates' courts?—It is, I think, a fact that it is against magistrates' courts in large towns that we make our major criticism.

3884. Do you often go to magistrates' courts?—In the metropolitan area, yes.

3885. What is the first thing that happens in the metropolitan magistrates' courts when they are taking husband and wife cases?—The court is cleared.

3886. Once the court is cleared what objection do you have to the court?—The objection is that one must still come to the court where people are tried for criminal offences, and one must wait until the criminal cases have been finished; quite often those cases are not finished and the matrimonial cases have to be adjourned. Although the clearing of the court obviously makes a great difference, the ordinary person who comes in respect of a matrimonial matter to a magistrates' court still has to come to a court which is a criminal court, he still has to ask a policeman where he shall go, and therefore there is that odium about the proceedings which is referred to in the memorandum.

3887. Metropolitan magistrates' courts have a special domestic court afternoon, do they not?—In some courts they do.

3888. Do you know one where they do not?—As far as I am aware from my experience in North London there is a court in the Marylebone area where that has not been the case.

3889. You will agree that very nearly always the domestic work is taken on a special afternoon when there is no criminal work, no prostitutes, no drunks, or anything like that?—I have known it not to be so, as I said.

3890. How do you suggest that in practice, other than by adopting Lady Bragg's suggestion of adjourning the case, the difficulty of not giving particulars of allegations could be overcome? In most cases the parties are there in person and they cannot settle particulars, can they?—No.

3891. So how do you suggest that the matter be dealt with other than by adjournment?—It links up with the question of legal assistance.

3892. But while legal assistance is not available, is it possible for a magistrate to order some working man or woman to give particulars?—No, I quite agree.

(Chairman): Thank you for your memorandum and for the help you have given us by coming today.

PAPER No. 50

MEMORANDUM SUBMITTED BY MR. T. K. P. BARRETT

I have the honour to submit evidence for consideration by the Royal Commission on Marriage and Divorce.

I do this with considerable diffidence, because of the complexity of the issues involved, and solely under the pressure of an urgent sense of public responsibility.

WORK OF THE JOHN HILTON BUREAU

I would point out that I am employed as Director of the John Hilton Bureau, an organisation unique in its composition, function and purpose. It is financed by *The News of the World*, which is the most widely read of all newspapers. In a staff of about 150 there are some

forty men who are, in fact, a cross-section of the "social professions". There are ten solicitors and barristers, a similar number of men with professional and administrative experience of welfare work in all its forms, with voluntary agencies and public authorities, a staff highly qualified in Service conditions, an income tax unit, men from the educational field, men with prolonged trade union and industrial welfare experience, a medical group, and so on.

Their task is to offer to the readers of *The News of the World*, when they seek it, advice and information carefully adapted to their personal needs and capacities.

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Because we have been allowed to set ourselves a high standard of thought and values, it is inevitable that we should do a great deal more than that.

We have found it impossible to avoid research and criticism. So many of the matters put to us as problems in personal living are so clearly indices of active social pressures that need study and amelioration. From such studies we have been led into making documented representations to government departments, to the writing of articles on wider ranges of thought, to propaganda for a society which shall seek to be at least consistent in the demands it makes upon its members and the resources which it supplies to meet them.

In doing this work for nearly nine years it is not surprising that the present state of our conceptions of marriage, of its legal structure, of the legal and personal consequences of its dissolubility, should have become an insistent issue.

It is a convenient brevity if it is assumed that we deal with an average of 5,000 cases a week, covering the whole range of human and social relationships, from the old couple who cannot manage on a non-contributory old age pension to the personal difficulties of a deserter in Korea who has fallen in love with a Japanese girl. Many of these cases are intricate and demand investigation, which is widely undertaken on our behalf. Many build themselves up into dozens of commentary, report and representation that may cover years before any result is reached which can be called, with some show of reason, final.

We keep most careful analyses of the types of problem which reach us and try to explain their statistical fluctuations. As a rule we classify the incoming post into sixty-odd categories. These are, however, supplemented by additional categories when special enquiries are being made.

A number of these categories are closely relevant to the subject matter of this memorandum. I quote from the instructions used by the staff engaged in the work of classification. They are:—

14. "Matrimonial. The relationships between husband and wife when the legal answer is not the essential feature of the advice to be given, when there is tension but not actual separation, or when there is separation but some apparent hope of reconciliation."

16 (14). "Legal matters arising between husband and wife. Divorce, separation, maintenance, but not the possession of the matrimonial home or the custody of children."

It will be seen that every effort has been made in definition, and it has been supplemented by constant exhortation, to treat the personal relationships between man and wife, even if they are unhappy, mulling about separation and arguing about property, apart from the formal background of law, in a frame of mind that is personal and concerned with values, not analytical and concerned with rights.

It may be taken that all letters falling into the second category which I have quoted refer to marriages that have dissolved, are certain to dissolve, or are kept in being by legal difficulties or the deliberate intention of one spouse, against the will of the other.

The numbers of such cases coming before us are remarkably consistent. They rise in a week in which special reference is made in one of my articles in *The News of the World* to cognate problems. They then fall to some 400 a week. Keeping with precise and narrow rigidity to the legal aspects of the hopelessly unsatisfactory marital union, we received, in the two years ending December, 1951, 30,024 letters asking for advice and help.

It is exceedingly difficult to discover what proportion this represents of unsatisfactory marriages. The figures of divorce suits are little help in elucidating this, because clearly they do not include the marriage to whose dissolution some legal bar exists, nor the marriage where the innocent party is refusing to seek a remedy.

However, since it may be of help, I would point out that in any given year, about 7 per cent. of all Service pensioners write to us (4,746 out of 695,000 in 1951). About 3 per cent. of all non-contributory old age pensioners (3,713 out of 421,553, January to December, 1951) also write to us annually.

These are letters on subjects to which we regularly give feature space. It seems incredible that the 15,000 letters a year, dealing with miserable workdays of marriage to which our present legal system offers no solution, represents the same sort of proportion. On the other hand, I can think of no reason why there should be more correspondents on painful, complex and involved personal issues than on any others.

ARTICLE SEEKING CORRESPONDENTS' PERMISSION TO PUT EVIDENCE BEFORE THE ROYAL COMMISSION

On learning of the terms of reference of the Royal Commission, I communicated with the Secretary, and asked if there would be any objection to my seeking permission from a number of my correspondents to give evidence on their behalf. On receiving assurances from him, I wrote an article (Addendum A) which appeared in *The News of the World* on Sunday, 2nd December, 1951.

CLASSIFICATION OF RESPONSE TO ARTICLE OF INVITATION

It has been beyond our powers to make a prolonged statistical study of the response to this article. In the week 3rd December—10th December, however, 1,600 people wrote to us asking for the facts of their case to be submitted to the Commission.

Clearly I enter into an undertaking of secrecy when advising our correspondents about their personal affairs. This pledge is reiterated in many ways, by letter and in press publicity. The great majority of the relevant letters for the last two years are, however, available for the Commission's inspection if no publicity of any sort would arise.

But the 1,600 letters, received in the week 3rd December—10th December are, as far as my examination can give weight, entirely representative of the sort of post on these problems which we receive daily. It may be objected that the article which elicited this response is tendentious, that it suggests the sort of reaction which the unhappily married reader ought to feel and the motions through which he should go.

This may well be so. The answer is, surely, that the tendentiousness arises from familiarity with the kind of response which readers make when a purely factual account of some aspect of the law of marriage is put before them, or when they write of their own free and unsolicited impulse.

I have studied these letters with considerable care, believing them to be a truly representative fraction of the insoluble marriage problems of our day, and being anxious that they should be given the consideration to which they are entitled.

I have taken 1,000 of them at random and have divided these into two groups, one of 100 and one of 900.

I have had the first group copied verbatim (Appendix A) and the second group roughly summarized (Appendix B).

I have tried to make the first group of 100 letters copied verbatim a miniature representation of the second group in the types of matrimonial difficulty that it represents.

I realize most fully the appalling task of reading through this mass of material. In justification may I point out that Appendix A represents the raw material of one week's work for one of my more unfortunate colleagues. People who deal, day in and day out, with such a mass of misery are perhaps over-anxious that it should be felt and known.

For this reason, I have had this typical batch of letters about matrimonial unhappiness from which there seems no escape copied exactly as they are, "warts and all," with their mis-spellings, their *longeurs*, their irrelevances, their lapses into the language of the cinema or the popular novel, and their essential truthfulness.

There is much in this material which could usefully detain the sociologist and the psychiatrist. I do not feel competent to dwell upon these matters. It seems clear, for example, and this impression would be strongly emphasized by a further study of the great range of case-material in our possession, that all too little attention has

been paid, in assessing the causes of marital breakdown, to the impossibility of the gulf between the spouse who wants children and the spouse who doesn't. Just as the unsuccessful marriage between the young man and the older woman seems to recur with uncommon frequency.

There seem to be overwhelming signs of the importance of a specific sexual intimacy. No doubt the Commission will be hearing gynecological evidence on this just issue. It is probable that the same experience lurks behind many conventional phrases in the evidence submitted. "We never hit it off from the first", for example. To what extent pre-marital education could remove such difficulties, to what extent adequate discussion and examination, with competent professional aid, beforehand could avoid hopeless physical misadventure, are matters on which the Commission may well wish to hear opinions.

Every social case-worker will have made the point, underlined in this material, of the poor prognosis of the compelled marriage. Whether the recurrent attributions of marital failure to the other spouse's alcoholism should be taken at their face value is open to question. It may well be that we are meeting here merely an overt expression of the sexual anasthesia referred to above. The impossibility of reducing all these tensions to a formula is obvious. The wife's shrewishness and dishonesty, as much as the husband's drunkenness, may be merely signs of an inability to cope with a physical relationship that gives no relief and builds up emotional demands until they are intolerable and must be given an airing somehow.

Before any comment is made in analytical shape on the evidence in these Appendices, I should like to draw attention to one pleasurable impression. It is the degree of tolerance and self-criticism shown by most of these invisible witnesses. These are not letters from people reckless of social consequences, indifferent to the sufferings of others, unaware of ethical motivation. Indeed, the respect for the conventional moral code which is shown is often the most painful factor to the correspondent. It is difficult to pass by a statement like that in letter 575, "by the time the divorce laws are altered I shall have passed beyond", without some gesture of deference to the confidence in a wider goodness which can survive thirty years of married misery. It contrasts favourably with the typical example from the wife who is sure she's right. "The woman who caused this upheaval in my life died from a tumour on the brain. You'll perhaps understand why I quote there is something wrong with the minds of these husband-snatchers." It seems odd that such a witness should invoke to confidently "God's Holy Laws".

ARRANGEMENT OF EVIDENCE

In this attempt to put before the Commission a truly representative selection of problems arising from the contemporary marriage-complex, I have arranged the evidence thus.

1. Letters from correspondents to whom the remedy of divorce is not available because the party having the needful grounds refrains from action

There are 34 of these copied verbatim in Appendix A and 454 summarised in Appendix B. There were 488 such letters in the random sample of 1,000.

While I do not suggest that every statement in these letters should be treated as unshakable, they are but a small sample of the statements made by correspondents who have found, in a mistaken marriage, a succession of trials which became unbearable. Usually there is a prolonged effort to "make things go". Finally, it may be after years, breaking-point is reached and they walk out. Few of them tell of marriages which have not been given a reasonable time for experiment and even endurance. Most of them tell of post-marital unions which have proved lasting. In a high proportion of cases there are illegitimate children of the post-marital union.

It is relevant to ask what advantage accrues, either to the innocent spouse, or to society, through our present system of placing the right to remedy in one pair of hands. The disadvantages are obvious. A sense of insecurity and risk in the post-marital union, however laggy, the lack of legal rights for the second woman, the bastardisation of her children.

It can be argued that these are appropriate penalties to be paid by all those who connive at the infringement of a crucial social institution, which is upheld by religious

sanctions. But anyone who can argue that the first marriage, of which these letters speak, were monumental in character is guilty surely of a profane extension of sacred symbolism. In any event, the position of the children of the post-marital union calls for consideration.

2. Legal anomalies which bar remedy of divorce

The second large group of letters is an indication of the legal anomalies which bar the remedy of divorce when, for personal reasons, it seems an appropriate answer.

Of the 1,600 invitations to give evidence received between December 3rd and December 10th, 1966 could be classified roughly in this way. The samples in Appendix A and Appendix B seek to be numerically and in type representative of them.

Letters 570, 571, and 572 may be taken as representative instances of the near-impossibility of proving cruelty against a spouse who refrains from physical violence, especially if the husband seeks to establish this ground. In at least two of these cases prolonged emotional illness has arisen since the date of marriage and there seems no strong reason for disbelieving the statement of the correspondents that the unhappy marriage was the cause of this. Two men are, in fact, leading tramp-like existences, though one has shown himself capable of honourable and responsible regular service in the Royal Navy, because, apparently, of the pressure of marital failure.

Letter 574 is a truly tragic document in which a young woman, whose life has been poisoned by the psychological aftermath of syphilis, is unable to prove that her husband was responsible for her infection.

Letter 575 is one of thousands of statements in our possession which reinforce the commonly made criticism of the disastrous effects of an agreement of separation. The marriage, in personal and domestic fact, lasted only seven weeks. For fifteen years the husband has been supporting his wife and child and cannot re-marry.

Letters 577 and 578 set forward the hardships of the spouse with the alcoholic as husband or wife. The marriages concerned have ceased to have any existence except as legal fictions, but there is no escape from them.

I make no attempt here at detailed analysis of all the factors, but adultery, cruelty and desertion do not complete the list of offences against the central loyalties of marriage. The letters in Group I, Appendix A, and Group II, Appendix B, are case-histories, however subjectively told, of failures to honour those loyalties which do not fall under the headings provided by the Matrimonial Causes Act.

3. Suggestions for reforms in divorce law

Groups B and C, Appendix A, and Group X, Appendix B, are representative of the specific individual suggestions made to us for reforms in the law of divorce. They mostly spring from personal and unhappy experience and tend to give the other parties who might be involved very short shrift. Letter 536 (Appendix A) tells succinctly of the hardships of the deserted wife who is turned out of the matrimonial home, a point to which attention must be drawn later.

4. Difficulty of enforcing and meeting maintenance payments

Group D, Appendix A and Group IX, Appendix B, are representative of the statements made which complain of the difficulty in enforcing maintenance payments upon an unwilling or irresponsible husband and, from the other angle, of the alleged tendency of magistrates' courts to ignore the indelicacy of a man's wage packet.

Letter 539 gives an actual budget which there seems no reason to doubt. Assuming that the correspondent has forgotten his national insurance contributions, it is quite impossible for him to maintain even a minimum standard of living. One knows the customary generalisation, "You should have thought of all this before you re-married". On the other hand, it is a crude law which demands the impossible.

5. Protests against prohibition of marriage with divorced wife's sister or divorced husband's brother

In Group E, Appendix A and in Group VI, Appendix B, we have a sample of protests against the present prohibition of marriage with a divorced wife's sister or a divorced husband's brother. Letter 543 also records a protest against the prohibition of marriage with a nephew's divorced wife.

Of the 1,600 letters which were the preliminary response to the article published on 2nd December, sixty-six were concerned with this issue. It is usually said, in opposition to any suggestion for a relaxation of the laws concerning prohibited degrees of relationship, that so few would be affected.

This is never a strong argument, but all evidence would suggest that the actual numbers directly concerned must run into some two or three thousand.

A study of the stories in Appendix A does not suggest that there is any foundation for the theory that this minor relaxation of the rules of in-law marriage would aggravate consanguinity within the family circle. They are mostly stories of failed marriages, for completely extraneous reasons, in which the brother-in-law or the sister-in-law feels a strong sense of personal responsibility towards the children.

5. (a) Registration, legitimation, and illegitimacy

It is evident, from a debate on the Affiliation Orders Bill (*Horwood*, February 25th, 1952), that there is some concern at the exclusion, by the Chairman's ruling, of any discussion by the Royal Commission on the matter of the laws governing legitimacy. While not in any way contesting the propriety of his Lordship's ruling, I find it difficult to see how an inquiry into "the law of England and the law of Scotland concerning divorce and other matrimonial causes . . . having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children . . ." can exclude from its naivete of discourse the problem of legitimacy.

However, since this decision has been announced, I restrict any comments on legitimacy post *nuptial* to an addendum (Addendum B).

Presumably the question of the registration of births, which does not involve their legitimacy, has not been automatically excluded. Nor can the formulae which govern the registration of marriage be considered as outside the terms of reference.

In the 1,600 letters received in the week December 3rd-10th, thirty-three were concerned with the registration of births, the registration of marriages, and the question of legitimation.

Letters 548, 550, and 552 are put in as being representative of these.

The pressure of grievance and opinion is, however, much wider and deeper than this would suggest. All problems concerning legitimacy and registration are, as far as our normal work is concerned, separately classified and coded. No reference was made to these topics in the article of invitation.

On strict matters of registration alone, apart from the wider issues of legitimacy, we receive an average of 100 letters a week.

(b) The registration of the births of illegitimate children

In England and Wales and in Scotland an illegitimate child may be registered on the mother's information alone in which case the father's name and occupation are omitted from the register. Alternatively, the father may act jointly with the mother as informant so that his name and occupation may be recorded.

An illegitimate birth registered on the mother's information alone may be re-registered on the joint information of both parents. The Registrar General for England and Wales has power under regulation to authorise this.

In Scotland the Registrar General has no such power. The father's name can be recorded only if a decree of paternity is made by a court. Then, in accord with Section 35 of the Registration of Births etc. (Scotland) Act, 1854, the original entry in the register is given a marginal note with the father's name.

The English procedure is an improvement over the Scottish, but even this is limited to the availability of both parents. In late life the survivor of an unmarried partnership may wish an adult child to be re-registered in the family surname, this being the name the child has used consistently throughout life.

This is a typical instance:—

"My son and I lived together as man and wife for nearly fifty years. His wife left him for another man, but we never had enough money for him to divorce her.

When my son was born 48 years ago I registered him in my maiden name because the registrar said this was the name I had to use. But he has always taken his father's name and used this for everything including his own marriage and registering his children. I tried to get his birth re-registered in his father's name, but it was too late to do anything as my man had been dead six months. Isn't there any law which allows it to be done now? I will sign anything they ask. He has done very well in life and it's very hard for him to have to keep explaining about his different names every time he has to show his birth certificate."

Or again, this time from Scotland:—

"It is causing a lot of trouble in the family because my son's birth certificate is in my maiden name. I didn't know at the time that I could use the name I had assumed for this purpose. The registrar never told me, nor that if my partner came with me he could sign the register as well. Both of us are willing to do practically anything to get our son's birth certificate in the name he has used all his life, but I'm told I've got to go to the Court for a Decree of Paternity before anything can be done. We are very well known here and everybody thinks we are married. I don't very much relish the idea of having to parade everything in the Court after all these years. Can't the alteration be made if his father and I swear declarations about it privately before a magistrate?"

Perhaps present-day registrars of births are more knowledgeable and understanding than their predecessors, but some official instruction on the advice to be given in these cases would not be out of place. One is rather alarmed to learn from correspondents that:—

"The Registrar said I must register the birth in my proper name, not the one I have assumed", or

"The Registrar says he can't help what name I've got on my identity card my lawful name is the one on my birth certificate (or marriage lines)".

There seems to be the need to bring the Scottish system into line with the English; indeed for the whole system to be revised. In cases of admitted illegitimate birth where no question of inheritance from the father is involved, there cannot be any serious objection to a "family" surname assumed by mother and child being added in the margin of the birth register on the sworn declaration of the surviving parent and, perhaps, another informed person.

The Regulations made under the Act of 1947 (Shortened Birth Certificate) allow of an alternative name being shown on the birth certificate where two different surnames appear in the register. There is a case for extension to a "family" surname recorded in a marginal note.

(It is interesting to compare this suggestion with the present laws of Jersey and Guernsey which allow of a change of name by the execution of a deed poll to be noted in the margin against the original entry in the birth register.)

(c) The case for the shortened certificate of marriage

England and Wales provided a shortened birth certificate in 1947—years after Scotland and several other countries. According to semi-official information it is now used about fifty-fifty with the full certificate. The need for it is thus proved, but there is still need to educate the public to use it more fully so that production by those whose circumstances compel them to use it is not construed as concealing some irregularity in birth.

There are about 100 registrars still on foot, and obviously these will not deprive themselves of income by pushing the shortened birth certificate. Some clerical registrars may recommend the full certificate to show a better fee income to their respective local authorities. It is probably misplaced loyalty to the registrars paid by fees which stops the Registrar General from issuing a general instruction to recommend the shortened certificate except where the full certificate is insisted upon. This could be a step towards the ultimate goal restricting the issue of full certificates to recognised legal purposes, as already obtains in many countries.

As the law has confirmed the value of the shortened birth certificate the principle should be extended to the marriage certificate. A marriage certificate for most every-day purposes need only to prove that A married B on a certain

date. Their respective condition at the time cannot be of general interest, nor can their ages, residences and occupations. Still less can anybody (except to prove a right to inheritance) need to know the names and occupations of parents.

We have had a steady stream of complaint objecting to production of the full certificate where one or other of the parties' previous marriage has ended by divorce: thus, "Does my divorce have to be mentioned in my new marriage certificate?" or "My employees are very peculiar people and I would not like them to know my first marriage had ended through divorce". The existing full marriage certificate gives extensive details. The guilty party is described as:—

"The divorced husband (or wife) of so-and-so."

The innocent party is shown as:—

"Formerly the husband (or wife) of so-and-so from whom she (or he) obtained a divorce."

There is also an objection to a full certificate which shows (by omitting the parent's name and occupation from the register) that a person is born out of wedlock. This can cause embarrassment throughout life, and not least at the wedding ceremony despite the good intention of the minister or registrar, for this information is not sought until the register is entered subsequent to the ceremony. There is a case for taking this information when notice of marriage is given and endorsing the facts on the notice form.

The general availability of a full marriage certificate to anybody prepared to pay the small fee can be productive of harm. It could be used for anything from satisfying baseless curiosity to blackmail.

7. Definition of insanity under the Matrimonial Causes Act

In Group G, Appendix A, and in Group VII, Appendix B, I have sought to give an indication of the painful urgency of an exceedingly difficult problem, that of the definition of insanity under the Matrimonial Causes Act. There were nineteen such letters in the 1,600 reaching us in the relevant week.

The point principally made is that treatment as a voluntary patient is becoming increasingly the regular practice. Certification is, for the insane who are capable of comprehending its implications, a medically undesirable fact. If the patient is not too intractable there is no reason why he should not remain a voluntary patient for a very prolonged period, even though no psychiatrist would entertain any great hopes of his ultimate recovery. More than this, even if certification becomes imperative, previous protracted treatment as a voluntary patient does not lessen the number of years of detention necessary, nor the stringency of the required medical statement, before relief can be sought. (Letter 554, Appendix A, is an interesting example of the apparent hardship thus created.)

8. Conduct of matrimonial cases in magistrates' courts

It is inevitable that a great many of our examples should focus criticism upon the conduct of matrimonial cases in the magistrates' courts.

In the 1,600 sample, forty-five were concerned with this topic. Group H, Appendix A, and Group XII, Appendix B, are submitted as fair specimens.

While I am thoroughly familiar with the habitual projection by the disappointed litigant of his failure on to his advocate and the bench, it would seem that all is not well. It is perhaps undesirable that, in cases where personal issues are so important and so intangible, advantages should seem to lie so heavily with the able-bodied litigant. "When I was in Court my wife admitted desertion on her part and yet I was summoned for deserting her. I know I made the mistake as her solicitor said to me, 'Would you go back with her?' and I said 'No'."

Whether the particular incident is precisely reported or not, the outlines are familiar: the husband, unrepresented, compelled by the astuteness of his wife's advocate to concede that he consents at the desertion.

I apologise for any personal statements, made about advocates and the judiciary, by unguarded and unguided correspondents particularly in these letters of complaint.

It is even suggested earlier that a harimony of bench and bar was not familiar with the prohibition against marriage with a divorced wife's sister.

9. Time-bar in nullity actions

In Group I, Appendix A, I submit two statements (there were ten in the representative 1,600) concerning the twelve months' time-bar in nullity actions. It is not to be expected that such complaints would reach high proportions, but their subject matter is sadly revealing.

In one case appeals and in the other case adultery were present at the time of marriage. Either they were discovered too late or the right legal steps were not taken in time. It seems reasonable to suppose that a woman can live with a man, notice moodiness and depression, without suspecting their real cause for a much longer period than twelve months.

10. Costs of divorce

In Group J, Appendix A, and in Group III, Appendix B, I have tried to give typical examples of the burden of costs in a divorce suit.

It is commonly assumed that, since the introduction of the Legal Aid Scheme, this burden is now reasonable.

That assumption is not founded on a study of the effect of the Assistance Board's assessments on the lower wage earner or small salary earner. For example, a man earning £6 a week, caring for his own two children, living apart from his wife, paying a rent of 25s. weekly, would have to pay £39 towards the cost of divorcing a plainly guilty wife.

He is little better off than he would have been in the hands of a socially-conscious solicitor before the Scheme came into force. Indeed, he may well be worse off, because the solicitor would in all probability have agreed to enter terms for the payment of his account than a public authority can admit. Letter 566 is relevant here.

As it happens, our normal post concerning the Legal Aid Scheme is separately coded and classified, as far as this can be done. The proportion of complainants is very high.

11. Property-ownership between husband and wife

In Group K, Appendix A, and in Group IV, Appendix B, I have endeavoured to group a reasonable statistical example of difficulties arising from property-ownership, as between husband and wife, when the marriage is dissolved or dissolving.

In 567, 568 and 569, the power of the husband to possess the matrimonial home, whatever his wife's contribution towards its achievement, direct or indirect, is strongly criticised.

12. Effects of divorce on wife's rights under social security legislation

Particularly relevant are letters 1730, 1711 and 1980, summarised in Appendix B, where the effect of divorce on the wife's rights under our social security legislation is discussed.

In Great Britain there is a comprehensive insurance scheme which provides cash benefits to meet commonly occurring needs. The family is the unit upon which these benefits are administered and it appears that insufficient provision has been made to meet the situation which arises when the family breaks up. At the present time many decisions as to whether divorce proceedings should be instituted or not are made upon the effect of such an action on the insurance scheme benefits. When the obscure provisions of the scheme become more widely appreciated more decisions will be based on this factor and any change in the law to broaden the grounds on which divorce can be obtained could largely be frustrated unless accompanied by a change in the insurance law.

The change of status from married woman to divorced woman is, save in exceptional cases, accompanied by a loss of all rights to benefits under the insurance scheme. For some benefits the disadvantage suffered is only temporary or the incidence of hardship caused is not likely to be great. For widow's benefits, and more particularly retirement pension benefits, the loss can be permanent and of serious financial consequences.

A widow is entitled to certain weekly payments following the death of her husband and these payments include sums in respect of their children. From the date of divorce a woman gets no widow's benefits by reason of her ex-husband's insurance, nor is she entitled to benefits in respect of her children. Section 17 of the National Insurance Act makes payments only to widows.

A person's right to a retirement pension depends upon the yearly average of contributions made between the age of sixteen and retirement age. The insurance scheme became law on 5th July, 1948, and for those who were over sixteen and not then insured, the average dates from 5th July, 1948. The retirement pension is only paid in full if the average is fifty. If the average is less than fifty but more than twelve, the pension is reduced so that a person with a yearly average of thirteen would get 7s. a week instead of 26s.

On 31st December, 1949, there were over seven million married women who were not making insurance contributions but the years when not contributing will be counted in the average.

The average is counted over forty-four years (from sixteen to sixty) and to average fifty, 2,200 contributions must be made. There are fifty-two weeks in a year (occasionally fifty-three) and this means unless over forty-two years' contributions are made the total (2,200) cannot be reached. In other words, if a married woman fails to make contributions for two years she will not get a full pension in the event of ever being divorced.

The number of married women making contributions is likely to decrease since a young married woman is not well advised to make contributions.

The following examples give an indication of some of the benefits which are lost as a result of divorce. If a woman with two children was separated from her husband at the time of his death and he was under no legal liability to make contribution to her maintenance, she would receive a widowed mother's allowance of 42s. 6d. per week and a family allowance of 5s. If, however, she had divorced him and he was responsible for making payments, both to her and for the children, she would get no widow's benefits whatsoever in the event of his death and would only receive the family allowance of 5s. a week. A divorce takes away the ex-wife's rights to all widow's benefits whether she or the husband is the guilty party.

A married woman who is over the age of sixty and may have been separated from her husband for forty years and have never seen him during this time, will receive a retirement pension of 16s. a week or more when her husband gets his pension. In the event of the husband's death this pension then goes up to 26s. a week or more. On the other hand, a woman may have made insurance contributions from the age of fifteen to thirty, have been married to a man who has made insurance contributions all his life, and have made insurance contributions in full between the date of her divorce at the age of fifty and pension age, and she would get no pension whatsoever. This is a case which may commonly occur in a few years' time unless a change is made in the law.

At the present time the more usual case is where a woman who has been married for a large number of years and is approaching pension age before she is divorced, finds out on reaching the age of sixty she is entitled to no pension at all but is required to pay contributions of 6s. a week until July, 1958, and then will only be entitled to a reduced pension.

13. Effect of conflict of jurisdictions in divorce

I have no wish to become entangled in ambiguous and subtle discussions concerning the *lex domicilii* and the *lex fori*. However, in Group VIII, Appendix B, I have had summarised two accounts of the effect of the conflict of jurisdictions in divorce.

Since the war the English and Scottish courts have made substantial advances away from the traditional stalemate. A regular series of problems put to us suggests that a more fundamental approach would remove infrequent but vicious anomalies.

RECOMMENDATIONS TO THE ROYAL COMMISSION

It will no doubt have been seen, from this preliminary memorandum, that certain conclusions have been forced upon me by the weight of the evidence our organisation is compelled to study.

Very briefly, I would wish to put the following recommendations to the Royal Commission.

(1) That divorce should be available as a remedy to either party after a period of *de facto* separation lasting five years. I would wish to see some safeguard against an occasional act of condemnation, where it could be seen that there was no free will to return to the state of domestic union by one party, being held to undo a preceding period of desertion.

Such a change in the law would afford ultimate relief to those who cannot prove cruelty to the satisfaction of the court, and to those who are prevented from finding a remedy because of the present effect of an agreement of separation.

(2) That the possession of the matrimonial home, assuming that it is by way of being a controlled tenancy, should be awarded to the spouse having custody of the children.

(3) That custody of children should be awarded, as at present, in the interests of the child, and that access of the other parent to the child should be granted with the greatest reluctance.

(4) That the present assumption that all property, unless ownership can be shown to arise directly from the wife's earnings, is the husband's, should no longer apply.

(5) That magistrates' courts, dealing with matrimonial cases, should be specially constituted, and composed from a panel of justices specially trained. Certain further restrictions on the publication of evidence should apply, not so much in the public interest, but for the benefit of the parties themselves.

(6) That it should be the practice for both parties to be represented, or for neither party to be represented, so that justice may clearly be seen to be done.

(7) That the award of maintenance against a husband should take more fully into account the husband's ability to pay and the wife's capacity to earn.

(8) That the definition now required for divorce on the grounds of the incurable insanity of one spouse should be made less stringent in its terms and should, for example, permit divorce where, in the opinion of two medical men, "there is little chance of ultimate recovery". When such a certification is made the term of years of treatment required to be served should take into account previous continuous treatment as a voluntary patient.

(9) That the time-bar in adultery actions, for mental deficiency, insanity or epilepsy existing at the date of marriage, should be extended.

(10) That the assessment conditions for divorce actions under the Legal Aid Scheme should be relaxed for applicants earning up to £12 a week.

(11) That Scottish practice in the matter of registration of births should be brought into line with English practice.

(12) That a shortened form of marriage certificate should be made available.

(13) That, to encourage the use of the present shortened form of birth certificate, the longer form should be available only on application by an officer of the court.

(14) That divorced women should be allowed to credit national insurance contributions made by their husbands during the subsistence of the marriage when qualifying for retirement pensions.

(15) That marriage with a divorced husband's brother or a divorced wife's sister should become legally permissible.

ADDENDUM B

LEGITIMACY POST NUPTIAS

The conditions under which children born out of wedlock are legitimated by the inter-marriage of their parents subsequently are worthy of study.

Apart from wide divergences in different parts of the world there is a disparity within the United Kingdom itself. In England and Wales, Northern Ireland and (it is believed) Eire, children are legitimated in this matter provided the parents are free to marry each other at the

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[Continued]

attitude at times creeping in when one looks at the terms of reference. It does seem to me that with a little wider range the whole problem could have been seen as not essentially a legal problem but as a social and personal one. There is a danger that we may look at it from the wrong angle. Another aspect of the terms of reference—and again I speak with great diffidence—is the exclusion of the dissolution of illegitimacy.

3897. I think you might postpone that, because my first question is going to deal with that.—Then I will say nothing about that at the moment. Then if I may look at this memorandum, for which I take full responsibility, including all mistakes, perhaps I might mention that it does make certain obvious points. The first and very large point is that I do consider that the evidence of the weight of misery which is caused by placing the right to proceed for the remedy of divorce in the hands of the innocent party is overwhelming. I realise fully all the legal implications of departing from that. What I would like to say is that the divorce case, the matrimonial case, is, apart from the care of children, the only case in which the State through its judicial system is asked to come to the rescue of personal life. It is in a different category from almost every other kind of legal case. It is something that needs not merely the judicial mind, it needs imagination, helpfulness, co-operation with the people in court; it is a situation where people have to be seen not merely in the narrow context of law. It is for that reason, above all others, that it does seem to me that if a remedy such as I propose were available to people whose marriages have broken—and it seems to me that the numbers are so vast—if those people could in the end, even though they were not legally innocent, at least make a clean start, the good that would be done would so outweigh the legal harm and any effects on intellectual and social conventions, that it would be more than justified.

3898. Thank you. There is just one general point which occurs to me arising from what you have been saying. I am sure that every member of the Commission appreciates the magnitude of the problem, and it has been put to us by a number of witnesses that the remedy lies not in making divorce more easy, but in trying to inculcate a different attitude towards life generally and marriage in particular. Would you disagree with that?—My Lord, without wishing to appear clever, is not that outside the terms of reference? It seemed to me that this Commission was concentrating on the legal aspects of divorce and marriage. I entirely agree that what we are doing at present is creating in many people a wrong conception of marriage and a wrong attitude towards it. I entirely agree, but that does not alter the fact that here and now we have a great series of painful problems to deal with, and I can only see one way of dealing with them.

3899. Would you turn to section 6 (a) of your memorandum, headed "Registration, legitimation, and illegitimacy". I wish to deal at once with a statement which appears on that page. Referring to a report in Hansard, you say:—

"It is evident, from a debate on the Affiliation Orders Bill . . . that there is some concern at the exclusion, by the Chairman's ruling, of any discussion by the Royal Commission on the matter of the laws governing legitimacy."

You then go on to make some comment on "his Lordship's ruling". I have never at any time given such ruling, and I would be interested to know how you got that impression.—I can only say that the impression is extremely strong, but I regret to say that the Hansard is not in my hands.

3900. I have here all the references in Hansard to the debates to which you refer. I will refer first of all to the more recent statement in the House of Commons by the Prime Minister. Mr. John Parker asked the Prime Minister whether he would recommend such alteration of the terms of reference of the Royal Commission on Marriage and Divorce as to enable it also to consider and report on the present laws about illegitimate children. To that the reply of the Prime Minister was:—

"I am advised that it would not be desirable to extend the terms of reference of the Royal Commission on Marriage and Divorce in the way the hon. Member suggests. The Commission has already a great deal of

work to do and the law relating to illegitimate children is complicated and had better be studied separately in the light of the Royal Commission's recommendations on the aspects of family life which have already been referred to it."

It may be that you thought that the Prime Minister's reply was based upon some ruling or suggestion of mine?—Frankly, without the notes in front of me, I do not know, but I certainly got that impression very strongly from reading Hansard, and, what is more, very strongly from reading Press reports; I think *The Times*, in reporting Hansard, gave me an extremely strong impression to that effect.

3901. I have Hansard here. I will not trouble to refer to the passages, but I assure you that there is nothing stating that any such ruling was given by me. Anyway, it is not the case, and I was not consulted before that reply was given by the Prime Minister. May I turn now to section 2, where you deal with "legal anomalies" which bar the remedy of divorce. You say:—

"Leters 570, 571 and 572 may be taken as representative instances of the near-impossibility of proving cruelty against a spouse who refrains from physical violence, especially if the husband seeks to establish this ground."

What legal anomaly is it that gives rise to that difficulty? Of course, as I am sure you know, mental cruelty which has a physical effect is regarded in the courts today as cruelty which entitles the petitioner to divorce. What legal anomaly had you in mind?—It may be incorrect to call it a legal anomaly. One is tempted, when trying to classify, to take simple titles and groupings, but let me put it from the point of view of my correspondent: he knows that his wife is cruel to him, or she knows that her husband is cruel to her. They suffer from drunkenness, bad language, all kinds of things which they cannot prove in court. That I quite agree is not legally anomalous, there is nothing wrong with the law. There is something wrong with the evidence, if you like to put it that way. But it is the case that an enormous number of people are perfectly certain in their own minds that they do suffer from cruelty and can do nothing about it. The thousands of cases of that kind which have passed through our hands make me perfectly certain that it is so. When it comes to legal anomaly, I think the Law Society—I have not their memorandum with me—do make the point that it would be an advantage if cruelty as a ground for divorce did not have to be aimed at the petitioner.

3902. I quite follow you. You will understand I am not concerned at all to defend the present state of the law. The Commission is required to investigate whether it can be improved and, if so, on what lines. But if you mean that there should be a re-definition of cruelty, I quite follow and that explains your point.—I probably mean two things: first of all, that there are some types of cruelty inside the home between man and wife, of which it is exceedingly difficult to produce evidence in court, it always will be difficult to produce evidence of it; and, secondly, I think that the present definition of cruelty is too stringent.

3903. Will you now pass to section 4, which is headed "Difficulty of enforcing and meeting maintenance payments", a difficulty of which we are fully conscious from the evidence of many witnesses. There is one statement you make in regard to letter No. 539. You refer just before that to the alleged tendency of magistrates' courts to ignore the inelasticity of a man's wage packet, and you give an instance where a man has found it impossible to pay. But surely the general state of the law is this, is it not, that he is not ordered to pay more than he can actually bear? The particular instance which you take was a man who had paid his first wife a bribe of £75 to divorce him by arrangement, and he found the subsequent orders very difficult to carry out, but are you suggesting there is a general tendency to ignore the man's ability to pay?—My Lord, I am going again on the experience which has been put in front of me, and I do think that many men are asked to pay more than they can possibly manage to do. I freely concede that if one takes the highly moral or highly social view one can say that they ought not to be in that mess, they ought not to have done this, they ought not to have done that. But they are asked to make payments which they cannot

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[Continued]

possibly keep up and at the same time live a reasonable life on competitive grounds with their fellows. I think that certain presumptions exist very commonly in the minds of those who adjudicate on matrimonial cases in the magistrates' courts. For example, I think that the one-third rule, which is a kind of fiction generally accepted, is a convenient thing when you are dealing with people whose income is £1,000, £2,000 or £3,000 a year. It is a quite impossible thing when you are dealing with a man whose income is £5 a week, and who has now taken to himself a mistress and begotten another child.

3904. That may be so, but have we not got to think primarily of the wife who has been deserted, and, while not ordering him to pay more than he can pay, to put first things first?—Yes, I think we should put first things first, and I think sometimes we put morality before the possibility of living a decent life. If you compel that man to pay more than he can pay, what will happen? He will borrow, sponge or steal. Where do we start with first things? The point is that we are confronting that man with an impossible situation.

3905. I will not pursue the matter further than this, that I am sure you will agree his first obligation is to pay for the wife he has deserted?—What do you do, my Lord, when two unmetable obligations conflict?

3906. I will not pursue the matter any further, I have your answer. Will you turn to section 8, which is headed, "Conduct of matrimonial cases in magistrates' courts"? There you set out the great advantage which is possessed by somebody who has legal advice. Am I right in thinking that your solution appears in paragraph 6 of your Recommendations, that it should be the practice for both parties to be represented, or for neither party to be represented?—I would not say it is the solution, I think it is the way to greater fairness.

3907. Then you would prevent, let us say, a wife from appearing with the assistance of a solicitor, if her husband was not in possession of similar assistance?—I would go a great deal further. I feel that the courts which deal with matrimonial cases, not being divorce courts, should be specially constituted, should proceed in a special way, and should in fact themselves set out to find the truth co-operatively and sympathetically. The case should not be heard in the legal atmosphere of cross-examination. Since I felt unwilling to make any recommendation quite so drastic, I have suggested as a short cut that it would be a good idea if magistrates refused to have one party represented unless the other one was. Let the magistrates themselves, with the aid of the clerk, persuade the parties to tell their story and endeavour to arrive at the truth. I would say that many people are convinced that they have suffered deep injustice through the cleverness of the advocates of the other side. Whether or not that is true does not alter the fact that we have created that sense of injustice.

3908. There is only one other matter I wish to refer to, and it is more by way of comment than question. In section 5 of the memorandum, you deal with marriage within the prohibited degrees of relationship, and I see that there is a fairly close correspondence between the proportion of letters which you had dealing with that matter and the proportion of letters which have been received by the Commission.—I am interested to hear that.

3909. You say:—

"Of the 1,600 letters which were the preliminary response to the article published on December 2nd, sixty-six were concerned with this issue."

That is to say, just over four per cent. of your letters were concerned with that, and so far, to the end of January this year, we had 39 letters out of a total of 1,356, which was just in the neighbourhood of three per cent.—I hope they were not from the same people—I do not think they can be. (Chairman): I do not think so, but I cannot be sure.

3910. (Sir Frederick Burrows): In section 6 (c) of your memorandum, Mr. Barritt, where you deal with the case for the shortened certificate of marriage, you say:—

"There are about 100 registrars still on fees, and obviously these will not deprive themselves of income by pushing the shortened birth certificate."

Is that based upon actual experience?—May I say, first of all, that I should have pointed out, perhaps, that the

use of the shortened form of certificate of marriage no longer applies, in that the Registrar General has just issued the Registration of Marriage (Registries) Regulations 1952, Statutory Instrument No. 1192, which now makes it possible for a registrar merely to enter and register a marriage. He does not have to engage in all the questions. But when it comes to "100 registrars still on fees", whether or not I am being unjust to them—I am very sorry if I am—I would say that on this matter I know very little except indirectly. But one of my colleagues is a former superintendent registrar with very wide experience; he is in constant touch with the Registrar General's Office, and I am in fact giving you his view, I am following his advice, and I have always found his advice to be based very closely on fact.

3911. I am not seeking to controvert the advice which you have received. But is it not a fact that if you write for a copy of a birth certificate you do not enclose the fees or anything else, you just write for it. And you get back a letter—I have known of it in innumerable cases—a letter stating that you can have either the full certificate or a shortened one?—I think we are at cross purposes. What so commonly happens is that a child is born and the child is illegitimate, or has a somewhat cloudy background, shall we say, and the mother or one of the responsible persons goes along to get the original birth certificate. It is my contention that the registrar should then say, with great force: "Look, there is nothing wrong with the shortened certificate. Nobody will know there is anything wrong or dubious about the birth or parentage of the child, everybody will accept it for the purpose for which it is required". I merely say that it is asking a lot of human nature to expect registrars to say that when they will lose money by doing so. It is perfectly true that if you write to Somerset House you will get back a perfectly reasonable letter saying, "Which will you have?" but what I am concerned with is what the mother is told when the child is born.

3912. But you have no actual knowledge yourself of a registrar doing that?—Indeed, I have very great knowledge. I can produce many cases of mothers who were advised to have the long certificate, and mothers who were never told there was a shortened certificate, in spite of all the publicity which has been given to it. I can also produce cases of employers who have refused to accept the shortened certificate, although they are not entitled to do so.

3913. (Lady Bagg): I want to ask how your service of information and advice operates. Am I right in thinking that it is done without seeing the people who write to you?—By and large, we do not interview correspondents, but of course it is very important that we should be in touch with people, therefore we interview a section, shall we say a sample, regularly. I personally do a great deal of that, and in addition a very large number of cases which come before us involve very detailed investigations, which are made on our behalf by every voluntary agency, public authority and so on, in the country. We receive un-biased reports from that source and that source.

3914. Do I understand that half of these very interesting letters are investigated by case-workers?—Not half, but something like fifteen per cent.

3915. Then fifteen per cent. have really been looked into? I only want to know whether we are only hearing one side of the story in each case.—Very often we are. Very often, I think, all of us who are engaged in this work, when reading a letter, see that something is missing, that the thing sounds too good, or that it could not have happened. We in fact train ourselves to spot the leavens, we get quite good at that. I can assure you that my colleagues are not idealists, they are not taken in by the simple pathetic story, they are people with a great deal of practical and professional experience in the social field, and they see how many mistakes could be made by always reading these stories as if they were true. We are exceedingly careful.

3916. Would you tell us, spouses perhaps of one letter about which you were doubtful, how your investigations are made?—To give you an isolated example would probably mislead you. All kinds of things may happen.

3917. But you could give one example?—Shall I take an extremely interesting case which has been going on for many years, a very complicated matter with the Ministry of Pensions. . . .

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[Continued]

3918. May I interrupt you? Could we have an example on our own subject?—Yes. There are two young people and a child living in North London. The man was in the Army and was discharged, he was invalided out and then he developed economy thrombosis, which made him a very sick man indeed and also extremely neurotic, extremely responsive to external pressures. The only home they had was with his wife's parents. There were two elder daughters—his wife's sisters—who possessed the child and possessed the wife, and he was not fit to stand up to them.

3919. May I ask if it was he who wrote to you?—I was telling you the story for the simple reason that both of them have now written. It is one of the interesting things, that after many years we have now both sides of the story. What I did in that case was first of all to get the Ministry of Pensions to give specialist medical help. They investigated on the medical side; next, the Disabled Persons Branch of the Ministry of Labour found him special light employment. Thirdly, I got in touch with his wife—his wife got in touch with me first—then with her co-operation, I got in touch with the Housing Committee and sought to get them preferential treatment over a house. The housing situation was so bad that that could not be done, so we have now got in touch with the man's employers and they have a certain number of houses of their own which they make available for staff, and we are trying to bring the two to reconciliation in that way. In that case we have had five separate investigations made.

3920. Thank you. You see, what I was trying to find out was how far we could consider the letters as evidence, because if you did not hear the other side and had not seen the parties, it makes rather a difference—I agree entirely, but what I feel is that so many people cannot so consistently and so consummately lie. We must have on our file, under the narrowest possible category relevant to this hearing, over 30,000; taking a broader view, over 50,000; and if we had included everything we have had on this subject it would be approaching a quarter of a million. There does emerge a story which is substantially self-consistent. There are many things which one might criticise, there are many things which one might suspect, but one can hardly break down the weight of that witness altogether.

3921. (Mr. Selous): In your recommendations, Mr. Barrett, you have made a considerable number of practical suggestions, most of which are what one might almost call minor suggestions, by which I do not mean to underestimate the value of them in any way. There is one very big one, of principle, namely, the first one. Now you will say that something like this is needed to clear up the existing mess?—Yes.

3922. Have you thought about the influence of such amendment as this upon the future?—I have thought about it very seriously. What I feel is that we are in grave danger of doing less than justice to the sense of responsibility of the average couples who get married. People by and large get married because they want a home, they want children, they want to live a reasonably happy life together. Marriages break up sometimes, because of unforgivable temperamental weaknesses, and maybe a rigid legal system will stop those people from just going over the fringe. That I take it is the justification of our present legal system, where you put barriers in the way of the irresponsible, the feeble, the easy-going, the self-indulgent. I do not believe that they are such a large fraction of the people concerned. Most of them are reasonable people trying to make a go of it, and the fact that you make it possible for them to have a divorce after five years is not going to make any difference to their lives. Five years' separation means five years of mental misery, loneliness, and other evils. People who try to make a go of their married lives will not put up with that unless they are driven to it. I grant you a small fraction of irresponsible people will probably find divorce a little easier, but I should say that was outweighed countless times by what you prevented in the way of suffering in the homes, in the lives of children, and so on.

3923. (Sheriff Walker): In your memorandum, under "Recommendations to the Royal Commission", your first recommendation is that divorce should be available as a

remedy to either party after a period of *de facto* separation lasting five years. Suppose the wife and children remain in this country, but the husband has to go abroad on business which keeps him away five years, then there would be a *de facto* separation for five years. Do you mean that either spouse should be able to divorce the other in those circumstances?—I have never suggested that if it could be shown that the other spouse freely intended to return to domestic union and was only prevented from doing so by external circumstances, that that should be regarded legally as separation. A case in point is the man called up into the Army.

3924. So something really has to be added to your recommendation, something like this: "Provided that there is no reasonable probability of their resuming cohabitation"?—It is a question, perhaps, of the word "separation". I do not regard a man being called up in the Army as being separated from his wife. I mean that one of the parties at least clearly does not want to go back to the state of domestic union.

3925. Suppose the husband has gone away without his wife's sanction, he has deserted her, are you suggesting that the husband should be allowed to divorce his innocent wife?—Yes.

3926. But he has undertaken, has he not, to give her a life-long union? Why should he be allowed to break that promise?—The answer with regard to that is, to do a great right one do a little wrong. It is perfectly true that he has broken a promise. As I said when I was asked at the beginning to comment on the memorandum, I do not feel that marriage can be regarded as a contract or bargain, or anything of that kind. There is a contractual element in marriage, but marriage affects so deeply people's lives and feelings that I do not see what society is gaining by holding a man to a promise which he does not intend to keep, which is only a fiction.

3927. You put it that marriage is a status rather than a contract?—I would say that if it is a status, and I would say that it begins to lose its weight when it loses the values for which that status was created, the values of companionship, children if possible, common sharing, and so on, its values are what make it. When it becomes a merely dutiful tie, it seems to me absurd to insist that it has a contractual basis which you are going to keep there. By all means see that a man pays reasonably to a woman who has kept his home and his children, by all means protect the wife if she is incapable of looking after herself, but it seems to me anti-social to insist that personal lives should be treated as if they were the subject of bargains.

3928. But is there not some force in the view that from the deserted wife's point of view she is justified in saying: "Why should I be deserted by my husband when he has promised to look after me for my life"?—If she chooses to comfort herself with that fiction, I suppose she can, but I do not see what good it is doing anybody.

3929. I wonder if there is a possible answer to the objection that I have put in this, that it may be that the view of marriage as a contract has already been departed from, and I would like to put this view for your consideration. Supposing a wife is deserted by her husband, or the husband commits adultery, the law allows her divorce, but she has undertaken to give her husband a life-long union for better or for worse, has she not? That is the common view of marriage?—That is the view of marriage.

3930. So is the promising that however bad her husband may become she will stick by him for life, or is there something wrong in that?—There is nothing wrong in that if both parties freely believe it and accept a system of values in which that plays a part. In fact it is probably the most honourable state of matrimony there is, but I think quite frankly that it is unwise to imagine that most people today enter into marriage with that kind of consideration in mind, with that kind of system of values behind their thinking. Whether they ought to do so is another matter.

3931. If one looks at the wording of the marriage service it is really the intention that neither party should be allowed to divorce the other, is that not so?—That of

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[Continued]

course is the canonical view of marriage. I think something like seventy per cent. of all people today get married in church. To the vast majority of that seventy per cent. that church ceremony is only a conventional gesture. I do not think the Church of England would suggest that seventy per cent. of the community are regular communicants, or that all the Churches together would claim that. The great majority of people get married in church because they want a solemn and beautiful ceremony, and they want to do something which is socially approved.

3932. Does it come to this, then, that whatever the form of the marriage ceremony and warrant may be, a great many people regard marriage as being a dissoluble union?—I think that most people go into marriage—although we

probably ought not to generalise in this way—I think a large number go into marriage intending to do their best. But they are not aware of the difficulties which they will have to face, and to which marriage is inevitably and singularly vulnerable, due to external strains. When such difficulties arise, some of them try to get out of it too easily, but the number who do that is very small compared with the number who make a deep and determined effort to create a successful marriage, and to legislate against that minority is to penalise the sufferers in the larger group.

(Chairman): Thank you for all the work you have done, and for coming to help us today.

(The witness withdrew.)

(Adjourned to Wednesday, 23rd July, 1952, at 10.30 a.m.)

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MINUTES OF EVIDENCE

TAKEN BEFORE THE

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ROYAL COMMISSION

ON

MARRIAGE AND DIVORCE

EIGHTEENTH DAY

Wednesday, 23rd July, 1952

WITNESSES

Mr. J. M. GREGORY-JONES

Mrs. M. A. CUMELLA, M.B.E., J.P.

Mr. and Mrs. ELLIS BIRK ... representing a Group set up by the Fabian Society.



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MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

EIGHTEENTH DAY

Wednesday, 23rd July, 1952

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PAPER No. 51

MEMORANDUM SUBMITTED BY MR. J. M. GREGORY-JONES

1. When considering possible reforms in the law dealing with marriage and divorce, I feel that it is essential first to decide what is, or should be, the aim of the State in legislating on these matters. Clearly the basic aim should be the establishment of a sound matrimonial relationship throughout society, and reform of the law as to divorce should be considered in relation to the very much wider issue. To reform divorce law without at the same time doing whatever can be done by legislation (or administrative action) to reduce the necessity for such law would be like repairing the stable door after the horse had bolted.

2. There are, of course, many reasons for the present very high divorce rate—economic and other difficulties resulting from the war being the most obvious, but the crux of the matter lies far deeper than the more practical difficulties of living. An attitude of mind has developed during the past fifteen years or so, which views marriage as a contract that can be brought to an end comparatively easily. This attitude of mind, coupled with profound ignorance by a great many couples contemplating marriage of the realities of married life, accounts to a great extent for the present state of divorce work.

3. The primary matter which should be considered is how the attitude of mind, given the ignorance to which I have referred, can be best remedied. As mental attitudes are acquired at an early age, it is clear that education in marriage should be the first consideration. This is a matter which is very much in the forefront of the minds of those who have been seriously considering this problem. It formed the subject matter of last year's annual conference of the National Marriage Guidance Council. Education in all the varied aspects of married life should be taught in every university and senior school. The Marriage Guidance Councils throughout the country already undertake pre-marital guidance for engaged couples, but of course they can only touch the fringe of the problem. No doubt one of the matters which will be considered by the Royal Commission is the extent to which the State should give active assistance and financial support to the Marriage Guidance movement. At present, such support is slight.

4. As I have endeavoured to stress, the aim of the State should be by practical education and by the encouragement of a proper attitude of mind towards marriage to pave the way to a reduction in the number of unsuccessful marriages and consequently to a substantial drop in the divorce rate.

5. Having considered what steps could be taken towards achieving this ideal, it is then pertinent to consider whether any, and if so what, reforms are desirable in our existing divorce law.

6. I feel that in some circumstances the insistence of the law on the so-called "guilt" or "innocence" of the parties to a matrimonial breakdown is rather unfortunate. Though one party may technically be the innocent party, in that he or she is the one who has successfully proceeded for divorce on one of the recognised grounds, the actual innocence of that party, so far as the breakdown of the marriage is concerned, is often very much open to question. In many cases both parties were equally blameworthy, but as under the existing law a matrimonial offence has to be proved before there can be a divorce, it is natural that the party who is proved to have committed such an offence should be considered the guilty party, even though the other party may be equally to blame for the breakdown of the marriage.

7. I am not suggesting that the present grounds for divorce are not very right and proper grounds if they are genuinely the cause of the collapse of the marriage, but it is undesirable that a party should in effect be encouraged to commit a matrimonial offence by the knowledge that to do so is probably the only way of enabling the marriage to be brought to an end.

8. I would suggest that this somewhat artificial aspect of our divorce laws might be removed to a large extent if either party were permitted to sue for divorce on the ground, "That despite the utmost endeavour of the parties, they have found it impossible to establish or maintain a sound matrimonial relationship". I would say that this should be a discretionary ground, the judge having an absolute discretion as to whether or not he should grant a decree, and in the normal way, he should not grant a decree without hearing the evidence of both parties and at least two other witnesses; and he should not grant a decree unless satisfied on the evidence that both parties have really striven sincerely to make a success of their marriage, that their endeavours have failed and that it is in the interests of society that the marriage should be brought to an end. The judge would, of course, exercise particular care if there were children of the marriage. I would suggest that there should be no divorce on this ground within five years of the marriage and that the judge should have a very wide discretion indeed in deciding whether or not an order for maintenance should be made in favour of the wife.

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9. I think a reform on the above lines would cover the genuine case of incompatibility, which is the type of case that under our present law undoubtedly leads to collusive or near collusive proceedings. In such cases, it is safe to say that the marriage has already broken down before any matrimonial offence has been committed, and such offence, when it occurs, is probably committed with an eye to divorce proceedings (even if there is no actual collusion).

10. It may be contended that this suggested ground might be the thin end of the wedge that would open the door to unlimited divorce by mutual consent, and that,

before long, English divorce courts would be on a par with those in Reno. I do not foresee this danger. The effect of my proposed reform would be that a matrimonial breakdown would be laid honestly on the table before the judge. He would hear what had or had not been done by both parties to try to put their marriage to rights, and there would be no red herrings drawn across the trail in the shape of "matrimonial offences", which might not have occurred at all if one or other of the parties at the time of the breakdown had not directed his or her eyes towards the Divorce Court.

(Received 9th April, 1952.)

EXAMINATION OF WITNESS

(MR. J. M. GREGORY-JONES; called and examined.)

1933. (Chairman): Mr. Gregory-Jones, you are a solicitor practising at Newcastle-on-Tyne?—(Mr. Gregory-Jones): That is so, my Lord.

1934. And you have sent with your memorandum a covering letter stating that you are a member of the Law Society and that you are on the Society's staff. For the past five-and-a-half years you have been in charge of the Newcastle-upon-Tyne office of the Law Society's Divorce Department, and in the course of your work as a conducting solicitor you have handled several thousand divorce cases, and accordingly you have had considerable opportunity to observe the workings both of our divorce laws and of the minds of many married people of all ages towards their marital difficulties. You are also Honorary Legal Adviser to the Newcastle-upon-Tyne and District Marriage Guidance Council. You make it clear that in submitting your memorandum you are doing so as a private individual, and that though the memorandum has been read by representatives of the Law Society and by the Newcastle Marriage Guidance Council it is not sponsored by either body but is solely an expression of your own personal views.—That is correct.

1935. Before I ask you any questions on your memorandum, do you wish to add anything to it by way of comment?—My Lord, I think there is just one opening remark I would like to make. My memorandum does contain a proposal which may be considered rather sweeping and perhaps full of potential difficulties, and I do well realise that there would be many difficulties but I do not think they would be insurmountable. I have put on paper only the germ of an idea, and I have not attempted to work out its practical application. If the Royal Commission would desire it, my Lord, I should be happy to try to work out its detailed application. I did anticipate that one of the obvious points which might be posed would be the difficulty of administration so far as the judges are concerned. Since being invited to give evidence I have discussed my memorandum with two divorce commissioners, neither of whom expressed qualms on this particular point. Certainly to start with, the judges would have no yardstick in the shape of precedent, but I do not believe that they would find themselves in any great difficulty. According to my recommendation, they would have a very wide discretion, which, no doubt, they would exercise with care. They would be greatly assisted by their own wide experience of human nature. Naturally, there would be slight differences in interpretation resulting from the differing personal approaches of various judges towards matrimonial matters. But, assuming that all those concerned have similar ideas on the essential ingredients of a successful marriage, I do not believe that there would be any serious difficulty in administering the law in the spirit of the recommendation I have made in my memorandum. I do not think that I need make any further preliminary remarks, my Lord. Doubtless other points will be covered in the course of questions.

1936. As a matter of fact you have anticipated certain questions which I proposed to ask you on your proposal. In the first paragraph of your memorandum you say:—

"When considering possible reforms in the law dealing with marriage and divorce, I feel that it is essential first to decide what is, or should be, the aim of the State in legislating on these matters. Clearly the basic aim should be the establishment of a sound matrimonial relationship throughout society, and reform of the law as to divorce should be considered in relation to the very much wider issue."

You go on to point out that:—

"To reform divorce law without at the same time doing whatever can be done by legislation (or administrative action) to reduce the necessity for such law would be like repairing the stable door after the horse had bolted."

From that I apprehend that you are anxious to reduce the number of marriages which end in divorce?—Indeed, my Lord, yes.

1937. Then you point out that:—

"There are, of course, many reasons for the present very high divorce rate—economic and other difficulties resulting from the war being the most obvious, but the crux of the matter lies far deeper than the more practical difficulties of living. An attitude of mind has developed during the past fifteen years or so, which views marriage as a contract that can be brought to an end comparatively easily."

Is the latter statement based on your personal observation in the course of the experience which you set out in your letter?—Yes, my Lord, it is.

1938. You are against anything which would encourage such an attitude of mind?—Very much so, my Lord.

1939. You go on:—

"This attitude of mind, coupled with profound ignorance by a great many couples contemplating marriage of the realities of married life, accounts to a great extent for the present state of divorce work."

Then you go on to consider how that attitude of mind, and the ignorance to which you have referred, can be best remedied. You make certain suggestions in regard to education, including the suggestion that:—

"Education in all the varied aspects of married life should be taught in every university and senior school."

Would it be your view that that education should be a compulsory or an optional subject?—I think it should be a compulsory subject, my Lord. I have found so frequently in cases which I have to handle that one or both of the parties, particularly if they are young, have very little idea of what they are embarking upon when they marry.

1940. Having pointed out that the aim of the State should be to pave the way to a reduction in the number of unsuccessful marriages, and consequently to a substantial drop in the divorce rate, you come to what you yourself say is a suggestion for a somewhat sweeping reform in the divorce law. In paragraph 6, you say:—

"I feel that in some circumstances the insistence of the law on the so-called 'guilt' or 'innocence' of the parties to a matrimonial breakdown is rather unfortunate."

I wonder whether there really is such an insistence. I put to you what, I suggest, is the present attitude of the law—very briefly summarised. The law says, does it not, that, *prima facie*, marriage is a life-long contract, and more than that, a change of status for both parties, but that if one spouse behaves in a particular manner the other spouse can, if he or she so desires, obtain a divorce?—Yes, my Lord.

1941. I do not quite see in that any insistence on "guilt" or "innocence". It may be that many things have contributed to a matrimonial offence.—Yes, perhaps I might amplify my statement a little bit. What I had

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[Continued]

in mind was that so often the actual matrimonial offence upon which a divorce decree is granted is—net from the legal point of view but from the human point of view—very much less than the matrimonial offence actually committed by the other party. In other words, the general behaviour and conduct of one party who may, in fact, be the legally innocent party, may have contributed to the breakdown that caused the other party's matrimonial offence to occur.

3942. That is quite true but, as has been pointed out by other witnesses, if the court were to be required to take these considerations into account, that would lead to the trying of very complicated personal issues. It might be almost impossible to determine whose conduct contributed most; whereas the present divorce law does at least set down certain limits and bounds, and if they are transgressed the parties know where they are. Do you think that such matters as "who is really responsible for the breakdown, and to what extent," are appreciable, my Lord, the difficulty there, but dealing with the question of "guilt" or "innocence" the criticism, if I could call it a criticism, might be covered to some extent if, in the decree absolute, it were not specified to whom the decree was granted, but merely that a decree of divorce had been pronounced.

3943. In paragraph 8 of your memorandum you say:—"I would suggest that this somewhat artificial aspect of our divorce laws might be removed to a large extent if either party were permitted to sue for divorce on the ground, That despite the utmost endeavour of the parties they have found it impossible to establish or maintain a sound matrimonial relationship."

Then you say that:—

"... this should be a discretionary ground, the judge having an absolute discretion as to whether or not he should grant a decree, and in the normal way, he should not grant a decree without hearing the evidence of both parties and at least two other witnesses; and he should not grant a decree unless satisfied on the evidence that both parties have really striven sincerely to make a success of their marriage, that their endeavours have failed and that it is in the interests of society that the marriage should be brought to an end."

Then you say that the judge would, of course, exercise particular care if there were children of the marriage, that there should be no divorce on this ground within five years of the marriage, and that the judge should have a very wide discretion as to orders for maintenance. I have several questions to put to you on that. In the first place, if parties could come to the court on the ground simply that, despite the utmost endeavour, they found it impossible to establish and maintain a sound matrimonial relationship, might that not encourage a wrong attitude of mind when they entered into marriage; the attitude of mind, "If we can make a success of this, well and good, but if we cannot, we can always put an end to the marriage"? Is not that a possible danger in your proposal?—I do rather feel, my Lord, that that is the attitude of mind at present adopted by quite a number of young people when they enter into marriage, even with the divorce laws as they are at present.

3944. Would not your suggestion perhaps tend to encourage that attitude of mind rather than to achieve the end that you desire, that is to say, stable marriages?—It might be so, my Lord. I did feel that this particular ground, if it were properly and carefully gone into would not be an easy ground. It would probably be a more difficult ground on which to obtain a divorce than the existing grounds. I have not at all envisaged it as an easy way out.

3945. Is not there a risk that people who merely want to change their married partners, might say, "We really cannot establish and maintain a sound matrimonial relationship"? In one sense that would be true, but, at the same time, might they not start out on married life with the wrong idea of what marriage is?—My Lord, I had thought that the provision that the judge should normally hear at least two outside witnesses would ensure, as far as possible, that the true facts were before the court.

3946. Suppose that both the parties and the witnesses said: "It is a fact that John, the husband, has fallen in love with another woman" and the parties said, "We have really tried to like each other, and we cannot"?—I think that it would then be a matter for the judge to

decide, my Lord, on the evidence that had been given, whether this was just a flash in the pan, or whether the parties had, over a period of time, genuinely endeavoured to make a success of their marriage, but had not succeeded. That would, I think, be a question of fact in every case.

3947. That is the first problem that occurs to me. You understand that I am only asking your views on it, and that I am not expressing any personal view?—I very much appreciate the difficulty.

3948. Next, do you not think that your proposal might discourage that patience and tolerance and willingness to wrestle with the difficulties of married life—which are so important? If couples can come to the court and say, "We cannot make a success of this; please divorce us," might not the knowledge that such a course was always open to them discourage that attitude of mind which, I am sure, you would agree is the right one?—I certainly do. I had hoped, on the assumption that the proposed new ground was a difficult ground, that the attitude of mind would be at any rate no different from what it is now, but that the new ground would enable the true and honest facts behind the break-up of the marriage to be brought to the court. I do think that so often now two people do not achieve a successful matrimonial relationship, and then one or both starts thinking of divorce. Perhaps one of them realises that the marriage has broken up completely, and that the only way in which it can be brought to an end is for a matrimonial offence to be committed. One party then commits a matrimonial offence—not in any collusive way—but with the idea that the other party will be able to take proceedings.

3949. Of course, whether your proposal would increase divorce or divorce-mindedness, or whether it would, as you hope, reduce it, is a matter which one would have to consider very carefully?—I was hoping that my earlier proposals regarding education for marriage would, if implemented, have the effect of altering the attitude of mind of a great many people. One would have to start the education at an early age. It would be many years of course, before it would have any effect.

3950. Then the next point I wish to ask you about is the discretion of the judge. Under your proposal, he has got to be satisfied of certain things, and one is "that it is in the interests of society that the marriage should be brought to an end". What matters would the judge take into account in forming a conclusion on that point?—In my view, the first matter which he should consider would be the interests of any children of the marriage. It is a matter of opinion whether, in the long run, children would be better off being brought up in an unhappy home with two parents or being brought up in a happy home with one parent. I rather tend to the view that a happy home with one parent is better than an unhappy home with two. That is one of the matters which the judge would have to consider.

3951. What else?—I think that if the judge were satisfied that the parties were never going to achieve a successful relationship, and particularly if there was somebody else—a third party—concerned, then he might feel that it was better that the marriage should be dissolved, rather than that it should continue with the prospect of one of the parties ultimately being forced to go off and live with the third party.

3952. You make, as you have said already, that your proposal would put a very great burden on the judges, and that there might be a very great difference in its administration by individual judges. Would not that be rather an objection from your point of view, as a solicitor? Can you picture a litigant saying, "Try and get this case on before Mr. Justice A rather than Mr. Justice B"?—Yes, my Lord, I do appreciate that difficulty.

3953. My last question is this. You say in the last paragraph:—

"It may be contended that this suggested ground might be the this end of the wedge that would open the door to unlimited divorce by mutual consent, and that, before long, English divorce courts would be on a par with those in Reno."

You do not foresee this danger and you give your reasons for thinking so. On reflection, do you not think that your proposal would be going rather a long way on the road towards divorce by consent? I will tell you why

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I suggest that as a possibility. If two people made up their minds that they wanted to put an end to the marriage, could not they go to the judge and so put it before him that the judge who, after all, is only human, would be almost bound to grant a decree. They would go to him and say, "We simply cannot get on, we have tried hard, here are two neighbours who say that we are utterly unsuited to each other"—and I suppose it would not be very difficult to get two friends to say that, particularly if the parties were really not getting on particularly well?—My view on that is that when a marriage has reached the state which you have just described, a divorce will probably take place anyway—there will be a matrimonial offence committed. But the matrimonial offence will not be the cause of the break-up of the marriage; it will merely be an offence committed in order to enable the marriage to be dissolved. Whereas, if my recommendation were adopted, one would hope that the true facts would be before the court, and it would then be a matter for the judge to decide whether the marriage had broken down for purely frivolous reasons or whether there was a real and genuine breakdown. I do agree, my Lord, that it would be a very difficult matter for the judge, but he would have the true facts before him, I would hope.

1954. There may possibly be some dangers in that phrase "broken down". It has been pointed out in other memoranda submitted to us that even in happy marriages the parties may go through rather a dangerous stage when for a time they are not getting on too well together, but they very often settle down in a very happy Darby and Joan affair in the end. Would there not be some danger in your proposal that what was really only a temporary phase, would put an end to a marriage that otherwise might have gone on?—I think there might well be that danger, my Lord. The judge would, I think, have to be satisfied that the trouble was of long standing, possibly continuing for a period of several years.

1955. (Lord Kinnaird): Am I right in thinking that your proposal is that all the existing grounds of divorce should disappear and that this new principle should be the basis of divorce?—That is not quite correct. I had envisaged that the existing grounds would continue in a proper case.

1956. This is an additional ground, is it?—In effect, yes.

1957. I was not quite clear about that, because in one sense it did seem to me that your new ground would cover almost all the existing grounds?—I have a rather open mind as to whether it should be an additional or an entirely new ground in lieu of the others. I did not feel able to put it quite as strongly as that in my memorandum.

1958. I think we have received another memorandum which suggests a ground similar to yours, and regards adultery, desertion, drunkenness, and various other matrimonial offences, as supporting evidence of the view that a marriage has broken down. That is very much what is in your mind?—That is so.

1959. But you do not feel able to propose that all the existing grounds should disappear, and that this new ground should be substituted?—I did not feel quite able to do so.

1960. There is only one other matter I would like to ask you about, concerning the question of the attitude of mind towards marriage and divorce. You suggest that an attitude of mind has developed during the past fifteen years or so, which views marriage as a contract that can be brought to an end comparatively easily. It is just fifteen years ago since the Herbert Act became law?—That is so.

1961. Is it your view that the grounds of divorce that were introduced in 1937 occasioned this attitude of mind, or that the attitude of mind has grown up independently of the 1937 Act?—I would say a bit of both. The 1937 Act came into force just before the war and provided new grounds for divorce. Then the war occurred and it was the cause of a great deal of matrimonial unhappiness. I think that those two influences, and possibly the influence of troops from other nations who were in this country during the war, all worked together to create a slightly different attitude of mind from what had prevailed prior to 1932.

1962. Of course, the war was the occasion of multiplication on a very intensive scale of circumstances which could give rise to the matrimonial offences constituting statutory grounds of divorce, is that not so? The circumstances connected with the war did produce a situation in which adultery and desertion were very greatly intensified?—That is so, my Lord.

1963. And the 1937 Act was intended to introduce additional grounds of divorce. Previously, in England divorce had been on a very restricted scale, and the intention underlying the Act was to allow persons greater relief in the matter of divorce. I think it has been said that the result was to relieve a great deal of the existing misery and distress. Would you agree with that?—Certainly I would.

1964. (Mr. Janice Pearce): Your suggestion would give a very wide discretion to the judge?—It does put a very heavy burden on the judge.

1965. Unless the judge can tell false from true, this new ground of divorce might simply become divorce by consent?—Yes, my Lord, but surely that is so under the existing law.

1966. I am not sure that it is quite comparable, because, you see, whether a person has committed adultery is a question of fact, is it not?—Yes.

1967. And you have the sanctions against perjury if witnesses do not tell the truth. On your new ground it is purely a matter of opinion whether the marriage has broken down, is it not?—Yes.

1968. You are, of course, assuming that a judge will be able to detect falsity or truth in a witness on a matter of opinion?—Yes.

1969. Let us assume for the moment that when the parties have fought out a defended case, an experienced judge can decide with reasonable certainty which is telling the truth. But in an undefended case, where he only hears one side, it is difficult for him to tell false from true?—Very difficult indeed, my Lord.

1970. From your experience as a solicitor you would agree that if somebody has heard only one side of a case it presents a wholly different appearance from when he has heard the other?—Yes.

1971. Even though the witnesses on the one side may be reasonably honest people?—Yes.

1972. What would a judge do in an undefended divorce case where the petitioner—without committing perjury—perhaps exaggerated the extent of the discord and minimised their happiness? How could the judge find out whether the petitioner's account was true?—He would be in a difficulty, but I should have thought that he might not be in any greater difficulty than he might well find himself in deciding, say, an undefended desertion case. Desertion is often not so much a question of fact as a question of law, and where there is an undefended case, with the merits rather evenly divided, the judge is, I am sure, in a considerable difficulty on many occasions. I do not know that his difficulty would be any greater in the type of case envisaged under my proposal.

1973. In the average desertion case somebody leaves the home. The issue is thus whether that party was driven out, or whether the parties separated by agreement. Of course, the court generally has correspondence between the parties, as part of the evidence before it, because in desertion cases the parties almost always write to one another?—Yes, I agree.

1974. That is a very different problem, is it not, from trying to find out whether the quarrels, that every married couple has to some extent, are in a particular case such serious quarrels that they make life intolerable to both parties?—Yes, I do very definitely agree there. Perhaps if I might just add this—these new types of case would probably take very much longer to try than existing divorce cases, and it might well be that the judge would adjourn the case if he were not satisfied. It might be possible to have an adjournment for, say, six months.

1975. For what purpose—because it is a subjective test which is being applied, is it not?—The judge might possibly decide that the parties had not really done everything they might do to put their marriage to rights, and he might decide that he would hear further evidence about them from outside sources in six months' time.

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3976. On what grounds could a judge consider a case for adjournment?—I think the judge would have to have evidence of fact, my Lord, not just evidence that one party could not get on with the other party. He would have to require outside evidence.

3977. Of what?—Of interminable quarrels or whatever else was being alleged. I do appreciate there is a great difficulty.

3978. You have stated in your memorandum that the cards would be laid honestly on the table before the judge. And, of course, no judge can complain if all the cards are laid honestly on the table, because then he has something on which to make up his mind. But what I do not follow is why you say the cards would be laid honestly on the table before the judge, and by "honestly" we imply sufficient objective accuracy to make it a true account, do we not?—Yes.

3979. Because we include also the witnesses who cannot really give an objective view because they themselves are so directly involved. Why do you say that the cards would be laid honestly on the table before the judge?—Perhaps for this reason, my Lord, that if the parties got to the point of applying for a divorce on this ground, it follows that the marriage must have been an unhappy one for some reason or other, otherwise they would not have got to the point of wanting to dissolve it at all.

3980. Is that a valid conclusion? All that the application means, does it not, is that one or both want a divorce? That is all you need postulate in the case coming before the court, that one or both want a divorce. Why should you say in addition that it shows that the home life must have irrevocably broken down?—I did in my recommendation, my Lord, suggest that the judge should normally hear both parties, and if there is only some entirely frivolous reason why one party wants the divorce, or if the marriage had not broken in fact, then presumably the evidence of the other party would make that clear.

3981. I follow. I think that we can leave out the contested cases, because there the court has evidence on both sides.—In contested cases there would probably be no divorces on this ground.

3982. In the undefended case, why should you assume that the cards are all laid honestly on the table?—I felt, my Lord, that if a marriage has broken down and the parties can get a divorce without a matrimonial offence, as now understood, having to be committed, there would be no necessity for anything in the nature of near-collusion, shall we say. There would be presumably some good reason why the marriage had broken down, and that would be before the court.

3983. Mr. Gregory-Jones, are you not really saying this, that there would be no need for the two parties to deceive the court because, whenever they wanted to, they could always get a divorce, whatever the truth?—I do not think I was saying quite that, my Lord. If there were really good reasons why the marriage had broken down—and presumably the parties would not both be anxious for divorce unless there were such good reasons—they would lay those reasons before the judge, and he would hear both of them and form his own opinion as to their honesty. He would hear outside witnesses—as many as he wanted—and if he was not satisfied, then the marriage could be dissolved on proof that it had broken down, without the necessity for a matrimonial offence, as now understood, to be committed.

3984. I do not think you are quite following my point. If there were any cases in which couples, who want a divorce, could not get it under your own ground, then it might be quite easy for them to paint as a ugly gloomy picture of their married life, and thus secure a divorce to which they were not entitled. I want to know why you say that they would not—as in some cases they would not even have to go to the extent of telling any factual lies—I think there would undoubtedly be a certain number of cases where parties might perhaps be tempted to throw in the sponge too quickly. I do certainly agree that.

3985. Would you agree that really the trouble with so many of the cases that, no doubt, you deal with, is that the parties will not try hard enough to make a success of their marriage?—Yes, I do.

3986. Casting your mind back to the days when you were a boy at school, do you think it would have made you do more or less work if, in addition to the proper excuses for not doing work which we know were always available, it had been accepted as a valid reason that you could not bring yourself to do it?—I accept that point, my Lord.

3987. That is a serious point. I have put it perhaps not in a very grave way, but you would agree that it is a serious issue when one is considering the effects of the divorce law on public attitudes towards marriage and divorce?—I do agree. Indeed, my Lord, my recommendation was to some extent dependent upon the implementation, first of all, of the suggestions made in the earlier part of my memorandum. I think that perhaps one has got to try to establish a more proper attitude towards marriage before bringing in a proposal of this sort.

3988. You mean that, provided you can get people to a state of mind in which they really try hard to make marriage a success, then this new ground could safely be used?—Yes, my Lord.

3989. (Mr. Moore) Mr. Gregory-Jones, which legal aid area are you attached to?—No. 8, Newcastle.

3990. We have the statistics of the number of cases in your area that your Divorce Department dealt with. The total is 835 in the year ending March, 1952. How many in the whole area did you personally handle?—I should say that my office would handle approximately half.

3991. Looking at your scheme, not from the solicitor's point of view but from the point of view of the public, do you think it desirable that the public should be able to get a firm legal opinion from a solicitor?—Before contemplating divorce proceedings?

3992. Before contemplating any action?—I do, indeed.

3993. Then do you favour statute law or case law?—I do not quite see the point.

3994. On statute law you are able to advise the client that his facts had come within or without the statute, is that right?—Yes.

3995. And very often you can give a clear opinion?—Yes.

3996. If your opinion rests on case law, it may be right when you give it, but the Court of Appeal may even at that moment be reversing a decision on which your opinion was based?—That is so.

3997. If your suggestion were accepted, have you considered that drunkenness might become a ground for divorce?—It might be, yes.

3998. On case law?—On case law, yes.

3999. And in six months time, drunkenness might cease to be a ground of divorce on case law?—Yes.

4000. Do you think that that would be desirable from the point of view of the public—quite apart from the difficulties which it might create for solicitors to give advice?—Not very desirable, no.

4001. Let me take the single act of adultery. In answer to Lord Keith, you said that you would retain the present grounds of divorce, so that a single act of adultery proved would entitle a petitioner to a decree?—Yes.

4002. Suppose the petitioner did not allege that single act, but alleged your ground, and the judge felt that the parties had not really tried to make the marriage a success, and ordered an adjournment for six months, as you suggest. Then the petitioner could come back and allege a single act of adultery?—Yes, of course, he would have to decide on which ground to proceed. I anticipate that he would probably proceed on the adultery ground in a case of that sort, because it would be more certain of achieving what he wanted.

4003. Perhaps I myself am not thinking of the point clearly. What I have in my mind is this. If we accept your contention, then surely whether the single act of adultery had caused the marriage to break down is a material issue?—A material issue, yes.

4004. Therefore, ought that not to be included in the judge's discretion?—Yes, the point you are making is that the adultery ground should also be discretionary and not an absolute ground.

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4005. I was in exactly the same position as Lord Keith. I did not know whether you intended to retain the original grounds. I was rather surprised when you said that you did, because, as I understood it, in your proposition you were saying that the *onus* should rest upon the judge to say whether in the interests of society a particular marriage should be dissolved—that is right, is it not?—That is correct.

4006. Therefore ought not the judge to have a discretion on cruelty, desertion and adultery?—Yes, I rather agree with you on that. I felt that to suggest the abolition of the existing grounds was perhaps rather too sweeping, but I agree that there is a lot to be said for abolishing the existing grounds.

4007. You understand, of course, that I am not necessarily putting my personal view to you? I am only trying to test your views.—Yes.

4008. I wonder if you could help the Commission on something that is not in your memorandum, and here I call upon your experience, which, I appreciate, is very great. The cases which come to you come from the legal aid office of the Law Society, which has granted a certificate?—Yes.

4009. You have nothing whatever to do with whether a certificate is granted or refused?—Nothing whatever.

4010. So that you are acting as a member of the staff of the Law Society, and the petitioner or the defendant, as the case may be, is your client?—Yes.

4011. And you act entirely in the professional capacity of solicitor *vis-à-vis* client?—That is so.

4012. What is your experience once the parties have reached you as to the likelihood of success if reconciliation machinery is brought into play? May I put it this way—do you think a good purpose could be served if each client were urged to see somebody about the possibility of reconciliation?—I think it depends a great deal on the facts of each individual case. I think there are a great many cases where a useful purpose would be served, but in a great many other cases—in particular, I have in mind long-standing cruelty cases, of which there are a great many in my area—I do not think that any good purpose would be served. But there are a great many in which it would be desirable for the parties to see somebody.

4013. You do not think that it is too late by the time they have reached you?—I think that very often it would prove to be too late, but, nevertheless, I think it would be a good thing if facilities were available. I do sometimes succeed in achieving reconciliations myself at that stage—unfortunately not in a very large proportion of the total—but enough to make it worthwhile to make some further facilities available.

4014. Would you favour the reconciliation officer being an official of the court or an outside body?—I would say an outside person, because I think that the less the court is brought into the minds of the parties the more chance there is of reconciliation being brought about.

4015. (Sheriff Walker): Your proposal in paragraph 8 is that the action should be brought by either party?—That is so.

4016. You do not contemplate joint application to the court by both parties?—I have not contemplated that, no.

4017. In your memorandum you tell us what kind of evidence generally you would expect. Am I right in thinking that the petitioner would have to prove that the respondent had done his or her best to make a success of the marriage?—Although I had not contemplated both parties bringing proceedings, I had, I think, contemplated that it would be purely a matter of deciding in whose name the proceedings were actually to be brought. It might well be—in fact in most cases it probably would be—that some degree of responsibility for the marriage breaking down rested on both sides. I had not envisaged a guilty and an innocent party in this particular ground.

4018. Suppose the application on the ground that you contemplate were a defended one. Would you require the petitioner to prove that the respondent had done his best to make a success of the marriage. Is that not rather a difficult position?—I think so, Sir, yes. I cannot quite visualize any defended action being successful on this particular ground.

4019. Suppose it were an undefended position—the respondent does not enter any defence—what kind of facts would have to be proved before the judge could grant a decree?—He would have to be satisfied that over a suitable period of time—I would not like to say exactly how many years—there had been grave difficulties between the parties, such as complete incompatibility or perhaps drunkenness on one side, as Mr. Mace suggested—grave matters of that sort resulting in the marriage going on the rocks.

4020. It would not be sufficient to rely on the statements of the parties as regards the possibility of their making a success of the marriage?—No, I do not think it would be sufficient.

4021. One has to distinguish between the statements the parties make as to their inclinations and intentions and good faith and so on, and the facts of the case?—Yes, indeed.

4022. Let us turn for a moment to the present law. I think that you have already referred to the case of the single act of adultery. I want you to think of the case where both husband and wife are desirous of ending the marriage, and one of them goes and commits adultery and then tells the other. Under the present law that is a good ground for divorce?—Yes.

4023. But in such a case, while the act of adultery might be easily proved, it would not be an act, would it, that could be said in any reasonable sense to offend the other party—or could it?—I think it would.

4024. If both parties, you see, are desirous of getting a divorce, the husband goes and commits adultery and then tells his wife. Would you expect her to be offended or to be overjoyed at having a ground for obtaining dissolution of the marriage?—On occasion, she might well be overjoyed; I think I have got your point there.

4025. That is to say, the act of adultery, while it might easily be proved, is in such a case rather a scurrilous act so far as the human relationship goes?—That is so, yes.

4026. If the act of adultery plays no essential part in the break-up of the marriage relationship, can you see any real reason why it should remain a ground for divorce?—I find it a little difficult to answer that question. The point that I tried to make in my memorandum was that to often the act of adultery is not the cause of the break-up of the marriage and is quite a minor incident, following on from the real break-up. But, on the other hand, I find it a little difficult to say that in many cases it is not a very grave matrimonial offence. I think perhaps that I could best answer that question by saying that, in certain cases, the act of adultery is of no importance at all, but that in other cases, it is of very great importance in the actual break-up of the marriage.

4027. In many cases the act of adultery may be a very serious thing—it breaks up the marriage, or leads to the break-up?—Yes.

4028. But where marriage is already broken up and both parties want it dissolved, does it, in your view, have the same significance or not?—No. That is the point I had endeavoured to cover in my proposed new ground.

4029. So that although, from the point of view of proof, it may be a relatively easy thing to prove adultery, it may have very little bearing on the question of whether the marriage has failed or not?—In many cases, yes, I agree.

4030. When one comes to the actual proof of adultery, am I right in thinking that in England it is really an inference from facts and circumstances? Would that be a fair way of putting it?—In many cases, yes, Sir.

4031. In proving an act of adultery does the court at present rely simply on the statement of the respondent, if he is a witness, and of the woman in the case?—Usually, if there is a confession statement by the respondent, some further evidence is required that the respondent has associated with the woman or man concerned.

4032. That is to say, there has to be some evidence of circumstances?—That is so. On the other hand, of course, if the respondent attends court and gives evidence on oath as occasionally happens, that is accepted as sufficient.

4033. What I want to put at is whether in your view there is any greater difficulty from the evidential point of view between proving the failure to maintain a sound matrimonial relationship and proving an act of adultery?—Yes, I think there is.

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4034. I am not sure if you have considered this, but I think the general view is, is it not, that the success of marriage depends on the attitude of mind of the parties entering into it?—Yes.

4035. Suppose that the law did not allow either party ever, in any circumstances, to have the marriage dissolved. Do you think that would affect the minds of parties in entering into marriage?—I feel sure it would.

4036. They would then enter into it on the footing of knowing that they could not get it dissolved?—Yes.

4037. Would it be any remedy if, instead of the law allowing either party to apply for a dissolution, the only party who could apply would be a representative of the State, such as a Queen's Proctor or some public official? Would that be of any advantage from the point of view of the attitude of mind of the parties entering into marriage?—Undoubtedly it would, I think, have a profound effect on their attitude of mind.

4038. They would at least then, would they not, know that neither of them could ever in any circumstances apply to the court for a divorce. The application could come only from a public functionary?—On the existing grounds, were you suggesting that?

4039. No, I rather had in mind, Mr. Gregory-Jones, something on the lines of your proposal, that if in a particular case it is impossible to maintain the marriage on a sound matrimonial relationship, then and then only, should some public functionary be entitled to step in and apply to the court to have the marriage dissolved in the public interest.—In effect then, the public functionary, the Queen's Proctor, would have to do what the judge would normally do in my proposal. He would decide first, and then he would make application to the court that the marriage be dissolved?

4040. The public functionary would be able to make particular enquiry into the actual facts. The judge can only see the evidence that is laid before him.—Yes. I think possibly that if a public functionary like the Queen's Proctor—if he or his representative were available to the judge who heard the case to make the necessary enquiries—then that would make it very much easier for my suggested ground to be administered.

4041. That is to say, that the Queen's Proctor, let us call him, makes enquiry into the circumstances. If he thinks the marriage has altogether failed, then he would apply to the court and show certain facts, and leave it to the judge to decide whether to grant a decree. Is that a possibility?—I think it is a possibility, although I should rather prefer to see the parties themselves making the application and the Queen's Proctor having to report to the judge when the case was heard.

4042. (Mr. Young): Have you considered whether you could define a sound matrimonial relationship?—I think it would be very difficult to define.

4043. If you cannot define it how can you say you have either established it or broken it?—It must be considered in the light of the normal attitude of the average man in the street towards the matrimonial relationship. I think it might be dangerous to try to define it. It would make the judge's task altogether too difficult.

4044. That is one difficulty I see in your suggestion. As I see it, correct me if I am wrong, one married person might think that drunkenness on the part of the other party destroyed a sound matrimonial relationship. Some other person might not think anything at all about it. It is the breakdown of the marriage to be assessed by the judge or is it the judge to decide whether drunkenness, individual or in the judge to decide whether drunkenness, for example, destroys the basis for a sound matrimonial relationship?—It would rather depend on the facts of the relationship?—In some cases, drunkenness might be the individual case. In some cases, drunkenness might be the basis of this particular ground. In other cases, it might have caused a breakdown at all. If, for instance, both parties were equally addicted to drink, then drunkenness would obviously not be important. In other cases it might be. I think it would be a question of fact in every case. The judge would have to base his decision upon his own ideas as to what formed the ingredients of a satisfactory matrimonial relationship.

4045. In effect, you might have divorce for drunkenness in one case and not in another?—I think it might be an ingredient in one case and not in another.

4046. (Mrs. Allen): In paragraph 3 of your memorandum you say:—

"The primary matter which should be considered is how the attitude of mind, plus the ignorance to which I have referred, can be best remedied."

In a previous answer you did say that you linked up your proposal for a new ground of divorce with that particular paragraph?—That is so.

4047. If that paragraph could not be implemented, would you still continue with your proposal?—I should have some diffidence about it.

4048. That being so, could you tell me what you mean when later in that paragraph you say:—

"Education in all the varied aspects of married life should be taught in every university and senior school."

I am a little doubtful as to exactly what you mean by "all the varied aspects of married life", and, secondly, what you mean by "senior school"?—I left the actual schools rather vague because I have not got any very strong ideas on that particular point. But with regard to what I meant by varied aspects of married life—I come across so very frequently marriages that took place without either the husband or the wife having any idea at all of what they were entering into. The man, for instance, could not appreciate that he had any new financial responsibilities, that he had in any way to alter his bachelor way of life, that he had any duties so far as being a companion to his wife was concerned, and so on. Similarly, I have often come across cases where the wife apparently has had no appreciation of the fact that she has any duties towards her husband in the home—looking after him, having a meal ready for him when he comes home in the evening, and that sort of thing. That is one of the aspects, and also on a purely sexual level there is complete ignorance very often.

4049. I asked about the senior school because you do appreciate that the majority of people leave school at the age of fifteen?—Yes. That is a difficulty.

4050. (Mr. Beale): I have been thinking about the possibility of coercion in relation to your proposal. Might it not be quite possible that a wife wanted to keep the home together for the sake of the children, and her husband said to her, "Now, look here, if you do not come to the judge with me and say that our marriage has broken down, and we both want it to be dissolved, I will give you such a frightful time that your life and the children's lives will not be worth living"?—I had considered that. There is a certain danger maybe, but I think it would have to rest again on the shoulders of the judge to detect anything of that sort when hearing the evidence of the wife.

4051. Have you contemplated the possibility of her being visited by an officer of the court?—I had not, but I do think it would be a very sound idea.

4052. There is, of course, also the possibility of bribery in relation to your proposal?—Yes.

4053. And it is possible to think of conditions in which the judge would not be able to discover that?—Yes, there would be that possibility.

4054. (Lady Bragg): Mr. Gregory-Jones, I want to ask you one question about education for marriage, which you consider to be of fundamental importance?—Yes.

4055. You said that you thought it should be compulsory, and I imagine that you have given this very careful thought. I would like to ask you where you have in mind to undertake this teaching in the universities?—I say especially in universities because you said you were not quite sure about how such teaching should be carried out in schools?—I had envisaged that it would be undertaken by the teachers, but they would require special training.

4056. Do you mean by university professors, when you say teachers?—I was dealing with the schools. It would have to be undertaken by somebody with a specialised training. I do not know that there is at the moment anybody who would be able to undertake this work without special training, but it would be undertaken by the staff.

4057. Do you mean that the existing staff should be specially trained or were you thinking of asking some body such as the Marriage Guidance Council to undertake this immense programme?—The Marriage Guidance

23 July, 1952]

MR. J. M. GREGORY-JONES

[Continued]

PAPER No. 52. MEMORANDUM SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.

Council have got so much on their shoulders already. I think that their function really comes at a slightly later stage, in the instruction of engaged couples, but I would say that the existing staff—especially selected members of the existing staff, obviously everybody would not be suitable—should be trained. That is really what I had in mind.

4058. Would you consider such education to be more important at the school age or university age?—I think the university age is probably the more important, but something of a more elementary nature could well be taught in schools.

4059. Do you think that you might find a school of thought amongst university teachers to the effect that students—and especially male students—taking a three-year course which already makes heavy demands on their time, should not be encouraged to think about marriage and its various aspects?—I did not particularly contemplate that. University students have a lot to think about certainly, but I think they would be only too glad to receive the instruction I had in mind. I am not speaking for the Marriage Guidance Council, of course—but so far as the pre-marital instruction at present being given by the Marriage Guidance Council is concerned, the Council does find that couples are only too anxious and grateful to have such facilities as are available for this instruction.

4060. But this is to be compulsory?—I did feel that it should be compulsory. But it might well be that if it was not compulsory people would attend for instruction just the same, in which case obviously it would be better for it not to be compulsory. I had really in mind that it should reach the greatest possible number of adolescents—that preferably it should be voluntary but that, if necessary, it might be compulsory. It is a very difficult decision to take as to how that line should be achieved.

4061. May I ask, if it is so important, what about all the people who do not go to university?—It would be a big task to undertake, but I think that there should be facilities available for these people as well, by means of night classes, shall we say.

4062. Also compulsory?—Preferably voluntary. If it was found under the voluntary system that people were not attending, then I think probably it would be better to be compulsory than not at all.

4063. (Lord Keith): I would like to ask one supplementary question. Have you considered at all the report on the recent census figures, particularly with regard to the marriage status of the population?—Not in any great detail.

4064. Did you notice that the number of married people in the population has risen very considerably in recent years?—Yes.

4065. And particularly among the younger members of the population?—Yes.

4066. I think it was pointed out that, between the years of nineteen and twenty-four, there was a very considerable rise in the number of married people?—Yes.

4067. I wonder if that reflected in any way on your view about people marrying with divorce in their minds?—I think that perhaps people are tending to marry younger now than they used to, and it may be—I would not like to be at all dogmatic about it—that the prospect that they can have their marriages dissolved if they are not successful, and the fact that that is much more in young people's minds than ever it was before—may be encouraging an increase in earlier marriages. I think that may be so, but I would not like—

4068. The Registrar General pointed out that in spite of the big increase in the number of divorces in the last ten years, the number of marriages had increased very much more?—Yes.

4069. That might indicate that people, particularly young people, were marrying and sticking to their marriages?—I hope there are a vast number who are.

(Chairman): Thank you, Mr. Gregory-Jones, for your memorandum and for the help you have given us this morning. We are much obliged to you.

(The witness withdrew.)

PAPER No. 52

MEMORANDUM SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.

1. Introduction

In submitting this memorandum I wish to make clear the following points:—

(a) It is limited to the requirements of questions (a), (b) and (c) of the Commission's Press Notice.

(b) My experience and qualifications have provided the material which will enable me to advance views on policy covering the questions of marriage and divorce, under present-day social conditions, and, therefore, I consider it to be my duty to place those views before the Commission for their consideration.

(c) My personal experience on the bench is confined to the Liverpool City Magistrates' Courts, and I am, therefore, appreciative of the fact that parts of the text covering courts of summary jurisdiction may not be applicable to smaller courts.

(d) I have endeavoured to be sparing in quoting individual cases.

(e) I have closely observed the stipulations that memoranda should be concerned with the importance of considering the promotion and maintenance of happy married life, and it is in this connection that I have considered it necessary to emphasise the importance of basic training in citizenship through education in the schools.

2. Public opinion

Further, I have endeavoured to keep in mind the principle outlined in paragraph 9 of the Denning Report, namely, "It should always be remembered, however, that whilst individual causes may be treated, the institution of marriage itself needs to be anchored by effective public opinion, sound moral teaching, and careful administration

of the law as to divorce". It is not possible to consider the questions before the Commission without appreciating that much ground was adequately covered by the Denning Committee, and that many of its recommendations have not yet been implemented by the legislature. It will, therefore, be necessary from time to time to refer to those recommendations.

Whilst I am in agreement with the sentiments expressed in the quotation from the Denning Report, I confess that I sometimes find difficulty in appreciating just what is meant by "public opinion" today. In these times the organisation of "pressure groups" within the legislature is tending to become a permanent feature, and I fear that views are often advanced with a weight of vocal support which is not matched by a proportionate measure of sympathetic electoral opinion. So-called reforms, masquerading as vital contributions to social progress, are thrust on a bewildered public which most often wonders where "public opinion" has been garnered and threshed to produce the harvest of reform measures later to prove often a source of future embarrassment to themselves and the legislature.

3. Marriage failures: the causes

Paragraph 5 of the Denning Report defines the basic causes of the failure of marriages, and, broadly speaking, I agree. In my opinion, however, the associations and other bodies referred to, though admirable in themselves, are inadequate in resources and personnel to touch more than the fringe of the problem of broken marriages today. Many of the young people whose marriages are breaking down are unlikely to make contact with the recommended voluntary associations, and the young people who approach marriage with sufficient thought to attend instructional classes are unlikely to need the assistance of

these voluntary agencies. In short, those whose need is the greatest will not only refuse such help, but will do all they can to avoid it. I think we are rapidly approaching the time when there should be a more general legislation that marriage problems are the direct responsibility of the contracting parties, and cannot indefinitely be attributed to the unsettled times in which we live or to the outcome of conditions following two world wars. Young people must be taught through educational processes that they have duties and responsibilities as citizens if they are to be the good home-makers of the future.

4. Present-day standards

A statistical study of the position is relative to marriage, separation, and divorce makes depressing reading. In addition to the information furnished by statistics it is necessary to remember that a very high percentage of women are pregnant before marriage, add to this the testimony of people engaged in juvenile court administration, and moral welfare work, and one cannot escape the conclusion that training for citizenship and its demands in every-day life is a vital omission from the present educational training scheme.

It is admitted that a good home background should prove to be a sound basis for good behaviour and intelligent citizenship, but I know also that a large proportion of the present generation lack the influence of Christian teaching in the home and the moral discipline which flows from it. As one actively engaged in civic and professional duties it is clear to me that the welfare state has not yet succeeded in evoking a general response to the implication that duties are as important as rights, and until this vital lesson is driven home there will not be any appreciable progress towards that self-discipline which is the only basis for the development of character. It follows that we are unlikely to increase the proportion of successful marriages until there is more general recognition of this important fact. From this recognition it follows that the school has a vital part in early training.

5. The school

The introduction of new classifications in our educational system has not, as yet, removed the handicap of overcrowded classes, insufficient and inferior accommodation, and inadequate teaching staffs in the secondary modern schools or their equivalent. The present timetable cannot allow adequate time for the teaching of good citizenship. Attendance is limited to six hours daily and as this must include time for recreation, etc., there is barely time for teaching staffs to get beyond the basic three "A's" which, under the new system, have replaced the better known three "R's". I feel, therefore, that if the younger generation is to acquire a proper respect and understanding of the duties implicit in membership of the welfare state, additional school attendance is a vital necessity for those of eleven years and over. Such additional schooling should be compulsory, and in the evening. The extra school syllabus could provide adequate and graduated tuition in all aspects of training in citizenship, and in the later age sessions could include sensible education in matters concerning sex behaviour. This would offset the unsettling effect of unwholesome sources of sex information which excite many adolescents and surround a normal function with unhealthy secrecy which finds expression in experiment, often with disastrous results. The present position where many young people leave school at four o'clock, and later hang around the street corners waiting for the cinema to open, and who experiment with sex, often, from boredom, is causing concern to social workers and organisers. I know that there are voluntary associations which cater for out-of-school activities, but the influence of these movements is limited to the minority who know the value of making sensible use of their leisure time.

I am aware that these suggestions are being made at a time when cuts in expenditure are envisaged in the matter of education. Further, I appreciate that teachers cannot undertake evening schools after their normal day's work, and my proposal would mean additional teaching staff. Nevertheless, I do feel that the practical difficulties of the present period should not prevent the proposals being put forward for consideration.

As an immediate step I suggest that in the present fiscal year, between fourteen and fifteen years of age, the syllabus should be concerned entirely with subjects covering

citizenship in its widest sense. The present proposal that the school leaving age should be lowered on grounds of economy is retrograde, and takes little cognizance of the problems before the Commission many of which can be traced directly to inferior educational training.

The foregoing suggestions are put forward in the hope that they may indicate a way to help the present generation of young people at school, and if they appear to be unrelated to the questions of marriage and divorce I do submit that if the essentials of citizenship had been given prominence in educational programmes of the past it is possible that the present Royal Commission need not have been appointed.

6. "Forced" marriages

The "forced" marriage is a vital factor in the number of broken marriages. It is a matter of regret that many parents resort to compulsion towards marriage whenever a daughter is deemed to be pregnant. It is, in my view, wiser to await the birth of the child before taking a decision on marriage. Should the parties then elect to forego matrimony, the man would be bound to pay for the maintenance of the child, but possibly a loveless marriage would have been averted.

Present-day housing conditions, allied in many cases to low-earning capacity of the husband, and a lack of real affection between the parties meant that the marriage is doomed to failure. Too often I see the consequences of these "forced" marriages; the resentment and hostility between the families because an unwanted union has been grudgingly accepted as a means of "giving the child a name". This bitterness persists throughout the years, and can be the source of much matrimonial strife. Even after other children have been born it is not unusual to hear the parties state that the marriage was hopeless from the beginning, and indeed it often is. I realise the impracticability of legislation to prevent the marriage of a woman under twenty-one years of age until after the birth of the child, but I do press for the present special birth certificate to be converted into a normal issue thus avoiding any distinction between legitimate and illegitimate children. I consider it most desirable that parents and welfare workers should be encouraged to refrain from applying pressure to bring about "forced" marriages, and that instead there should be more agitation for the provision of nursery accommodation which would enable the unmarried mother to have the custody of her child, and at the same time, follow normal employment. I think that the girl should keep her baby, or arrange for its adoption through one of the recognised agencies if circumstances dictate that step. Later, she may meet and marry a man for whom she has real affection. It is wrong that a girl should be forced into an undesirable marriage later to be dissolved in the Divorce Court if the parties decide to forego a loveless marriage. If divorce is not sought, there may be legal separation, or worse—a life-long degradation of personalities who should never have been compelled to marry.

7. Reconciliation

I feel that in the majority of marriages which break down the problem is that both parties completely misunderstand the real purpose of the union, and appear to think that the only answer to the problem is a divorce. The Denslow Committee was mainly concerned with reconciliation, and, while I applaud their sentiments, I disagree with their recommendations. Paragraph 16 and other sections of its Report, appear to assume that it is normal practice for a probation officer to see one or both parties to a matrimonial hearing before the case is heard by the court. This is not my experience, and the weight of matrimonial and domestic proceedings business handled in the court in which I adjudicate, would make it impracticable for such a practice to be followed there. Possibly, in smaller courts in less congested areas, where applications are limited in number, the practice is for a probation officer to investigate grounds for reconciliation, but this can only be done where these officials are not overburdened with case-work. Generally speaking, I would say that only the working class type of applicant would seek the advice of a probation officer. Middle and lower-middle class applicants resent the suggestion that the probation officer could help, and prefer to go direct to the High Court where the suggestion is not normally pressed.

(3) *Conditions for effective reconciliation.* In general I am in agreement with the suggested conditions for effective reconciliation outlined in paragraph 22 of the Denning Report. However, I hold strongly to the opinion that the magnitude and urgency of the problem of broken marriages today demands that reconciliation should no longer be the exclusive province of the voluntary agency. The consequences of a broken marriage are far-reaching and are felt particularly by the children of the union. This expanding pool of human misery should be the concern of the State, and not be left to the administration of voluntary agencies, no matter how well-intentioned they may be, or how influential their sponsors.

The advent of the welfare state has induced popular acceptance of officially controlled social services over a wide area of circumstances affecting the individual, and I consider that the House of Commons must face squarely the fruits of previous legislation. Despite protestations to the contrary when it was introduced in the House of Commons, the Matrimonial Causes Act, 1937, has weakened the marriage bond and the easier divorce policy has resulted in an alarming increase in the divorce rate, which is an undesirable feature of our time. Further, it would appear to be obvious that further legislation of a like nature would share the same fate. I fear that the House of Commons is unlikely to retrace its steps, and it must logically be prepared to face the present position.

It appears to me to be impracticable to pursue the suggestion that reconciliation should be left to the machinery of the voluntary agency.

(4) *Voluntary agencies.* The Denning Committee proposed that the Marriage Guidance Council, in association with the Churches and other voluntary agencies, should be the instrument for the purposes of reconciliation. So far as the Church is concerned, whilst it is a matter of regret, the position is that its effective influence on this and similar problems appears to be diminishing. The aims of the Marriage Guidance Council are praiseworthy, and tribute is due to those public-spirited people who have voluntarily submitted themselves to a measure of training and who have unstintingly given up spare time to assist in the reconciliation of spouses whose marriages are in danger of breaking up through misunderstanding. These efforts, however, are in the main ineffective through lack of funds, which are derived from local authority grants and private donations. The latter are bound to diminish as taxation increases, and it must be admitted that an organisation without sufficient funds to pay for trained personnel will be ineffective. I think that the Marriage Guidance Council itself would admit to very limited progress only, and this principally in the London area. I am aware that it is the practice in this country to permit voluntary organisations to take the first steps in social reform measures, and that when the preliminary work has been done Parliament usually assumes responsibility, through legislation. However, that process is too leisurely and the increase in the number of broken marriages with all the problems inherent in these domestic tangles make it a matter of urgency that legislative action be initiated as soon as possible for the purpose of placing reconciliation on an official basis. The Denning Committee apparently thought that the intimate nature of marriage would operate against effective official action in this matter. I agree that marriage is an intimate personal relationship, but I am satisfied that the average person now accepts the impersonal attitude of State agencies as normal practice, and it is my considered opinion that there would not be much reluctance in referring matrimonial troubles to an official agency, namely, a legal advice centre. In support of this point of view one can point to the ready acceptance by the public of recourse to clinics, pre-natal and post-natal, and the acceptance of the National Assistance Board with its apparatus for enquiry into private and family affairs. If further support is needed this can be provided by reference to a recently published report on an investigation into the lives and habits of some hundreds of ordinary people in York. This book *The Survey of English Life and Leisure*, by Rowntree and Laver, gives remarkable instances where it is quite clear that the traditional reserve attributed to our people appears to be fast disappearing under the impact of community consciousness. The attempt to surround the question of present-day marriage with an aura of sanctity is out of

keeping in view of moral standards debased by so many of the young people who seek information and help. My experience proves to me that far from being diffident or reticent they are ready to discuss most intimate questions with the same detachment as if they were discussing the personality of a film star.

(5) *Legal advice centres and marriage officers.* It is my considered opinion in the matter of reconciliation that no application for separation or divorce should be admitted until there has been a preliminary investigation as to the causes for the breakdown of the marriage. It is too easy for young people to say, "I am fed up with you and should never have married you", and then forthwith to seek a way in which to bring about a breakdown of the marriage, even to the extent of committing adultery if this seems to be the only way. I feel most strongly that there must be official machinery for sifting all cases, and I suggest that the most practicable method would be to utilise the legal advice centres, which are authorised by the Legal Aid and Advice Act, 1949, Section 7 (2), when they are created. These centres are presently used by persons of small means. In these centres I suggest there should be one or more marriage officers whose business it would be to submit each application to scrutiny before arriving at a decision. The procedure in criminal appeals provides an analogy in part. For instance, any man convicted at quarter sessions or assizes, who desires to appeal, completes the notice, which is then considered by a single judge. He decides whether there is sufficient substance in the appeal to warrant unadvised progress to the full Court of Criminal Appeal, and if he is not satisfied that there are sufficient grounds for a full hearing the notice is rejected. I am aware, of course, that in these cases there has been a trial and a decision given, and that the analogy is incomplete but it serves to illustrate the point in connection with the functions of a marriage officer.

As part of the legal advice centre I suggest that there should be a reconciliation officer. This to be staffed by probation officers or marriage guidance counsellors. The procedure would be as follows—the applicant will have attended at the centre, and provided written details on an appropriate form. This would be quite a simple questionnaire, not confusing to the applicant, and the usual particulars—name, address, details of family, date of marriage, and provision for a short account of the reasons for the application. After the application had been registered, the next step would be to send a letter to the other party informing him or her that a visit had been made to the centre. A study of the application and the other party's reply should enable the marriage officer to determine whether there was a possibility of inducing the parties to get together and become reconciled. My experience as Deputy Chairman of a Rent Tribunal confirms my suggestion that people when replying to an enquiry form invariably add supplementary information in the form of a letter attached to the form, and I am sure that there would be the same reaction to an enquiry from a legal advice centre.

The marriage officer should be legally qualified, and if he is well chosen there should not be any difficulty in deciding which of the cases might yield to attempts at reconciliation, and those which were intractable and merited an unadvised reference to the domestic proceedings court or to the legal aid committee. When a case has been referred to the reconciliation office the application will be considered to be in suspense until that office reports back to the marriage officer. All necessary interviews and home visits would be undertaken by the reconciliation office and a report submitted to the marriage officer, who would then decide whether further action was necessary. The legal advice centres and the reconciliation office would soon be well known to the general public, and I am sure that there would be no hesitation when people required advice or assistance in matrimonial troubles.

(6) *Interference with legal freedom.* I anticipate the argument that my proposals interfere with the right of persons to seek redress in the courts, but here it must be borne in mind that parties to an improvident marriage have shown little inclination initially to make a success of the union, and they then expect the State, through the machinery of the Legal Aid Scheme, to furnish the funds to enable them to be legally released from the results of their improvidence. It is surely not asking too

much to seek a basis for reconciliation before permitting them to obtain a dissolution which is inevitably the prelude to a second accession into matrimony with, possibly, the same results, at the taxpayers' expense.

I feel sure that if the legislature acted in this matter, and it was ordered that applications could not proceed until a preliminary investigation had been made, it would have the effect of making many people revise their ideas on marriage and divorce. I am aware that the Denning Committee held the view that where preliminary courts had been held abroad they were not a success. However, I do not consider this as proof that a preliminary investigation, on the lines I have described, would fail to be satisfactory in this country. Whether the proceedings of the reconciliation officer should be privileged in the event of the case going forward is a matter outside the scope of this memorandum. As a question of policy it would be a matter for legislative decision, after consultation with the Law Officers of the Crown.

5. Courts of summary jurisdiction

(i) The increase in the number of applications under the Summary Jurisdiction (Separation and Maintenance) Act, 1895 to 1959, is seriously testing the resources and capacity of these courts. The growth in the volume of work undertaken by the domestic proceedings courts in Liverpool is shown at Appendix 1. These are extracted from the tables of statistics included in the Annual Report to the Liverpool City Justices, and these figures illustrate the growth in this work for the period 1946 to 1959, inclusive.

(ii) *Present procedure.* The parties may apply in person for a summons or they may engage a solicitor to make the application on their behalf. The bulk of the applications cover desertion, cruelty, or neglect to maintain, and invariably the applicant is the wife. There are many applications by wives who have separated from their husbands and who are obviously reluctant to apply for the summons, but are compelled to do so by the National Assistance Board, when it becomes aware that State funds are being paid to assist a wife whose husband is in employment. The Board rightly argues that he must maintain his wife unless, and until, a court of law decides that there are good grounds for his refusal not to do so.

The inference in the Denning Report is that either one or both of the parties to matrimonial proceedings are first seen by a probation officer but in my own experience this is not the normal practice. Occasionally this may happen.

The magistrate on oath hears the application for summons, and as these may include domestic proceedings, assaults of maintenance—wife and guardianship of infants, insulting words, assaults, and sundry triable phantas, he has not the time to make a close investigation of the reasons for the applications. Also, he is called upon to hear applications for further time to pay fines.

(iii) *Hearings.* When the summons has been served and the case is for hearing the magistrate may possibly ask, particularly if the parties are young, whether the probation officer has been consulted or whether reconciliation has been considered, and for this purpose an adjournment may be suggested. In my experience, however, when the parties have reached the court they are reluctant to agree to an adjournment even though their legal advisers are willing to help the court in this connection. Where the parties are unwilling to agree to an adjournment the magistrates have the power to order it if they are of the opinion that adjournment is in the interests of the parties. In these circumstances it is not unusual for the plaintiff's representative to request that an interim order be made pending the hearing of the case. These orders are, in my opinion, unsatisfactory. The magistrates making the order will be unlikely to be sitting when the case comes up for hearing after the adjournment, and it is not unusual for a fresh bench to assume that the existence of the interim order is grounded on good reasons. This, I feel, tends to prejudice the interim order might be converted into the formal order if the applicant is successful. It is my opinion that an interim order should not be made until the case has been heard and considered in full.

(iv) *Adjournment.* I am aware that the policy of adjournment appears to be sensible, but my experience is that once the parties have appeared in court their appetites

are whetted by the possibility of laying all complaints before the court, and in expectation of a legal settlement, and having attuned their minds to that state of anticipation, they do not welcome adjournments for the purpose of reconciliation. It is for this reason that I have pressed, and press most strongly, for all cases to be referred to the marriage officer (see earlier proposals). If there is an early attempt at reconciliation it might be successful, but there can be little doubt that when two people have been parties in a hearing which has been fought to the bitter end, there is little likelihood that they will choose to forget the experience and attempt to resume married life with a measure of dignity and forbearance. Also it is often the case that in their eagerness to score points either party will reveal intimate details of the married life. If the case is dismissed there is very little hope that reconciliation can be arranged.

(v) *Composition of magistrates' courts: selection of magistrates for domestic proceedings.* Magistrates for sots in the domestic proceedings courts are not specially selected for fitness or aptitude. In my opinion there are some who though willing to serve are not suitable for this type of work on grounds of age, temperament, or by religious persuasion. Matrimonial hearings can be complicated—desertion, particularly constructive desertion, and cases of cruelty pose questions which are difficult to decide legally and this fact is not readily appreciated by the lay magistrate. I anticipate the argument that the clerk's function is to guide the magistrates in law, but unfortunately many lay magistrates sitting in matrimonial courts take the view that they are capable of deciding cases of cruelty and desertion without assistance from the clerk. To them it seems merely a question of commonsense and not of law.

(vi) *Cruelty.* Allegations of cruelty are often difficult to prove. To succeed in the magistrate's court the applicant must prove that the cruelty is persistent. This is normally taken to mean that the plaintiff must prove three assaults over a period of six months. In the High Court the qualification persistent is not required. What must be proved there is that by reason of the respondent's cruelty the petitioner's health has been affected. There would appear to be no valid reason, therefore, why the qualification of persistent should remain in the magistrates' courts. Apart from this point, the question of cruelty as a matrimonial cause has been eroding the minds of His Majesty's judges for some time. A study of recently decided cases in the Court of Appeal, underlines the difficulties inherent in this problem, even to the trained legal mind.

It is within my knowledge that solicitors will advise clients, if they have the means, to proceed to the High Court as it is believed to be easier to obtain a divorce there on grounds of cruelty than to obtain a separation order in the magistrate's court on the same grounds. I consider this to be true. The High Court appreciates the importance of similar cases in which a decision has been given by the Court of Appeal but factors of this nature are not fully understood in magistrates' courts. An analysis of the cases decided in the Liverpool City Magistrates' Courts for the period 1st January to 30th September, 1951 (see Appendix 2), shows an unduly high proportion of cases dismissed.

At Appendix 3, for the same period, is a list of the decisions by the Divisional Court in cases taken on appeal from the Magistrates' Court for Liverpool City. Where re-hearings have been ordered the Divisional Court qualified its order with a request that the stipendiary magistrate should adjudicate in certain cases. In these instances three or four sessions have been given to the re-hearing, whereby the intricacies involved in constructive desertion, and cruelty, were adequately argued. It is important to remember that unless ample time is given to the consideration of these cases a wrong decision may be recorded with its attendant consequences in human misery.

9. Appeals

It may be suggested that if the applicant is dissatisfied with the decision of the magistrate's court he has his remedy by way of appeal, to the Divisional Court of the King's Bench Division. However, since the majority of the applicants in the summary court are persons of limited means they are precluded by reason of cost from exercising the right accorded them by law. Appendix 2 shows that during the nine months ended 30th September, 1951,

in the Liverpool courts 133 cases were dismissed in the matrimonial courts, and during the same period (Appendix 3) only ten cases were sent forward to the Divisional Court. I find it difficult to believe that the remaining 123 persons had no desire to take their case further. I am of the opinion that they were deterred from further action by reason of additional expense. In this connection it should be pointed out that persons convicted of criminal offences are not deprived on grounds of expense from giving notice of appeal, which is taken by the court of quarter sessions. It is not suggested, however, that appeals from matrimonial courts should be dealt with at quarter sessions, but consideration should be given to a revision of this question of the right of appeal to a court other than the High Court, and I suggest that the county court would be the appropriate court even if this necessitates the appointment of a divorce commissioner for this purpose. I do not feel that the question of cost should be the paramount consideration where the administration of justice is concerned.

10. Maintenance orders

Since the Denning Committee's recommendations have been implemented maintenance orders are adequate in amount. In my experience maximum orders are not usual in magistrates' courts. Magistrates sometimes adopt the practice of making a smaller order on the grounds that it is more satisfactory for the wife to receive a smaller order regularly, than to be granted a larger order with the difficulty of enforcing it. This problem would not arise if enforcement could be effected sensibly. The position today is often tragic—the man does not make the payments—the woman applies at the court offices and discovers that there is no money—she is compelled to register with the National Assistance Board who insist that court action is initiated—a summons is then issued for arrears, and on appearance in court the man states he is unemployed. In many cases this will be true as he has left his employment some days before in order to avoid commitment to prison. He is aware that on proved inability to pay he will not be committed to prison, and that the case will be adjourned. In the meantime his wife and family are being maintained by public funds, augmented by the earnings of the wife. Often it is a hardship for her to attend the court, and she loses money by taking time off for the purpose. Eventually, the man will be committed to prison but this is no help to the wife, as the amount of the arrears will be cleared and he will then start all over again. Small wonder, therefore, that many women give up the unequal struggle in this cat and mouse game, and bring up their children single-handed, or in some cases they find another man who is willing to shoulder the burden. When the latter situation occurs the "wronged" husband hastens to apply for legal aid and thence to the High Court to obtain a divorce on the grounds of his wife's adultery. Her plea that his refusal to pay the maintenance order drove her to it would not be acceptable. Officially, of course, the man enforces the order but the utter failure of the present procedure is not generally appreciated, and the legislature should consider means for strengthening the legal position of these wives who have been compelled to shoulder their own and their husband's responsibilities, with the help of State funds.

(c) *The solution.* To me the solution does not appear to be difficult. Where the man is a proved persistent defaulter the amount of the order should be deducted from his wages, at source, in the same way as P.A.Y.E. operates in income tax. I do not for one moment suggest that this procedure should apply automatically on the making of an order in the magistrates' courts. Where a man is willing to meet the order it seems to me to be quite unnecessary to acquaint his employers with his matrimonial difficulties, nor is it wise to open a door for a spiteful wife to establish a right to this course of action. The persistent defaulter would, in my view, be the man who had been summoned for arrears, had promised to pay the order plus an amount for arrears, and again defaulted. In place of the present alternative of a prison sentence he should, on appearance before the defaulter's court, be certified a "persistent defaulter". His employers would then be notified of the amount of the order, and of the court's decision. They would then be authorized to deduct the amount of the order (from wages due to the man, and forward it to the clerk to the justices from whom the wife would collect the money in the normal way. The figure

at Appendix 1 show that applications for the payment of arrears are on the increase in the City of Liverpool, and there would appear to be no reason to doubt that similar problems are being experienced elsewhere.

Another important aspect of this question is that a man proposing to set up an establishment with another woman would hesitate to take that step if he knew that the maintenance of his wife and family is a first charge on his wages, and that this would be a deduction at source. It is by no means unusual to hear a husband say, in an arrears court, "I can't pay her, I have my 'present' wife to keep". Marriage reformers, who are so vocal in their demands for easier separation and divorce, might, with profit, consider the problem of the man who attempts to maintain two homes on a wage barely adequate for one in these difficult times.

11. Lapsing of orders under Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925

A matter which is causing considerable hardship at the present time, and requiring urgent legislation, is the amendment of Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925:—

"No order made under the principal Act shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

(The principal Act referred to is the Summary Jurisdiction (Married Women) Act, 1895.)

(i) In many cases at the present time the rent book is in the husband's name, and the position of a wife who has been granted an order is virtually intolerable. It is usually impossible for her to obtain living accommodation in these difficult times particularly where there are children. With the lapsing of the court order due to the operation of the above Section, the wife is without protection and in certain cases at the mercy of a proved, brutal husband, whose behaviour will not improve with the knowledge that the order is no longer enforceable.

(ii) *The solution.* I suggest that consideration be given to extending the present "Transmission of tenancy on the death of a statutory tenant" to include wives who have obtained a separation order or a divorce decree. The majority of cases would be straightforward, but should unusual difficulties arise the case could be argued in the county court in the normal way. Any proposed legislation should also include house property owned and let by local authorities.

12. High court jurisdiction

(a) *Jurisdiction.* The introduction of the Law Reform Act, 1949, removed many grievances and I am satisfied that all persons who might reasonably expect to be assisted are covered.

(ii) *Grounds for divorce or judicial separation.*

(a) No doubt the Commission will hear many proposals the object of which will be the provision of additional grounds for divorce to meet cases of hardship not adequately covered by existing legislation. The value to the community of permanent marriage as a basic principle should not be permitted to become a secondary consideration to the relief of the individual hard case. Any extension of the grounds for divorce will weaken marriage as an institution, and the attitude of many young people will be conditioned largely by the attitude of the legislature to this question. Without extending the present grounds I consider that relief could be provided in many cases if these grounds were reviewed in the light of present-day social conditions, and their limits extended to permit of a more liberal interpretation of conduct likely to produce an adverse effect on the health of the individual petitioner.

(b) *Adultery.* The present approach to the question of the exercise of discretion in applications for divorce on grounds of adultery merits review. If its only object is to enable both parties to proceed to further ceremonies of marriage—if this is what is interpreted as public policy—then I feel it should not be necessary to ask for such discretion unless the adultery of the petitioner could reasonably be said to have conducted to that of

the respondent. In a recent case each party to the divorce had a number of illegitimate children, and the adultery had continued for almost identical periods yet the Court of Appeal granted a decree to the wife.

If the petitioner must ask for discretion then it should be exercised with greater diligence. Many excuses seem to be given by petitioners, which after a long period of time no longer sound convincing. Where a man is the father of several illegitimate children to a woman, unless there is proof of great poverty, I fail to appreciate why the State should assist him to regularise his position in the eyes of the law. This becomes more pertinent if the first matrimonial offence on the part of the wife occurred considerably later than his own. The situation is all too prevalent where a woman has lived with a man for very many years and action is now taken with a view to ensuring her eligibility for a higher widow's pension for the rest of her life. Quite apart and, in my view, more serious than the cost to the State in such cases, which in this connection only affects applicants for legal aid, is the wholly undesirable impression created in the public mind that asking for discretion is a mere formality.

(c) *Cruelty.* Whilst strictness is needed in the exercise of discretion in adultery, I am satisfied that a wider application of discretion should be available in applications for divorce on grounds of cruelty. Many people whose life may be made unbearable in the matrimonial home, find it almost impossible to prove that their health has been directly affected by the conduct of the respondent, and the burden of proof in this type of case should be reconsidered.

The results of recent enquiries made by myself show that in the majority of cases covering the potentially assisted person, in the case of the wife petitioner, the underlying cause of the breakdown of the marriage is the drunkenness of the husband, despite the fact that official statistics show a decline in the number of prosecutions for drunkenness. Many working class wives admit that they now have larger housekeeping allowances—sometimes larger than those enjoyed in middle class homes—and they agree that rent and expenses are lower. Nevertheless, it is a fact that many men make little or no effort to improve the general standard of life for themselves or their families, and the additional money is often spent on drink, tobacco, or gambling. Where actual violence can be proved the wife can obtain a separation and/or divorce, but frequently the complaint is of the husband's filthy personal habits arising out of drunkenness, his vomiting and urinating in the bedroom and other parts of the home, and his foul abuse, often in the presence of children, when the wife tries to complain. Such occurrences are difficult to prove as grounds of cruelty, and it is not unusual for the wife who wishes to rear her children with some standards of decency to leave the matrimonial home before she is able to provide the necessary legal proof that her health has suffered as a result of the husband's conduct. From the weary horror with which these stories are told it is clear that many of these wives would more readily excuse blows or even adultery. It is unusual for them to consult a doctor, and even if they did he would find it impossible in court to link up the wife's nervous state with the conduct of the husband as his knowledge would be limited to hearsay, and, therefore, inadmissible. I submit that in cases of this nature a wife should be able to divorce her husband on grounds of cruelty, as shown by, not his intention to cause hurt but on the grounds of his total disregard for his responsibilities as a husband and parent, as shown by his filthy habits due to his own self-indulgence. The same difficulties concerning the burden of proof will be experienced by the wife if she leaves him and pleads she had just cause for doing so, and as pointed out earlier in this memorandum the acute housing shortage will prevent her from finding alternative accommodation for herself and the children.

A case also requiring assistance is that of the wife of a man constantly in and out of prison with the resultant destitution of his wife and family and the bad influence exercised over the children. Cases of this type should fall within the definition of cruelty and these wives should be able to obtain legal redress. Without approaching the mental cruelty standards of certain other countries we could make wider use of

the case that a course of conduct may be cruelty in the legal sense if it adversely affects the particular petitioner.

There are also cases in which the husband petitioner needs help of a similar character. Here the primary allegation may be of a complete lack of a sense of responsibility, sometimes shown by sheer indolence but often by a firm determination to seek enjoyment outside the home. It is not generally known how many wives, with young children, leave their husbands to mind the children whilst they go out drinking and dancing. Where this course of conduct leads, as it often does, to adultery and desertion the husband has his remedy. Where, however, this is not the case he has no redress. The wife may be abusive when drunk, and although in many cases she would not object to him having the custody of the children he cannot provide alternative accommodation for them. The children's officer does his best to assist the husband but pressure of accommodation on his department precludes many deserving cases. Dancing, while harmless in itself, could become a social evil, if indulged in to the extent that husband and children become subordinate to it.

(d) *Desertion.* It will be appreciated that there are two distinct types of desertion, the simple disappearance and those separations in which it is extremely difficult to apportion responsibility to either side. I feel most strongly, however, that partings by mutual consent should never give rise to a petition based on desertion. Further, I consider that the three-year period is suitable and should not be reduced. Where questions of interpretation of the period arise, I feel that less attention should be paid to one or several acts of sexual intercourse, possibly not taking place in the matrimonial home, and apparently having little real association with the marriage, than to periods, however short, of actual cohabitation. I support the view that where there is a reunion after a full three years then a short period might revive the desertion in a similar manner to the case of condoned adultery.

(e) *Cases of impasse.* To avoid the introduction of fresh grounds for divorce I propose that consideration be given to the addition of a further discretion clause. This could be used to break the present impasse in cases where the wronged party refuses to take proceedings. This discretion, however, should only be used in cases of extreme hardship, and preferably where there are no children of the marriage.

There are many cases where the parties separate by mutual consent, and neither has committed any matrimonial offence. Later, one of them forms an association, and wishes to re-marry. As the wife is not entitled to maintenance a divorce will not affect her financial position. If it is the wife who is re-marrying she may be relieving the State of an obligation to maintain her. This discretion should not be exercised if there are children of the marriage, as by re-marrying the husband reduces his ability to maintain them.

The adoption of this proposal would give a petitioner the right to come openly to the court, admitting that he or she is the wrongdoer who now has an opportunity to live a re-adjusted life, with the help of the court. At the present time even where the respondent does not defend the case, the petitioner cannot be free. It would also remove the "provision of evidence" and the offensive device of collusion could disappear from the scene.

13. Children

(i) The Denning Committee made some admirable recommendations concerning the children of divorced parents but unfortunately they still await implementing by the legislature. I am in agreement with the general conclusions expressed by them at paragraph 33 but feel there is a vital need for some oversight of the future disposition of these children after the decree has been made absolute. When divorce is contemplated the children are often used as pawns by one party or the other and their interests are often subordinated to the main purpose, which is the ending of a marriage which has failed.

Lack of alternative accommodation today often precludes the mother from applying for the custody of the children of the marriage even though she may be the more suitable of the two parents. Further, the mother

who is the "guilty" party is sometimes afraid to ask for custody even though she may be a good mother. A more tolerant approach to this aspect of the problem is needed in these cases. It may appear strange to those unfamiliar with the sordid side of the broken marriage to realise that not all immoral women are bad mothers, unfit to have the care of the children. My attention was drawn recently to a case concerning a girl of fourteen years of age. Some years ago her parents were divorced and the judge stated that the mother was not fit to have the custody of her daughter. This girl has since been in a number of foster homes and institutions but has never settled in any of them. She is good looking, bright and highly intelligent and her only wish is to be with her mother for whom she has a deep affection. This feeling is reciprocated but the girl is still in the care of a local authority and even now takes advantage of every opportunity to be with her mother. I am satisfied that an initial mistake was made in that case and this has been a source of much unhappiness both to the mother and the girl. This is by no means an isolated case.

(ii) *After-care arrangements.* No after-care arrangements are made for the children of divorced parents and so check is made to see if the custody arrangements have changed. In many cases a change has occurred and the children have gone to strangers, to relatives, private schools, nurseries or institutions. The recommendations of the Denning Committee whilst admirable in themselves do not go far enough. It is essential that there should be a periodical check on the welfare of the children of divorced parents. This could be done by extending the provisions of Part V of the Children Act, 1948.

Where the position is clearly satisfactory on the initial check then further checks need only be made at infrequent intervals. In cases where one or both of the parents have re-married the children of the original marriage may be miserable and unwanted. If the check was carried out it would not be difficult for the investigator if in any doubt to communicate with the children's officer or the local authority who would be most willing to assist.

Dame Myra Curtis expressed the view that the children of divorced parents should not come within the province of the children's officer as they were not officially "deprived" within the legal meaning of the term, having one or both parents living. I submit, with respect, that this view is too narrow. In the strict legal sense they may not be deprived but they may be unwanted and unloved and deprived in the moral sense. With the present increase in the number of prosecutions for child cruelty and neglect are we entitled to assume, as we apparently do, that all the children of divorced parents are not in need of supervision? At Appendix 4 is a list of cases concerning children whose parents have been or are being divorced. I have not supplied the names but should they be required they are at the disposal of the Commission. My views are supported by my experience in the juvenile court and in discussions with children's officers and welfare workers.

Pending the appointment of court welfare officers in the High Court, whose particular duty should be to guard the interests of the children in divorce cases, I consider the children's officer should be appointed guardian of them in every divorce case in which there are children of the marriage and I consider this should be done without delay.

(iii) *Court welfare officers.* I consider the appointment of court welfare officers a matter of some urgency. Much was said concerning them and their functions in the Denning Report, but it appeared feasible to resolve itself into the simple expedient of using the probation service. I feel this suggestion should be reconsidered. Many probation officers although admirable people in themselves are not, in my view, suited to the work envisaged. Many of them are young and unmarried and lack the practical knowledge and experience so necessary for the special problems involved. I feel if court welfare officers are to function successfully that they should be officers of the court. There are solicitors and barristers whose training and experience will fit them to undertake the duties outlined. Their appointment would mean that all the parties concerned in a case would be on an equal footing and counsel concerned in the case would speak with greater freedom to them than to a probation officer. Briefs would

be more readily available and they would exercise far greater authority. They would be familiar with the law and would experience no difficulty in making the necessary contacts with the children's officers and the local authority. I feel this suggestion merits serious consideration. If the right people were chosen they could exercise considerable influence in the courts. The problems of the children would come specifically within their province both before and during the case. They would be independent of the petitioner and the respondent and would be able to make such enquiries as the welfare of the children necessitated. This independence would be their most valuable asset and would ensure that the children would no longer be just something to be moved hither and thither at the whim of either parent.

(Dated 18th December, 1951.)

APPENDIX 1

Statistics extracted from the Report of the Clerk to the Justices, Magistrates' Courts, Liverpool, for the year 1950

	Domestic Proceedings				
	1946	1947	1948	1949	1950
Matrimonial complaints for orders ...	1,606	1,242	1,339	1,418	1,434
Matrimonial complaints for variation of orders...	464	474	460	436	468
Proceedings for arrears ...	597	713	654	665	737
Guardianship complaints for orders ...	762	576	571	635	439
Guardianship complaints for variation of orders...	111	123	165	184	188
Proceedings for arrears ...	189	289	352	397	446

APPENDIX 2

An Analysis of Cases under Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1950, at Liverpool City Magistrates' Courts for the period 1st January, 1950, to 30th September, 1950

Ground of Complaint	Result	
	Order made	Dismissed
Desertion ...	158	63
Willful neglect to maintain ...	48	32
Persistent cruelty ...	74	35
Adultery ...	21	3
TOTALS ...	301	133

APPENDIX 3

Details of Appeals in matrimonial Cases from Decisions of Liverpool City Justices for the nine months ended 30th September, 1951

Name of Case	Justices' Decision	Order of Divisional Court	Result of further Hearing (if any) by Justices
"N" ...	Application dismissed	Re-hearing	Order made
"O.C." ...	Application dismissed	Re-hearing	Order made
"H" ...	Application dismissed	Appeal dismissed	—
"C" ...	Application dismissed	Re-hearing	Not yet heard
"H" ...	Application dismissed	Re-hearing	Order made
"C" ...	Order made	Not yet heard	—
"J" ...	Order made	Appeal withdrawn	—
"B" ...	Application dismissed	Appeal dismissed	(Further appeal pending to C.A.)
"T" ...	Order made	Re-hearing	Order made
"D" ...	Order made	Appeal dismissed	—

PAPER No. 52. MEMORANDUM SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.
 PAPER No. 53. SUPPLEMENTARY NOTE SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.

APPENDIX 4

Some Statistics concerning Children in the care of the Local Authority (or who have recently been discharged from care) and whose stay in care has been directly caused by or influenced by the Divorce of the Parents

Direct

1st child born—	21.11.42
2nd " " "	28. 7.44
3rd " " "	10. 4.47

Parents separated. Father not satisfied that the mother was caring properly for the children. Took them from her. Father divorced mother 13.3.51, and children received into care on that date. Discharged to father 19.5.51.

Indirect

1. Girl born—18.8.34
 Mother divorced 1939—re-married 1939. Mother died 1941. Girl remained with step-father and step-mother until 1943. Ran away and admitted to care. Now self-supporting.

2. Boy born—7.3.36
 " " 4.3.39
 " " 19.3.41

Mother divorced. Cohabited with another man and had four children to him. Mother died 19.5.50. All seven children received into care 3.11.50.

3. Boy born—24.5.36
 Girl " 9.12.38

Father divorced. Both children committed to the care of the local authority—(branch of attendance order). Father not exercising proper control. Girl boarded-out. Boy now with father.

4. Girl born—28.12.34
 " " 6. 7.37
 " " 2. 6.40
 " " 31. 3.42
 Boy " 22. 1.39

Mother and father separated 1942. Children committed to care in 1942. Father divorced mother 1948. Re-married and awaiting more accommodation before taking children.

5. Boy born—23.10.36

Father in the Forces. Mother epileptic—could not take care of children. Four received into care in 1940. Mother divorced. Father re-married. No accommodation for boy. Father and step-mother have already taken three other children.

6. Boy born—30.8.43

Mother cohabiting and awaiting a divorce.

7. Girl born—13.44

" " 19.9.45

Mother divorced 1942 (innocent mode of life). Four children received into care in 1947. Mother re-married 1949. Two discharged to mother 1950.

8. Boy born—20.2.35 (illegitimate)

Girl " 3.2.38

Boy " (legitimate) date of birth not stated

First two children are the illegitimate children of the wife. Husband divorced her in 1945, and was given custody of the third child. No accommodation.

9. Girl born—15.5.36

Mother divorced. Child boarded-out. Mother unsuitable.

10. Girl born—17.6.37

" " 6.3.40

Boy " 14.7.43

Parents divorced. Mother had custody of the children—she is now in prison.

11. Girl born—9.8.40

Mother divorced. The girl in the custody of the father who re-married. The girl later committed to the care of the local authority through indecent assault by her brother.

PAPER No. 53

SUPPLEMENTARY NOTE SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.

(See Qs. 4083-4084)

PRESENT POSITION

1. Aggrieved spouse sees:—

(1) Solicitor—Subsequent happenings depend on the type of solicitor. The good type will encourage reconciliation. If the party is not agreeable the solicitor will advise as to separation or divorce, or suggest sending papers to counsel. Then on to legal aid department. Here the case will be investigated and if there are good grounds the case will be sent forward for divorce. The legal aid department has no machinery for reconciliation. Alternatively, the solicitor may consider the case suitable for the magistrate's court, and will send the applicant to apply for a summons or he will make the application on his or her behalf.

(2) Magistrate's Clerk's Office—The aggrieved spouse can follow the procedure which is outlined in the memorandum.

(3) Voluntary Agencies—These may be the local Marriage Guidance Council, the probation officer, or any other voluntary agency engaged with the problem of reconciliation between the parties. If nothing further can be done the aggrieved spouse will be advised to apply to the magistrate's court, consult a solicitor, or see the legal aid department.

From the above it will be noted that no real machinery exists for the purpose of reconciliation, and the present answer to marriage troubles and marriages in the course of foundering seems to be separation or nothing.

SUGGESTIONS FOR THE DETAILED WORKING OF THE SCHEME FOR RECONCILIATION PUT FORWARD IN THE MEMORANDUM SUBMITTED TO THE ROYAL COMMISSION

2. The legal advice centre will contain a separate section for all matrimonial applications, and I suggest that the staff should be as follows:—

(1) Matrimonial Applications Section.

(a) Matrimonial officer (an experienced lawyer).

(b) Assistant matrimonial officer (lawyer or an experienced assistant from the magistrate's clerk's office).

(c) Chief clerk (preferably trained in the legal aid department).

(d) Clerks and typists.

NOTE.—If the scheme came into operation it might be possible to second experienced clerks from magistrates' courts or similar offices.

(2) The Legal Aid Department—already functioning.

(3) Reconciliation Office. (This should be part of the legal advice centre, and in the same set of offices.)

(a) A senior probation officer or a fully trained marriage guidance counsellor, who must be in charge of the office.

(b) An assistant—a probation officer or marriage guidance counsellor.

PAPER NO. 53. SUPPLEMENTARY NOTE SUBMITTED BY MRS. M. A. CUMELLA, M.B.E., J.P.
22nd July, 1952]

MRS. M. A. CUMELLA, M.B.E., J.P.

(c) Clerical work—this could be absorbed by the clerical staff of the legal advice centre.

NOTE.—The practical work could be done by the probation officers, already attached to the courts, with assistance from these marriage guidance counsellors who have had training, or other persons approved by the matrimonial officer. When this type of work is officially recognised there are a number of qualified people who will give their services. At the present time Roman Catholics have formed their own marriage guidance department, but as the legal advice centre will be a government sponsored department there should be no question of setting up separate offices for applicants of different religious persuasions. At the same time it would be wise to have some differing religious on the staff or attached to the reconciliation office, as there are people who would prefer to discuss certain aspects of their marriage problems with a person of their own faith. However, as far as is possible, it would be better for the reconciliation office to carry on its work in the same spirit as in other government offices. (The National Assistance Board and similar social welfare departments do not permit an undue intrusion of religious feeling to colour their activities.)

3. Procedure. For the purposes of the scheme it is essential that all domestic proceedings applications must, in the first instance, be referred to the legal advice centre. This would apply to persons who were consulting solicitors, and those who intended to proceed through the magistrates' court, or any other source.

(1) Each individual would be required to (furnish all relevant information by means of a form, which should be easily understandable by even the simplest of people. It is also essential that the official approach should be such that the applicant will feel that help is readily available if there is difficulty in furnishing the information. The ordinary man or woman beset with matrimonial trouble will shy off if met with a brusque approach. The legal aid department form is reasonably simple to understand, and a similar form could be devised for the purposes of this scheme.

(2) When the complaining spouse has completed the form a copy of it or a summary of its contents should then be sent to the respondent spouse, and this should be accompanied by a form which would be in the nature of a reply to the complaint, when it is completed. If the respondent should ignore the request then the case should be referred direct to the reconciliation office.

(3) On receipt of the respondent's reply, both forms and any other correspondence relating to the case will be examined by the marriage officer, and he should decide the future course of action. It may be that he will require further information, and this could be obtained by writing or by a member of the reconciliation office staff visiting the respondent. If the marriage officer is in possession of all available information he can then do one of three things, namely,

- (a) send the case to the legal aid department, or
- (b) authorise proceedings in the magistrates' court, or
- (c) refer the case to the reconciliation office.

(4) Cases under (a) and (b) will then take their usual course.

(5) Reconciliation office. When the matrimonial officer has referred a case to the reconciliation office it will be on the assumption that full control has passed to that office subject to the advice of the matrimonial officer in certain circumstances. Each referred case will be regarded as in suspense until final action has been completed by the reconciliation office. There are difficulties usually associated with cases where the husband can possibly prove a matrimonial offence by the wife. The question of the wife's maintenance is most difficult, and I think that the reconciliation office should at all times endeavour to persuade the husband in such cases that he should make a voluntary payment, without prejudice. He is legally obliged to maintain any children of the marriage, and there is no difficulty there. Should the husband refuse to make a voluntary payment, it would be unwise to take the matter to the magistrates' court as this step would jeopardise any attempt to reconcile the parties, and would in any case be contrary to the policy in the scheme. In the event of a refusal it would be necessary for the wife to make application to the National Assistance Board. This step would be regrettable but necessary in such circumstances. I do not suggest that the marriage officer should be empowered to order an interim payment. Such questions arising out of different circumstances could be a matter for discussion between the marriage officer and the National Assistance Board.

At the present time there are large numbers of wives who have left their husbands without good cause. The National Assistance Board requires only the proof of need when considering an application for maintenance. However, after a period of time the National Assistance Board compels these women to take proceedings in the magistrates' court, and this is done with much reluctance on the part of the applicant. When in court it is usual for the woman to declare her intention of refusing to return to the matrimonial home, and the husband is then deemed not to be liable for her maintenance, and there is a return to the status quo with the National Assistance Board. Since this is the present position the suggestion made above loses some of its unworthiness. I am not attempting to justify the present position and it is possible that the time has arrived when the position of these wives should be reviewed. Those who are able-bodied and able to work should be denied assistance, and where there are young children it is a time to consider some form of compensation on the husband in the matter of paying the wife for her services in caring for the children.

In the event of either the husband or the wife refusing to consider reconciliation, and the marriage officer and the reconciliation office have agreed that there is no valid reason for the marriage to end, then application for separation or divorce should not be considered suitable for the granting of legal aid, or at all.

(Received 26th July, 1952.)

EXAMINATION OF WITNESS

(Mrs. M. A. CUMELLA, M.B.E., J.P.; called and examined.)

4070. (Chairman). Mrs. Cumella, you are a Barrister-at-law and a Justice of the Peace, and you sit in the Liverpool City Magistrates' Court?—(Mrs. Cumella). That is so, my Lord.

4071. Have you had experience of matrimonial problems both as a magistrate and as a barrister?—More as a magistrate than as a barrister.

4072. Do you practise at all in divorce at the Bar?—Not at the moment. I am hoping so, but I have not done any practical work on that side.

4073. You are really experienced as a magistrate and that is the basis of this memorandum?—Yes.

4074. Is there anything you wish to add to your memorandum before we ask you some questions about it?—If the Commission will allow me, I should like to give my reasons for putting in a memorandum. Many of the opinions expressed in my memorandum may sound rather

old-fashioned, but I still believe that there is such a thing as making the best of a bad bargain in life. I feel strongly that I should register an objection against so many people passing their responsibilities on to the community at large. I do feel that young people—and perhaps those who are not so young—should know that there is something more than just getting the partner you want in life. I apologise for the defects in the memorandum, but I gave most careful thought to the constitution of marriage, as I see it in the present welfare state, and after very careful thought I came to certain conclusions. I felt that the time had come to impress on our young people that they had duties to the welfare state, as well as the acceptance of privileges under it; that divorce was much too easy at the moment, and that the consequences to the children of the marriages, so often tragic, were not appreciated at the time of the divorce or separation. I felt further that considerable sums of public money were being spent unprofitably by

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granting divorces or separations at the present time. Having faced that, it seemed to me that it followed that the State had accepted responsibility for social welfare, and, if so, the State should logically recognise that the minds of the young will be largely conditioned by the nature of the legislation governing marriage and divorce. We are apt to be mesmerised by psychologists and reformers into the view that there is nothing really wrong or sinful—that we are either maladjusted or frustrated or that our parents were callous to us when we were babies. Something had to be said in opposition to that, and it was with that in mind that I did give a good deal of careful thought to my scheme for reconciliation. I am quite aware, my Lord, that one cannot make people good by law and that one cannot make happy marriages by law. Nevertheless, I am strongly opposed to extending the present grounds for divorce. In view of the deterioration in our moral standards, of which I have seen so much in the courts recently, I want to emphasise the permanence of marriage rather than the breaking down of it.

Perhaps you would allow me to refer to one point in that part of my memorandum dealing with "Courts of summary jurisdiction". There I refer to the fact that there are many applications by wives who are separated from their husbands and who are receiving public funds. What is worrying me is that there are so many cases—I had one this week—where we are met with a flat refusal on the part of wives to return to their husbands. The wife is entitled to draw public funds but then at the end of three years it is fairly clear that the husband, if he so wishes, may apply for a divorce. That is going to extend the divorce figures considerably.

4075. I am not quite sure whether you are referring to the present law or some proposal to amend it—I am referring to the numbers of people drawing national assistance. At the present time the position is this: that we have an ever-increasing number of wives who are leaving their husbands—they just walk out saying, "I am not going to live with you". Then they go to the National Assistance Board, and it is now only a question of need whether they are supplied with money or not. They are given money to keep themselves and possibly their children. Then, in time, the National Assistance Board quite rightly send them to the magistrate's court in order to see whether they had any reasonable ground for leaving their husband. The problem will then be quite clear. The husband is not obliged to maintain his wife, and so public funds go on maintaining her. But at the end of three years, of course, it is possible on the production of the magistrate's order for the husband to obtain a divorce.

4076. Do you mean on the ground of desertion?—Yes. That point is not clear in my memorandum.

4077. What is your suggested remedy?—It is partly in my reconciliation scheme, my Lord. But the real remedy, of course, is very much more forthright than that. I think that if the woman is able to work, then she should not draw public funds. She must be told that she must go to work. That is a sensible system and the only practical one.

4078. I only want to ask you one or two questions on the points in your memorandum which were not quite clear to me. Under the heading, "Public opinion", in paragraph 2, you refer to the organisation of "pressure groups" within the legislature. I was not quite sure what you meant by that. Are you referring to Members of Parliament or outside organisations?—The Howard League for Penal Reform, for example, is what I would call a pressure group, which has in the House of Commons a number of Members of Parliament ready to support it. That is the sort of thing I mean by "pressure groups". I am quite sure the same thing can happen with marriage and divorce.

4079. Then in paragraph 4, you say:—

"... training for citizenship and its demands in every-day life is a vital omission from the present educational training scheme."

Is there no instruction given in schools in training for citizenship and its demands in every-day life?—Not in the secondary modern school to any extent. They have not the time to deal with their ordinary problems, let alone citizenship.

4080. Would you turn to paragraph 7, which deals with reconciliation. In paragraph 7 (i) you say:—

"Despite protestations to the contrary when it was introduced in the House of Commons, the Matrimonial Causes Act, 1937, has weakened the marriage bond..."

It is true, of course, that there has been a great increase in divorce. Not only were there new grounds for divorce but the divorces on the new ground of desertion have shown a very large increase indeed; I think they now outnumber the divorces for adultery. But I want to know what reason you had for thinking that the Act has weakened the marriage bond?—At the moment what is worrying many of us who sit in matrimonial courts is the age of the young people who are appearing before us at the present time. It is within my knowledge that many young people—and I have contact with very many young people—do enter marriage knowing that it is comparatively easy subsequently to get out of it if they want to. I have recently dealt with two young couples, in one case the parties being about twenty-four years of age and in the other about twenty-one. In both cases the men were married with two children, had been divorced, had re-married, and both their spouses were expecting babies again. The curious thing about these cases is that when they were in court, the fight was about who was going to maintain the two children of the first marriage. Yet they themselves were on reasonably friendly terms.

4081. In other words, they entered on matrimony, had two children, were divorced, and simply changed partners?—Yes. It was all so easy. I think most young people know that it is easy now.

4082. I note your view that if divorce were made easier the attitude of young people would tend to become, even more, one of looking on marriage as a temporary affair.—That is my view, my Lord.

4083. Then would you turn to paragraph 7 (ii), where you deal with "Legal advice centres and marriage officers". You say:—

"It is my considered opinion in the matter of reconciliation that no application for separation or divorce should be admitted until there has been a preliminary investigation as to the causes for the breakdown of the marriage."

Then you set out very clearly what sort of organisation you contemplate. Are you reasonably satisfied that if recourse to this agency were compulsory it could be made a really living thing, or do you think there is a risk that it might become a formality which people would feel they had to go through?—I gave it very careful thought. I even drew up a second paper which I would like to leave with you afterwards on that. If it became known that there was someone to whom the parties had to go before divorce was even talked about at all, that in itself would help, particularly if that were followed up on the lines I suggest. Such a scheme need not become a formality, although it could be, if it were staffed wrongly. I am quite sure that if one got the wrong person as the matrimonial officer, and the wrong person in charge of the reconciliation office, the scheme would not work.

4084. You said that you would like to supplement this part of your memorandum?—It was only the further detail I had worked out, but questions could be answered on it—or I will leave it with you. (See Paper No. 53.)

4085. By all means do. Would you turn to paragraph 10, which deals with maintenance orders. You point out the difficulties with which a wife is faced when her husband will not pay. These difficulties have been referred to by many witnesses, but when you come to the solution to the problem you say—perhaps a little optimistically: "To me the solution does not appear to be difficult". You recommend deduction from the man's wages if he is a proved persistent defaulter. There are, I am afraid, some difficulties about that. For one thing, may I say that employers do not very much like being collectors of debts from their employees, more especially a debt of this particular kind? I do not know if that difficulty occurred to you?—It did occur to me, but I do not think that, in the beginning, they liked collecting P.A.Y.E. either. I think that if the legislature decided that they had to do it, they would grumble, but they would do it just the same. There would grumble, but they would do it just the same. The solution might be a further point which occurs to me. The orders could be made more effective by registering the orders once they were made. You will appreciate, of course, that I am

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suggesting that the system should operate only in the case of a persistent defaulter, and not generally—I would not agree to its being operated generally. If, however, an order were registered on the income tax authorities' form P.45, which the man takes from one employment to another, his new employer would know that a court order was in force, and would then know that he had to make the necessary deduction. That arrangement might make the scheme even more effective. At the moment it is rather dreadful to know that people can, with impunity, leave their wives and children. It is so unfair to the wives and children.

4086. I am sure we all appreciate the gravity of the problem. Do you think that there is a risk that, if this information was put on the form P.45, then the employer might be less willing to employ the husband?—I do not think so. If he is a good worker the employer would take him, particularly now in the days of full employment.

4087. In paragraph 10 (i) you say:—

"His employers would then be notified of the amount of the order, and of the court's decision. They would then be authorised to deduct the amount of the order from wages due to the man . . ."

Did you mean that the employer would be compelled to make the deduction?—No, I meant that legislation should make it effective. I meant "authorised".

4088. I do not think I have made my point quite clear. Do you mean that the employer, having been notified of the amount of the order and of the court's decision, should be bound to deduct the amount from the wages, or that he should be given some alternative to say, "I do not feel like doing it"?—No, I think he would be authorised, I might as well be firm.

4089. Again I am afraid I have failed to make the point clear. There is a difference between a man's being authorised by statute to do something if he chooses, and a man being told by statute, "You *must* do this".—Yes, the alternative being a penalty?

4090. With or without the alternative penalty. When you say the employer would be authorised, I suggest you mean that the statute shall provide that he shall deduct it.—Yes, that would do, as long as I get the deduction. I appreciate the point over the word.

4091. Will you pass to paragraph 12 (ii) where you deal with "Grounds for divorce or judicial separation"? There you say:—

"No doubt the Commission will hear many proposals, the object of which will be the provision of additional grounds for divorce to meet cases of hardship not adequately covered by existing legislation."

You are certainly quite right in remarking that that would be so. You then say:—

"The value to the community of permanent marriage as a basic principle should not be permitted to become a secondary consideration to the relief of the individual hard case. Any extension of the grounds for divorce will weaken marriage as an institution, and the attitude of many young people will be conditioned largely by the attitude of the legislature to this question."

You have already told us, in your opening observations, what you think is the tendency today. You are satisfied that the effect of any extension of the grounds for divorce will be as you describe it here?—Yes, I really am most strongly of that opinion.

4092. Have you had any opportunity of observing whether young people are more ready than they used to be to fly to the divorce court, rather than trying to get over their quarrels, or has that not come to your notice?—We are quite shocked, and I use that word advisedly, in the magistrates' courts at what age the young people come before us. On Monday afternoon I adjourned three cases and told the parties that they must discuss reconciliation. There are children in each case, and neither party was making the slightest effort at reconciliation. It was all, "We are not going to live together". I dare say that sort of case is prevalent in other courts besides my own.

4093. You go on to say:—

"Without extending the present grounds I consider that relief could be provided in many cases if these grounds were reviewed in the light of present-day social conditions. . ."

Then you set out certain suggestions and modifications in the law with regard to adultery, cruelty and desertion. Then I come to a suggestion, headed "Cases of impotence". That suggestion rather startled me, because it seemed to me to be out of keeping with the rest of your memorandum.—I rather thought it would. I gave very careful thought to this and decided that there are cases that obviously must be met. My problem was that in these cases if there were children, then no matter how difficult or hard it was, the parties were not to be allowed a divorce; if there were no children, then there was a possibility that one could meet certain individual cases.

4094. You say:—

"To avoid the introduction of fresh grounds for divorce I propose that consideration be given to the addition of a further discretion clause."

It seems to me that you are suggesting an additional ground for divorce—something that is not covered at all by the existing law?—No, I am suggesting a wider interpretation than at the present time, as I have already done in the case of cruelty. I thought that there were individual cases that might be granted relief by means of a wider discretion clause than that used now—many cruelty cases are not within the existing law.

4095. But what you are suggesting is that this discretion clause—I am quoting your words—" . . . could be used to break the present impasse in cases where the wronged party refuses to take proceedings". So that you are suggesting there that a party who has committed the wrong shall, in certain cases, be allowed to divorce the wronged party. That is what seemed to me to be so inconsistent with your earlier suggestion.—It is, I am quite prepared to admit that. Nevertheless, I was forced to include such a clause. I felt that consideration might be given to certain cases, where there were no children, and where no one was going to be harmed as a result of a divorce.

4096. What sort of conditions would have to be present to justify the exercise of that discretion?—I think there would have to be extreme hardship—that is, really, the case where a person can satisfy the judge that he or she could justify terminating the marriage by consent, and where there are no children and no one is going to suffer by that particular decision. I know that such cases would be very difficult to decide, and that is what is worrying me.

4097. You are not contemplating in this paragraph even mutual consent, but intend that the one partner can force the other to divorce against his or her will?—Not unless the case has been considered by the court—in the exceptional case. I know I am weakening the—

4098. You are putting on the court a discretion which, it might be suggested, is almost impossible to exercise. You are saying, "Although there are grounds for divorce laid down by law, still there may be cases for giving the go-by to the whole of the existing law and granting a divorce". Would you say that this part of your memorandum has really been thought out fully?—It is not the part which has been the most carefully thought out, but I did feel that I had omitted something which in honour and justice I should put in. I almost did not put it in at all.

4099. It has puzzled me considerably. I could not see how it could be reconciled with several of your statements elsewhere. What if the wife, for example, who has committed no matrimonial offence, and has tried her best to make the marriage a success, objects to her husband's petition for a divorce on this ground? Is the judge still to have discretion to say "Well, Madam, your husband wants it very much and you must be divorced"?—I think that then the decision would have to depend on what was before the court. Once again, I thrust on to the judges the unpleasant task of deciding.

4100. Does your proposal amount to this—that there should be a new ground for divorce, that people shall have a divorce if the judge thinks they really ought to

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have one?—I am afraid that it does sound like that. I am not very happy about it, but I am also unhappy about certain cases where there would be no hardship if such a divorce were granted.

4101. (Mr. Flecker): I was very interested, Mrs. Comella, in your views about education for citizenship. I would like you to explain what you say in paragraph 3. You say that:—

"The extra school syllabus could provide adequate and graded tuition in all aspects of training in citizenship, and in the later age anxious could include sensible education in matters concerning sex behaviour."

Of course the vast majority of children leave school at about fifteen. Any instruction that would be really adequate as instruction for marriage might be thought to be a little advanced for a child of, say, fourteen years of age?—The instruction would be designed not primarily as instruction for marriage but for good citizenship. It would provide the basic principles of citizenship, which, particularly in a welfare state, are often too little known.

4102. I fully realise that you wish to inculcate the principles of citizenship. You have got a very real problem in your next sentence. Children of fourteen, you say, are upset by the effect of unavourable sources of sex information. On the other hand, that is quite a different problem from preparing young persons for marriage at a later stage. I wondered whether there was not some confusion between these two stages?—I think that instruction could begin earlier, among children who leave school at fifteen and who at present spend so much time in the cinema. You could link it up with the cinema where they learn so much about sex that they should not. I think that suitable instruction could be given in school provided that there was somebody sensible on the school staff to give it.

4103. But you would want to follow up that elementary instruction in school with further education at a later stage?—Certainly. The difficulty is that so many of the young people we want to get at do not join the organisations which could give them that instruction. When he leaves school, the better type of child usually joins some youth organisation, whereas the type that so often comes before the courts does not. One would have to try to link sex education in the simplest possible way with what these children already know about sex, which, I am afraid, they gain at present from the cinema.

4104. It is suggested in one submission which we have received that the only satisfactory time to give such instruction to young people might be during the period of national service. Have you any views on that?—I have. I was six years in the W.A.A.F. during the war and we had to face this particular problem then. We found it extremely difficult to give instruction then, and I am not certain that it is not better to give it a little earlier. By the time young people come into the Service, many of them have had sex experience. That is one of the problems, but even without that it was awfully difficult. Our doctors tried to give instruction by means of films and so on; but it was not really successful. The problem is to try and eliminate, if one can, so much sex experience outside marriage, and therefore if one can start a little earlier, I think that is better than at the national service stage.

4105. Would you agree that in this matter there are two types of child who have to be considered? Are you going to give this instruction to the child from a good home—long before he ought to have it? On the other hand, you have the reverse type of child who knows what you are going to say before you have started?—It is a difficult problem. If parents were accepting their responsibilities, which they are not, we should not be faced with it. Instruction ought to be tried at school in a simple way by linking it with what the children see and know.

4106. Would you turn to paragraph 13 (b), where you suggest that a children's officer should be appointed as guardian of them in every divorce case? Would you include undefended cases?—More particularly undefended cases.

4107. You say, "pending the appointment of court welfare officers". There is already a court welfare officer appointed?—Pending the appointment of an official welfare officer, we are using the services of a probation

officer, but he only comes into the picture when the case is being heard. Unfortunately, the children are not considered in divorce cases at all. Undefended divorce cases go through quite quickly, and if there is already a custody order under a magistrates' order nothing is done about custody, or else it is left over until after the divorce has been granted.

4108. And you would prefer the children's officer to the probation officer for this purpose?—I do not think that the probation officer, who is very much overloaded, can do this work. My contention is that if the children's position was considered first by the husband and wife, then we might get a great deal less divorce. The trouble is that the children are not considered until later.

4109. (Chairman): If I might follow this up for a moment—as I understand it, you think that a guardian of them to look after the interests of the child should be appointed in every case in which there are children of the marriage? Your view is that as things stand at present with only a court welfare officer in the High Court, the most suitable person to do this work is the children's officer?—There is not a court welfare officer.

4110. You are speaking of Liverpool? At the High Court in London there is a court welfare officer.—Is many of the other courts we have none, that is the problem. We have not got a court welfare officer and that is worrying me a great deal.

4111. (Mr. Flecker): You make a number of references in your memorandum to the probation officers. Would I be right in saying that your chief complaint is regard to the probation officer is that there are not enough of them and that they have too much work to do?—In what connection, Sir?

4112. You mention them at various times. I wondered whether your view was that they are doing a very valuable service to the community, but more officers are needed?—I wondered whether the court welfare officers must be probation officers. I feel that there we could quite safely consider the appointment of legally qualified people. I think they would carry more weight than probation officers. All briefs would be open to them, and there would be a far closer contact, a better contact between all parties in the case than at the moment exists. That is not a criticism of the probation officer at all.

4113. (Sir Frederick Barrow): In paragraph 5 (vi) you say that the magistrates usually interpret the word "persistent" as requiring proof of three acts of cruelty?—Yes.

4114. But two acts might suffice surely?—They would not normally. In the court where I am a magistrate proof of three acts is required, and I have seen great efforts made to bring in the third.

4115. It is for the magistrate to interpret the word "persistent". "Persistent cruelty" could be one act of cruelty prolonged?—My point is that if the word "persistent" was left out we might not have to adhere to so restrictive an interpretation. Over a number of years in the court in which I adjudicate the interpretation of "persistent cruelty" has become very right.

4116. In the next sub-paragraph you say:—

"An analysis of the cases decided in the Liverpool City Magistrates' Courts for the period 1st January to 31st September, 1951, shows an unduly high proportion of cases dismissed."

Why an unduly high proportion? Do you think that the magistrates were wrong in that they did not exercise sufficient judicial forethought, and that they should have made an order in all these cases? Surely all these cases were fully considered, and although the number of cases dismissed might have been very much higher than those in which an order was made, surely the magistrates were entitled to dismiss them? Why use the words "unduly high"?—There are so many things about desertion and cruelty which frankly, I think, are not understood by lay justices at the moment. Matrimonial proceedings are much more complicated at the present time than lay justices appreciate. In contrast, far more time is taken in the High Court on desertion and cruelty petitions—I have sat many times through a case in the High Court which has taken several days. A similar case would have been dealt with in the magistrates' courts perhaps within one hour.

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4117. Do I assume from that that you think that the lay magistrates have not the qualifications to deal with these cases at all?—I think that many of these cases are so complicated that a trained legal mind is necessary to deal with them, because the consequences are so serious when a separation has taken place.

4118. I see, I have your point. You think it ought to be ruled entirely...—No, I did suggest that an additional stipendiary magistrate might be appointed.

4119. (Chairman). To sit with the lay magistrates?—No, to sit separately, to take cases off—where cruelty and constructive desertion are pleaded.

4120. (Sir Frederick Burrows). In paragraph 9, "Appeals", you say:—

"I find it difficult to believe that the remaining 123 persons had no desire to take their case further."

You would argue that every case in the lower court should be taken to a higher court?—No, I did not intend that, but I felt that it should be easier to do so than at present. At the moment by obtaining legal aid you can go to the High Court. There is a good deal of difficulty in doing that and solicitors are not apt to proceed in that way. If it were made easier to appeal against the magistrates' decision, I feel that more people would take advantage of it. That is why I suggested that the county court, with the appointment, if necessary, of a divorce commissioner, might serve as a court of appeal in such cases.

4121. Then in paragraph 11 (ii), where you deal with transfer of tenancy, you say:—

"Any proposed legislation should also include house property owned and let by local authorities."

You must be aware that such property does not at present come within the provisions of the Rent Restriction Act, so that to meet these cases you would have to alter the law to the effect that all Crown property and local authority property would be brought within the Rent Restriction Act?—Yes, Sir. I cannot see that there is going to be too much difficulty in view of the limited number of such cases involved.

4122. Would that not be taking a sledge hammer to crack a nut?—It might be. If any better method could be found I should be glad to hear it.

4123. The alteration of the law in this way would bring all local authorities' houses, all Crown lands, all public authorities' property—an enormous amount of property—within the Rent Restriction Act, just to deal with this one type of case.—It is only for this particular type of case.

4124. You could not legislate surely for this one type of case?—Well, you could, Sir.

4125. Even then, would you not be depriving the landlord of some right to which he is entitled and which he at present possesses?—I do not think the matter would be so serious. In the meantime they are tenants, the husband and wife together.

4126. You would apply this provision in the case of a divorced woman?—Yes, divorced or separated.

4127. As you are aware, statutory tenancy can pass from one party to another only once. Suppose that a man divorces his wife. He marries again. There are then two women to consider—the one that is divorced and the one to whom he is now married. Is a landlord to determine which of the women the tenancy shall go to?—If there was any particular difficulty, the county court would still be available, as it is at the moment, in cases where there is disagreement.

4128. So your proposal would mean that the landlord would have to go to the county court in order to determine which of the wives the tenancy passed to?—As against that you have got the present position of course, where the wife has nowhere to lay her head, although she is entitled to divorce or separation on the ground of cruelty—I do not think we need consider the position of the second wife. We must see that the first wife is provided for. The present situation does seem anomalous, because it has the effect of forcing two people to continue to live together after the wife has obtained an order.

4129. (Chairman). As I understand your proposal, a wife who has obtained a separation order or a divorce decree should be entitled to stay on in the house. Then if the man subsequently re-married, acquired another wife, and she became his widow, then the first wife, who obtained the divorce, would not be ousted in favour of the widow of the second marriage?—I am concerned with the immediate prospects of separation or divorce, particularly where cruelty is concerned and children. (Chairman). The contest between two wives would not arise.

(At this stage the Commission adjourned for a short period.)

4130. (Lady Bragg). In paragraph 7 (ii) where you deal with "Conditions for effective reconciliation", you say:—

"This expanding pool of human misery should be the concern of the State, and not be left to the administration of voluntary agencies, no matter how well-intentioned they may be, or how influential their sponsors."

Are you referring to the Marriage Guidance Council, the Catholic Marriage Advisory Council and the Family Welfare Association?—Yes, I had those in mind, and also the magnitude of the problem at the moment.

4131. What do you mean by the influence of their sponsors? Would you consider the Home Office their sponsor?—Yes. These organisations have a good deal of influence throughout the country, but I feel that what they are doing at the moment—I am not criticising the Marriage Guidance Council at all—but no matter how much public money is granted to them they are not going to do anything but touch the fringe of the problem, because they are not going to get at the bulk of the people who should go to them and do not go to them now.

4132. What sort of people are you referring to, when you speak of those who do not go to these agencies?—At the moment, a good many of our working class people do not go.

4133. Would you be surprised to hear that we have had evidence from the Marriage Guidance Council themselves that they have all types of people coming to them?—I have studied the figures for my own area of the type of people who go, and it is quite normal for the probation officer to say, "You are probably more suitable for the Marriage Guidance Council than for us". The point I am trying to make is this, that with the vast number of separations and divorces there is today, we have now reached the stage when I feel the State itself is better able to cope with the problem than a voluntary body.

4134. You would not agree that if there were a bigger Government grant, or a grant from local authorities, these voluntary associations would be as effective as a legal aid centre?—No, I do not think they would. There is the further consideration that if the State were doing this work, you would have just the one place for everybody to go to. You would not have separate agencies for the various religious denominations. The Roman Catholic, if it is run by the State, would go to it, in the same way as a Protestant. (I am a Protestant myself, I would like to make that clear.) All this reconciliation work would be done by one agency and it would be taken advantage of by everybody. In the reconciliation office, which I think should be attached to the legal advice centre, you would have a Roman Catholic counsellor for those people who want to discuss their case with a Roman Catholic. But I think it should be a State agency for everybody to go to, irrespective of their religious persuasion.

4135. The legal advice centre would be part of the Legal Aid Scheme?—Yes, it is envisaged that there would be a legal advice centre to which every case would be sent, and I envisage that there would be a trained and experienced person in charge.

4136. Would everybody go there, or only those who hope to be entitled to a legal aid certificate?—I think everybody. What is in my mind has much wider implications than may appear on the surface. Once there is a reconciliation office, a marriage officer appointed, then people whose marriages are in difficulty will know that these facilities are available. We have now got into the habit in this country of using a service once it is provided. Therefore couples, who are encountering difficulties, will, long before their marriage is in danger of going on the

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rocks, go there first of all. At the moment there is the Marriage Guidance Council, but so many people will not go to it. If an official service were set up I feel that it would become well known and would be widely used.

4137. The idea of a marriage officer is a new conception—would not be a probation officer?—No. He would be a very experienced solicitor or counsel, someone who has had years of experience in dealing with these problems, who would know quite quickly from the papers what the trouble actually amounted to. For example, he would know that sexual mispractices of a serious nature would have to be dealt with elsewhere. He would refer such cases to the legal aid centre with a view to immediate action, but he would know at a glance whether to pass such a case to the reconciliation office or not.

4138. This officer would in effect be a court of first instance?—He would be the original offer.

4139. Then, with regard to paragraph 8, I should like to ask you about the courts of summary jurisdiction. May I ask you rather a personal question? It seems to me that you are perhaps in rather an unusual position, being yourself a barrister, and yet sitting in court with untrained colleagues. May I ask you if you sometimes feel a little impatient?—No, my views have not changed since I qualified. I have held these views for a very long time.

4140. (Chairman): Would you tell me when you did qualify?—I was called last year, Sir.

4141. (Lady Bragg): I thought you might feel you were in a position rather apart?—No, my views on marriage and divorce are long-standing.

4142. In paragraph 8 (ii) you say:—

"The magistrate on rota hears the application for summonses . . ."

I think you are speaking only of Liverpool here, but do you know anything about the applications courts in other parts of the country?—We have not got them in Liverpool and I do not know how they are functioning elsewhere. Your point is that in an applications court there would be an investigation even before the summons was granted? Is that what you have in mind?

4143. Yes. As we heard from the Justices' Clerks' Society, the applications court, with the assistance of the probation officer, would try to discuss the case with the parties before the summons was granted.—Yes, but what I am trying to persuade the Commission to take notice of is that if my proposal for the appointment of a reconciliation officer were accepted, parties would not even get to the court until the matter had been investigated. It is the preliminary step I am so very, very keen about.

4144. It would have got to the court, surely?—No.

4145. To the clerk?—No, it would have got to no one. It would not have got to anyone other than the marriage officer. The marriage officer would have got it first and he would have decided what the substance of the case was. The case would not get near the court. My aim is to keep everybody away from the courts until, if I may use a vulgar term, everybody has had a go at reconciliation first.

4146. Do you think that this agency would be widely known and that each couple would go there first of all?—I think that it would soon be known if it was organised by the State. The State has the power to advertise things as well and at an expense which other people cannot afford. I know that the money would have to come from the taxpayer but it would be in a good cause.

4147. With regard to paragraph 8 (v), where you deal with "Composition of magistrates' courts",—would you abolish the appointment of lay magistrates in domestic courts and have only stipendiaries, or are you merely going to give the rather complicated cases of cruelty and desertion to the extra stipendiary, whom you suggest should be appointed?—I do not want to abolish the appointment of lay magistrates. Of course, we are talking at the moment of things as they are and not things as we envisage them if the scheme I have in mind were to be implemented. I think that there are straightforward cases which the lay magistrates could take. But there are cases of constructive desertion, which I would not leave to the lay justices. I am speaking from experience in my own court, and I must be careful what I say, but I think that many magistrates are not really suitable to deal with matrimonial cases. Many of them are not married and

are of a religious persuasion which makes them disagree in the first place with separation.

4148. What do you mean by "religious persuasion"?—Some of our Roman Catholic magistrates do not like separation, and therefore the stress is sometimes too much on the other side.

4149. You are saying that they are prejudiced?—Yes, and perhaps they do not know that they are prejudiced.

4150. You say:—

" . . . unfortunately many lay magistrates sitting in matrimonial courts take the view that they are capable of deciding cases of cruelty and desertion without assistance from the clerk . . ."

Is that your experience?—It has been my experience. Many of our magistrates, if I may say so, are rather old people. I am not altogether certain that they are familiar with the views of some of our young people today; for instance, young people nowadays cannot be made to take advice—shall I put it like that?

4151. Would you like to have magistrates specially selected for matrimonial work?—That would be a step in the right direction. Many of those who would be very suitable cannot spare the time to sit four and five hours, and sometimes three and four afterwards on a case, because they are busy people. Therefore we are getting people on the bench who can spare the time, and who are not perhaps the best people for the job.

4152. (Mr. Seloe): Would you turn to paragraph 4 of your memorandum, which is headed "Present-day standards". Is your judgment there of the work of the schools based upon your own experience?—Yes, coupled of course, with what I have heard from colleagues in other branches, and from many welfare workers.

4153. Your own experience is largely confined to the part of the country where you live?—To the North of England. Most of my knowledge is about conditions in the North of England, but I have discussed these matters from time to time with my friends in the South.

4154. So that are you saying that the schools in Liverpool omit something from their teaching which you think is vital?—Not only in Liverpool. I think that the schools cannot possibly cope with many of the subjects because of the crowded classes and consequent difficulties. I am talking of the secondary modern school now, as you probably know.

4155. What do you mean by "training for citizenship"?—One would have to simplify the instruction, because one is dealing with children, but they should be taught how the country is run, and their part in it, what part they play in their homes, and what part their parents play. Subjects of that kind should be brought into a curriculum in a way that the children could understand.

4156. But is it your experience that those things are omitted from the curricula of schools in Liverpool?—I do not think sufficient stress is laid upon them, but that applies not only to Liverpool schools. In the grammar school, you do get a good deal of it.

4157. But, Mrs. Cumella, what experience have you of what is taught inside a school? Have you been a teacher?—No, I have not been a teacher, but I am very conversant with the teaching profession and I have discussed these things.

4158. Have you been the governor of a school?—Yes, I have been. I was a governor of a grammar school, and I have also been a governor of a secondary modern school.

4159. Have you ever spent the whole day in a school?—Yes, I have.

4160. Have you spent a whole term in school?—No—you mean teaching?

4161. Even listening?—No.

4162. I find it rather difficult to see on what knowledge you have based this statement?—My knowledge is based in the first place on the problems I am dealing with in our juvenile courts. It is also based on a number of conferences between the magistrates and our head teachers on juvenile delinquency and related problems. That has led to discussions about what is taught in the schools. I really have tried to discuss whether sufficient is being done, and generally there is agreement among the teaching profession that they cannot do as much as they would like to do.

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4163. You think that children ought to be at school longer?—Yes, because all this instruction cannot be fitted into the present time-table. We have discussed this only recently at a headmasters' conference on delinquency, attended by over one hundred head teachers.

4164. Do you think that our judgment may be a little distorted when we are talking about delinquent children?—Yes, I appreciate that point, but nevertheless, delinquency does bring the question of education very much before us.

4165. I was interested in your proposal that children should return to school in the evenings. Do I take it you mean that a child, from the age of eleven until he leaves school, should go back to school for a further session in the evening?—Yes. I know it has not been done hitherto, but I think it would help.

4166. Would not that prevent one of the things happening which we all very much want to happen, and that is that a child should become and remain part of his home?—Yes, it would. But, unfortunately, many of the homes are falling at the moment. It is a question of filling that gap.

4167. Is your view not possibly rather a severe judgment on the country as a whole?—It could be, I quite appreciate that it could be.

4168. I wonder really whether you would say that the majority of people in Liverpool would agree that the home was not a better place for a child to be in than a school in the evening?—No, I do not think they would. But the point is that many homes are falling in their duty to the children. The whole problem is that many of the children leave school at fifteen. I would, of course, favour a higher school leaving age, but as that is probably impracticable at present, I am trying to find a substitute for that.

4169. (Chairman): I am very reluctant to intervene, but I cannot help feeling that perhaps the question of school hours is rather outside the scope of our terms of reference. (Mr. Beloe): My Lord, the statement has been made in the memorandum which leads one to think that Mrs. Cumella thinks that the schools are not doing their duty properly, and that is rather a serious statement. (Chairman): That is quite so. If your questions are directed to something which comes within our terms of reference, I am quite agreeable that you should pursue the subject as far as you think fit. But if this is to be a discussion upon the general schooling and teaching system of the country I am not quite sure we can really go as far as that.—Can I help? I am not criticising the teachers' methods. I fully appreciate the difficulties they are working under at the moment. I would like to make that quite clear. We have difficulties at the moment with the lack of teachers, overcrowded classes and the lack of time to do things. I am trying to help the teachers—I am not criticising them.

4170. (Mr. Beloe): There is one further question I should like to ask, arising from paragraph 13. Mrs. Cumella, is it your experience that children of divorced parents get into difficulties with the law after the divorce?—Yes, I was trying to get some actual figures about that from our minor probation officer, but I have not been able to get any figures. I am satisfied myself that these children do get into difficulties. We do not apparently keep the actual statistics, but the probation officer agrees with me that these children do get into difficulties.

4171. More than children from other broken homes?—No, I do not think more. But the broken home I would put with the divorce.

4172. You are suggesting here that the children of divorced parties should be under some kind of continued supervision after the divorce decree?—Yes.

4173. Is it only the children of divorced parties that are getting into trouble?—No, I would, of course, include separation generally. What worries me is this. Where the magistrates have made an order, although we may not deal with these cases as well as we might, the magistrates have at least gone into the question of who shall have the custody of the children rather more fully than we do many other things, whereas in the case of a divorce, particularly in undefended divorces, quite scant attention is paid to what is happening to the children. That is the reason why I stress divorce rather more than separation.

We do endeavour to make the custody arrangements one of our main concerns in magistrates' courts. That does not seem to be done in the Divorce Court.

4174. You feel that somebody, whom you call the investigator, should be responsible, presumably to the court that pronounced the decree? Would that be so?—No, what I want is this. I want the child life protection provisions extended to cover such children. And there would be some check later, so that if anything goes wrong you have a check on them. The children's officer could do that.

4175. So that when you refer to the investigator, the investigator would be a member of the children's department, would he?—Yes, the children's department would do that.

4176. You would prefer that to the probation officer?—I think it is more suitable for the children's department. The children's officer is concerned specifically with children, and there would be no difficulty for him to make the check. In fact his department might already be visiting other homes in the same street.

4177. But you do contemplate that one day the social welfare officer will take over that duty?—I am hoping that the social welfare officer will be specifically responsible for children. There would, of course, be a continuing link with the home, for there would still be supervision under the Children and Young Persons Act.

4178. The welfare officer's responsibility would end when the decree was pronounced?—Yes. The children's officer would take over and there would thus be continuing supervision. There is no subsequent check on such cases at the moment.

4179. (Mr. Allen): Returning to the question of maintenance orders, and your proposal in paragraph 10 (i) for the deduction from wages, what would you do in regard to casual workers and self-employed persons? I imagine that your area has a good many casual workers?—We have a good many. It may be unpleasant, but there I think Form P45 would come in. You cannot allow the casual labourer or the self-employed man to dodge while other people have to pay. I think the only way in which you could do that would be for the income tax authorities to be notified of the amount of the order of the casual labourer. They would have to make the deduction in the case of the casual labourer or the self-employed person because they are the only people who would know anything about his means. I do not know any other way in which it could be done. You may not even be able to do it that way, but it occurs to me that that is a possible way in which it might be done.

4180. Make it a charge on his income tax?—Yes, otherwise he would avoid payments, while everybody else would have to pay.

4181. As a charge on income tax over a long period? What would happen to his wife in the interval?—Too many people are at the moment living on national assistance and far too much money is being spent in that way. But that would be the only way of providing for the wife in the interval, and there would still be some means of getting the money back from the husband later.

4182. (Mr. Young): I want you to help me with regard to your proposal about legal advice centres. In the first place, I take it that you are suggesting an extension of the Legal Aid and Advice Act?—My proposal is a new departure, we have not got it on the statute book.

4183. But under the Legal Aid and Advice Act provision is made for giving legal advice orally. Your proposal would necessitate an amendment of that Act?—No, when the centre is set up you would still have your legal aid section functioning as it is at the moment. You would have a three-part section, you would have your matrimonial officer, your legal aid section—which is already functioning—and then you would have your reconciliation office.

4184. You are suggesting that the most practical method would be to utilise the legal advice centres? What you mean is that you want to have a marriage officer and a reconciliation officer attached to the legal advice centre?—I want the legal advice centre open; it is not open at the moment.

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4185. Let us assume that it were open, for the purpose provided in the Act of giving legal advice orally. Would you want a separate office for the marriage officer and the reconciliation officer?—A separate office, but in the same building so that you would have the whole lot together.

4186. Next, I want to ask you about the proposed procedure. People who are going to legal aid centres are normally only those people who are entitled to use them. Under your scheme of reconciliation, is your proposal that any person, irrespective of means, who desires either a judicial separation or a divorce, must consult the reconciliation officer?—Yes, I consider that the parties should go there before they go anywhere near the magistrates' courts or even a solicitor. My suggestion will get me into great trouble, but I think that even when the parties go to a solicitor they must initially be referred to the reconciliation department.

4187. Assume that a person has done what you suggest. You state in your memorandum that that would enable the marriage officer to determine whether there is a possibility of reconciliation. I take it that the applicant would be referred to the reconciliation officer, who would report back to the marriage officer. Then you say that the marriage officer would then decide whether further action was necessary. What do you mean by that?—I cannot give a direct answer, because forms will have already been sent to the marriage officer and he will scrutinise them and decide whether there is a possibility of reconciliation before he sends them on.

4188. Assume he does that.—When the case goes to the reconciliation department, it will be in abeyance. It might be a matter of six or twelve months before that department reports back.

4189. When they report back, what is the next step?—The next step of course is entirely on the actual facts of that particular case as it appears to the marriage officer, and it may be a case. . .

4190. May I stop you there? Is it your idea that you will then give power to the marriage officer to say whether or not the applicant will be entitled to proceed with his application for judicial separation or divorce?—Yes, the applicant will be then sent on to the court.

4191. So your scheme, if accepted, would amount to this, that no person would be entitled to have either a judicial separation or a divorce if a marriage officer decided that he was not to have one?—The marriage officer is going to investigate the case. Yes, I think that if he were satisfied there were no reasonable grounds for those people not to be reconciled, he would have to state that fact.

4192. You are going to remove the right of the person to go to the court, and leave it entirely in the hands of the marriage officer to say whether a person will or will not be allowed to go on with his application?—Yes, always bearing in mind that we are dealing here only with cases in which there was, *prima facie*, a chance of reconciliation. The marriage officer will have sent a number of cases direct to the legal aid section.

4193. I want to get your scheme quite clear. Do you wish to compel everybody who wants to get a judicial separation or a divorce to be referred to this legal advice centre, and then he or she will go through certain procedures? Then, under your scheme, is it for the marriage officer in the end to decide whether any further action will be taken or not?—If I may make it clear. There would be cases that would have to be sent immediately to the legal aid section, cases that obviously on the facts had to go forward right away. The latter are distinct from cases referred to the reconciliation office.

4194. I do not follow this, I am sorry. Are you now wanting to divide cases into two categories, those that must go through this procedure and those which do not have to go through this procedure?—No, I am saying that all cases will go to the marriage officer, but on the facts before the marriage officer he will be able to decide which cases should go forward unhindered.

4195. That comes back to my original point. It is for the marriage officer to decide whether a person will or will not be allowed to institute proceedings?—It will, I think, come to that.

4196. (Chairman): Suppose the applicant is referred by the marriage officer to the reconciliation office, and the reconciliation officer reports that they see no prospect at all of reconciliation in this case, would the marriage officer still be free to say—"Well, you shall not go to the court", or would he not?—I think the marriage officer in those circumstances would send the applicant to the court. But the marriage officer will at least have had an opportunity of trying to do something about the breakdown of the marriage.

4197. Mr. Young's question was about the ultimate decision of the marriage officer. I thought, if I understand your scheme correctly, that if the marriage officer sent a party to the reconciliation officer, and the latter said that there was no chance of reconciliation, it would be the duty of the marriage officer to allow the case to go forward?—He would see the facts of the case and send it forward.

4198. (Mr. Young): You are getting back to the question whether the marriage officer has a discretion or not. Assume that the marriage officer sends a case to the reconciliation officer. The reconciliation officer then reports to him that there is no chance of a reconciliation. In that case, is it or is it not open to the marriage officer to say: "Well, whatever these people say, I will not allow you to go on with a petition", or is he bound to let the applicant go on in those circumstances?—In the end, the marriage officer ought to be able to say "No, it will not go on". I feel that he should be able to say that. But he has the facts of every case before him, and he will, of course, know just what it amounts to.

4199. Do you contemplate that in that event there would be a right of appeal?—Yes, definitely.

4200. To whom?—That would be to the Divorce Court, as at present, or to a special branch of it. But there would have to be a right of appeal.

4201. Then the parties could appeal to the Divorce Court saying, "Please give us leave, notwithstanding the marriage officer's decision, to proceed to a divorce"?—Yes, that is so.

4202. (Dr. Robertson): In paragraph 13 (b), you quote certain views of Dame Myra Cartwright. But would you think it the general view that children's officers are the most suitable people to deal with children in need of care?—Yes.

4203. Is it your view that the children's officer should supervise the children who are left in the custody of a divorced parent as well as those who have been put into the care of the local authority?—They would already have the supervision of the children in the care of the local authority, but there must be some supervising authority for the children of separated and divorced parents.

4204. Would you tell us a little more about the increasing problem, which you have already mentioned, of the deserting wives who are in receipt of money from the Assistance Board? Would you tell us how you would attempt to bring about reconciliation in these cases? The Assistance Board officials could not cope with it? Would you have a children's officer or a marriage officer dealing with these cases? You do not want to have the voluntary organisations, you say.—The machinery is there. The difficulty we are in is this, that at the present time for the receipt of national assistance you only have to prove need. While a person can prove need—"I have left my husband, I have nothing to live on"—money must be paid. There is only one way of dealing with the situation and the Assistance Board cannot deal with it at the moment. They should be given authority to say, "There is no reason at all why this should be, and we must refuse you assistance unless you are prepared to take employment". That is the answer to it.

4205. So you would send these wives to the reconciliation office, and not bring the machinery to them?—At the moment they are not sent to any reconciliation agency unfortunately, that is the problem. They just come and say, "I am not going to live with my husband, I do not like him any more". On Monday afternoon, in court one of them said to me, "I am not going to live with him", before we even opened the case.

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4206. And quite often husbands are willing for the wife to return?—Yes, and it does not follow that there is any serious reason why they should not live together. The thing is that a great many women like getting their money from the Post Office. You cannot rely on a working class man to pay up the money and it is nicer to get it regularly from the Post Office. Automatically that situation is going to lead in time to more divorce.

4207. You do not visualise that the children's officer might possibly, where children are concerned, be asked to visit the home on certain days in the week?—It is the wife that is the problem here. The husband has at present got to maintain his children—it is the wife's maintenance that is the problem. I wonder if the right idea is not that we should make a charge on the husband for the wife's services. It might be done in that way, we would get something out of him that way, whereas at the moment we get nothing.

4208. (Chairman): Do you visualise legislation under which a wife can no longer go and say to the National Assistance Board, "I will not live with my husband, give me money", and they are bound to grant assistance?—I do, Sir. I think that the position is so unjust at the moment.

4209. Whether that comes within our ken or not I am not sure.—My Lord, at the end of three years they are divorced, and divorces are going to go higher and higher as a result of this. That is the reason I brought it to you.

4210. Yes, I am not expressing any view whether it is inside or outside our terms of reference.—It might be brought in that way.

4211. (Mr. Macle): In paragraph 9 you deal with "Appeals". At the end of that paragraph, you say:—

"I do not feel that the question of cost should be the paramount consideration where the administration of justice is concerned."

That concludes your recommendation that appeals from the magistrates' court on matrimonial matters should go to the county court. I understand that your argument is in favour of the county court is to avoid cost?—No, perhaps I have not made that quite clear. What is in my mind is that I want the equivalent of the cost of quarter sessions for the matrimonial case. As you know, appeals in criminal cases, and so on, can go quite simply to the court of quarter sessions, and I want the equivalent of the quarter sessions as a court of appeal in matrimonial cases. At the moment it is difficult to pay the cost of an appeal to the High Court unless the solicitor is sufficiently interested in the case to press for legal aid.

4212. I will deal with legal aid in a minute, let us keep to one point. How, in putting it to the county court, do you avoid cost?—I take it that in the county court you would meet the cost in the same way as in the court of quarter sessions. That is what I wanted, it is easier for people to go there.

4213. Do not misunderstand me, I have no views at all and I am not suggesting a preference for the quarter sessions, but why not quarter sessions?—I did have in mind quarter sessions, but they are so terribly overcrowded with work that I felt we could not inflict anything more on them.

4214. Have you any experience of delay in the county court?—Yes. But my idea was that you might appoint special people to deal with these cases. It is something I know is new, but I thought it was necessary.

4215. Would you agree with me that, in giving this jurisdiction, one would be giving a brand-new jurisdiction to the county court?—Yes, in this respect. Of course, we have got our divorce commissioners who work from there—but that is not quite the same. Yes, it would be a new jurisdiction.

4216. Quarter sessions are composed of magistrates who have had experience of trying the cases originally?—My only reason for not suggesting quarter sessions was the volume of work, and I would be only too glad to revert to the quarter sessions.

4217. I am not asking you to revert. I only want to find out why you have chosen the county court?—Purely because the quarter sessions are overworked.

4218. In paragraph 12 (ii) (c), which is headed, "Cases of impasse", you state:—

"There are many cases where the parties separate by mutual consent, and neither has committed any matrimonial offence. Later, one of them forms an association, and wishes to re-marry. As the wife is not entitled to maintenance a divorce will not affect her financial position."

Is that right?—Yes, where there is separation.

4219. But suppose they have had a deed of separation whereby the husband has covenanted to maintain his wife?—Yes, it would not affect that if that is in being.

4220. There are a vast number of those cases?—Yes, I think there are. As I said earlier this morning, I am unhappy about this suggestion, but I was worried about the case where there were no children, and where there seemed to be real hardship.

4221. I am not on the main principle of the suggestion; I have heard the evidence on that and it must be considered, but I am on this one particular point. You seem to be making the point that, where the parties are separated by mutual consent, the wife is not entitled to maintenance. But she may very well be, may she not?—She may be, but in many cases she may not be, that was the point I had in mind.

4222. (Mr. Lawrence): Your last answer on the subject of the National Assistance Board helped me, but I do not think I am quite clear about it even now. Is this what you are saying: the fact that a wife can leave her husband, and, if in need, can immediately get public funds for her assistance, is something which tends to disrupt marriage?—I do, Sir.

4223. Whether this Commission has any concern with that, or not, it is something you wish to see altered by legislation?—Yes, and I refer to it here because automatically at the end of three years the husband can bring a divorce petition on the strength of a magistrates' order. It does not follow, of course, that he will automatically get a divorce on a magistrates' order.

4224. What you have in mind is that, since it is so easy to get temporary maintenance, the wife goes off—simply because there is some quarrel with her husband—and gets this assistance, forgetful that she may be laying herself open to being divorced in three years' time?—Yes.

4225. And if she was not eligible for public assistance, she might face out her difficulties with her husband?—Yes. There is an increasing number of those cases, that is why I made the point.

4226. (Chairman): Another witness who submitted a memorandum suggests that in all these cases the first thing that should be said to the wife is, "Go and find your husband and bring him here, and then let us hear his story", possibly giving her assistance for a week. Would that meet with your approval?—No, sir, it does not, because they just come and say, "I am not going to live with him".

4227. I said—would that meet with your approval? I do not think you followed my question.—Certainly, it might help a little.

4228. (Lord Kitch): May I come back to a point that you raised at the beginning of your evidence? You made a reference to pressure groups, and I know what you mean by pressure groups. What I want to know is this, are you suggesting that divorce reform is the result largely of agitation by a pressure group or pressure groups?—No, Sir. What is in my mind is that when proposals for divorce reform reach the House of Commons there is far too much stress laid upon them, whereas they do not in fact have nearly so substantial a measure of support throughout the country as that might suggest.

4229. In other words, it is always difficult in matters of reform or change in the law to ascertain what the public opinion is?—Yes, my Lord, that is so.

4230. Mrs. Cumella, you recognise that a great many reforms in the past have proceeded from what we might call pressure groups, which very often represented a very small minority of public opinion?—Yes, my Lord. What worries me is that the Criminal Justice Act, 1948, is an example of the result of pressure of that kind.

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4231. Just as an illustration, the abolition of the slave trade was the result of an agitation by what, I think, might be called a pressure group?—Yes.

4232. And that is the sort of thing that happens repeatedly throughout our social history?—Yes, I am bound to agree. But I am trying to stop something that might be bad.

4233. I quite realise, Mrs. Cumella, that you have very definite views on this matter, I am not suggesting anything to the contrary. I suppose we might also say that, that the great bulk of the population of the country are happily married?—Yes, indeed.

4234. And, so far as they are concerned, they are not perhaps greatly interested in the problem of divorce?—Yes, they would not see the consequences of divorce to the children in the way that people like ourselves might see them.

4235. Is not that so?—Yes, that is true.

4236. And therefore the question of divorce for what may be a small minority of the people of this country is really a matter which largely concerns that particular group?—Yes.

4237. And the question really comes to be, is it desirable in the interests of society that something should be done for that group of people?—Yes, bearing in mind that it would quite possibly affect a very much larger number if it was done. That is the problem.

4238. You mean, of course, that the more grounds of divorce there are, the more opportunities there will be for people to be divorced?—And the greater the conditioning of minds of young people. What worries me is the fact that divorce is so easy—we can all quarrel with our husbands if we want to.

4239. What I am wondering is this. Whether it is the grounds for divorce that produce any increase in divorces or weakening of marriage, or whether that is not attributable to other causes altogether than the existence of grounds?—Yes, I think there is a general moral deterioration. I am sure you are right, my Lord, on that.

4240. You might look at it this way. By English standards, divorce in Scotland has for 400 years been what you might call "easy divorce".—Yes.

4241. It did not, so far as I know, produce any weakening of the marriage bond or any divorce-mindedness on the part of young people who got married.—That is a

difficult question, because Scottish people do, I think, look at so many things in a different way from English people. There is one thing about it, you do make the husbands pay, they do not dodge in Scotland as they do in England.

4242. I do not want to touch that question. I am not suggesting for a moment that I am standing up for anything peculiarly Scottish. I am merely trying to test this proposition from a scientific point of view. The argument I understand you are submitting is this, that because you have grounds of divorce more numerous than they used to be, you thereby are lessening respect for marriage and introducing divorce-mindedness?—I think that is what is happening.

4243. All I am pointing out to you is that one of the scientific methods of testing any problem is to look for a control group. You know what I mean?—Yes.

4244. From the point of view of the divorce laws, I am looking at the Scottish people as a control group, and what I am pointing out to you is that for 400 years Scotland has had, by English standards, what might be described as easy divorce. Up to about the last ten or fifteen years, that has produced no appreciable indication of divorce-mindedness or lack of respect for marriage. Does that not suggest to you that there is probably something wrong with the argument that merely to introduce additional grounds for divorce will result in divorce-mindedness?—I am only judging from the attitude of young people as I see it at the moment. In Scotland, your churches are very full, what I have seen of them, and the Church seems to be more closely knit into the lives of Scottish people than here. Maybe it is that. I think I see the point you are making, though I do not really agree.

4245. (Chairman): Could I add a supplement to that? Looking back, I think that until comparatively recent times in Scotland, to be divorced was looked upon as a very grave stigma. That may be another factor in accounting for the fact that for several hundred years there was no marked increase in divorce because you could get it for duress.—I think my Lord took advantage of me, because he knows I cannot compare Scottish with English. (Lord Keith): That is what I am suggesting, that there are other reasons for divorce-mindedness than the grounds of divorce.

(Chairman): Thank you very much, Mrs. Cumella, for your memorandum and for your evidence today.

(The witness withdrew.)

PAPER No. 54

MEMORANDUM SUBMITTED BY A GROUP SET UP BY THE FABIAN SOCIETY

(NOTE: The Secretary of the Society states "The expert group was set up by the Society's Executive Committee and its evidence has been examined by the Committee; but I would like to make it clear that, like all Fabian documents, it commits only the group which prepared it. The evidence is not 'Evidence of the Fabian Society'.")

A. INTRODUCTION

1. Responsibility must not be evaded

We believe the family unit to be the basis of society. It therefore follows that our main concern should be to safeguard marriage. In discussion on marriage law reform too much emphasis is laid upon divorce and not enough upon marriage. It should be remembered that marriage is usually entered into freely and hopefully by people who at the time have affection for each other. They make a choice, and they should not be able to escape lightly responsibility for their action. The trouble is that too many people embark upon marriage in ignorance of what is required in order to make it a success. Broken marriage, which is essentially a failure in human relationships, is often a direct result of such ignorance.

2. Emphasis should be on education for marriage

Reform should, therefore, be directed primarily towards education for marriage. Young people should have the opportunity of learning and understanding what marriage means and the kind of emotional, sexual and economic relationship between husband and wife which is likely to lead to a happy and lasting marriage. Ideally, such education begins at home, but, since it rarely does, other agencies must be relied upon.

3. Wife's contribution must be recognised by law

If marriage is to be a real partnership between two people ready to give and take, it follows that for this to be true in every sense of the word, the vital contribution made to the home and family life by the wife must be recognised by law. This recognition would give her an assured status.

4. Reconciliation services should be more readily available

Even so, it is realised that marriage cannot always be successful. If, however, a marriage is going wrong, it does not mean that it cannot be put right. We believe

that reconciliation can play a much greater part in preventing the breakdown of marriage, providing that facilities are made readily available. We should try to remove the impression which undoubtedly exists that there is something shameful in seeking advice on marital problems. It is a fact that when advice is sought from trained and experienced people the causes of friction and misunderstanding can often be removed and the marriage reinstated.

5. Divorce should be granted only if marriage breakdown irrevocable

It is only when all else has failed that consideration should be given to divorce. We believe that in general terms divorce should only be granted if the courts are satisfied that the marriage has broken down irrevocably. In such circumstances, there is no value from the point of view either of society or of the individuals concerned in enforcing a perpetuation of the marriage.

6. To reiterate, the main emphasis should be upon pre-marital education, the raising of the status of the married woman, and reconciliation. In this way, marriage and divorce will be seen in the right perspective.

B. PRE-MARITAL EDUCATION

7. Education for marriage

Although there are welcome signs that the prejudice that holds that nobody needs to be "educated" for marriage is being overcome, the numbers of those willing to seek pre-marital help and advice are still small. Education for marriage should be considered as normal for everyone, not as the odd predilection of a few. In the same way as there are special facilities for training in domestic science and baby care, so we should have training for marriage.

8. Marriage code

We have no intention of forcing information on those who do not want it, but it would be a symbol of the State's concern if a small book stressing the important elements of marriage could be given to those who apply for marriage, whether at a church or a register office.

9. Should young people produce evidence of pre-marital education?

It might be considered whether it would be desirable for young people to produce some definite evidence that they have received pre-marital education when they apply for marriage, for we do not believe that only the responsibilities and difficulties should be stressed in such education but it should be made clear that true marital happiness is not something that comes automatically. It is never marriage itself that fails, it is the partners to the marriage, and they fail, not so much through ill-will, as through ignorance.

10. Co-operative effort on wide basis needed

Since the fundamental basis for all reform in the marital sphere lies in the right education throughout early life, a co-operative effort is needed, with parents, schools, the Churches, and reputable secular authorities playing their part.

C. ECONOMIC RELATIONSHIP OF MARRIED PEOPLE

11. Economic servitude of the married woman

The vast majority of married women have no property of their own and therefore no economic status in marriage. In fact, unless the married woman earns money or has a private income she is in a position of economic servitude and is entirely dependent upon the goodwill of her husband for the well-being of herself and her family.

12. Economic relationship of husband and wife in Norway

This situation has a historical basis which has survived the emancipation of woman. Other countries have given consideration to the economic relationship of husband and wife, and, in Norway, for example, there was passed in 1927 the Economic Relationship of Married People Act; a paper entitled "An outline of the legal position of married women in Norway according to the Act of the

20th May, 1927" prepared by the Cultural Section of the Royal Norwegian Embassy is attached hereto as Appendix F.

13. Generally accepted superiority of husband undesirable basis for marriage

The generally recognised basis of marriage is that the husband is superior to the wife. It is bad that marriage should be based upon the superiority of one party and the inferiority of the other. Not only is it detrimental to the relationship between the two people concerned, but it is the wrong climate in which to rear children. Furthermore, the attitude that it is only the woman who gains from marriage must be broken down since it is so palpably untrue.

14. Real partnership in marriage necessitates legal recognition of wife's contribution

Marriage is often glibly talked of as a partnership. If it is to be a partnership, then it must be a partnership in fact, and the economic status of the wife must be raised. It follows that the vital contribution made to the home and family life by the wife must be recognised by law. This recognition would give her an assured status. She would no longer be just the household drudge, but a person doing a job as useful as that of her husband.

15. Wife's ignorance of husband's income often causes great unhappiness

It may well be argued that in most marriages the status of the wife does not require legal definition because husband and wife have found a satisfactory modus vivendi. It is, however, necessary for the numerous cases where the wife has no resources of her own, is ignorant of her husband's income and has to keep house as best she can on an inadequate allowance, not because her husband cannot give her more but because he will not. This is the cause of much unhappiness in marriage. It is not directly reflected in the available statistics concerning the cause of separation or divorce, since meanness and selfishness are not legal grounds for either. Such behaviour, however, often results either in the ultimate breakdown of marriage or in a continued association where the family life is overlaid with bitterness and recrimination.

16. Effect on children of marital friction and unhappiness

It is often overlooked that such marriages have a bad effect upon the children. They grow up either with resentment against one or other of their parents, or with the belief that this is the proper marital relationship. There is a danger that when the children themselves marry they will have a similar outlook and so perpetuate this injustice.

17. Anomalies

Furthermore, there are certain anomalies which are unfair to the husband and these should be abolished.

18. Legislative proposals

We recommend that the law be amended in the following respects:—

Separate assessment of married women

(1) A husband is at present assessable in respect of the income tax and surtax of his wife if she lives with him. This rule is clearly capable of working an injustice, particularly where a man of small means marries a rich woman who is unwilling to put him in funds to meet the tax demands. Furthermore, a husband who has paid tax on his wife's income has no right of indemnity against her. Also, if she has died leaving her property elsewhere, he has no right of indemnity against her estate. A married man should therefore be entitled to require his wife to be separately assessed to tax, and in such cases the wife should be treated (as far as the obligation to pay is concerned) as if she were unmarried.

Disclosure of property

(2) Each spouse should have the right to know of what the family property and income consists. Each spouse should be entitled at any time to obtain upon payment of a nominal fee from the appropriate Inspector of Taxes a copy of his or her spouse's last

¹ Appendix I is not reproduced.

three annual income tax returns or P.A.Y.E. certificates. Either spouse should also have the right to apply to the court for the production by the other of an affidavit as to means.

Property rights

(3) (i) All capital acquired after marriage should be the joint property of the spouses provided that gifts by third parties made specifically to one spouse should be the property of that spouse. The matrimonial home including its contents should be the joint property of the spouses, subject to the court having discretion upon dissolution of marriage or separation, to decide on the occupation of the matrimonial home and on how its contents should be divided bearing in mind the special needs of the partner who is awarded custody of the children.

(ii) The wife should receive as of right a reasonable proportion of the joint incomes of the spouses for the maintenance of the matrimonial home. The wife should also have the right to apply to the court for a determination of what the proportion should be and for enforcement of the court's decision.

(iii) The wife's savings from housekeeping money should be presumed to be the joint property of the spouses.

Actions between spouses

(4) Husband and wife should be able to sue each other in tort, but the court should have discretion to hear such cases *in camera*.

National insurance

(5) Further consideration should be given to the basis of national insurance. At present a married woman, unless she herself has been earning since the introduction of the scheme, cannot contribute towards benefits in her own right. Since she is dependent on her husband, it follows that, if the marriage should be dissolved, she forfeits all claim to benefit and may well be too old to establish any claim to a contributory old age pension or at best may qualify for one at a reduced rate.

D. JURISDICTION AND PROCEDURE

19. Present jurisdiction unsatisfactory

The present jurisdiction in matrimonial causes which is spread over the High Court, the county courts and the magistrates' courts is considered to be unsatisfactory. The High Court procedure is expensive to the parties and magistrates are frequently unable to deal with family disputes.

20. Establishment of Matrimonial Court in every county court area

We recommend the establishment of a new court to be called the Matrimonial Court, with jurisdiction over all kinds of matrimonial causes including divorce, separation, maintenance and disputes as to property between husband and wife. A Matrimonial Court would be set up in every locality in which there is today a county court, and would be presided over by a judge who would be a barrister, with a higher status than that of a county court judge. Solicitors as well as barristers would have a right of audience in these courts. It would be obligatory for the judge to sit with a panel of lay justices with special qualifications when dealing with cases of separation and maintenance. Appeals on questions of law and of fact would be to the Court of Appeal. The matrimonial jurisdiction of the Probate, Divorce and Admiralty Division of the High Court would be abolished and it would then be known as the Probate and Admiralty Division.

21. Alternative proposals

We realise that this fundamental reform might not be considered feasible at the present time. In that event we would recommend the following reforms to the present jurisdiction and procedure.

(1) County courts

(a) County courts to have exclusive jurisdiction in undefended divorces, and in defended divorces with the consent of the parties. It should be obligatory that cases be heard by the judge and not by the registrar.

(b) Any party to a defended divorce should be entitled to demand a trial in the High Court before a judge of the Probate, Divorce and Admiralty Division.

(c) There should be a right of appeal from the county court to the Court of Appeal, and the rule that no appeal lies from a county court on a question of fact should not apply to divorce petitions.

(d) Disputes as to custody of children of a marriage dissolved by divorce should be decided in chambers by the judge before whom the divorce petition is heard. When an order as to custody is made by a county court judge, either party should have the right of appeal to a judge of the Probate, Divorce and Admiralty Division of the High Court and such appeal should be a rehearing of the petition for custody.

(e) The legal aid service should be extended to apply to matrimonial causes in the county court.

(2) Magistrates' courts

(a) The matrimonial jurisdiction of magistrates' courts should be exercised by a separate panel of justices with proper qualifications, who should sit as a domestic court. Furthermore, stipendiary magistrates exercising this jurisdiction should be obliged to sit with a similar panel of lay justices.

(b) The procedure of the domestic courts should be as informal as possible. The business of the courts should be organised in such a manner as to reduce waste of time to a minimum and a time-table for the business of each day should be published.

(c) Any separation or maintenance order made by the courts should be limited to a period of two years.¹ A right of appeal should lie to the High Court.

(d) All hearings before a domestic court should be *in camera*.

E. ACTIONS FOR ENTICEMENT; SEDUCTION; BREACH OF PROMISE; RESTITUTION OF CONJUGAL RIGHTS

22. Enticement and seduction

Claims for damages in actions for enticement and seduction should be abolished. We do not believe that the law should help jealous fathers and husbands in their pursuit of revenge. Co-respondents will remain liable for costs, and will now be liable to contribute to the maintenance of the children.²

23. Breach of promise

We recommend that actions for breach of promise of marriage should either be abolished, or, at most, the plaintiff should be allowed only the reimbursement of out-of-pocket expenses incurred in reliance on the promise. We believe that gold-digging actions for what is known in America as "heart-balm" are anti-social and indecent. Moreover, "it is bad policy for the law to put a monetary value on the marriage promise and to seem in any way to force people into the marriage relation when the churches so strenuously insist that no matter what promises have passed between the two parties there shall be no marriage performed unless both parties are perfectly willing at the time of the ceremony".³

24. Restitution of conjugal rights

Suits for restitution of conjugal rights have long been recognised by the court as merely a means of obtaining maintenance, and are no longer necessary since the passing of Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949. We therefore recommend that they be abolished.

¹ See paragraph 35.

² See paragraph 48.

³ Morris R. Cohen in (1927) 27 *California Law Review* 248. Cf. (1935) 23 *Michigan Law Review* 979; (1946) 41 *Illinois Law Review* 199.

F. KINDRED AND AFFINITY

25. We have considered the proposals current in certain quarters to prohibit, on biological grounds, marriage of certain near relations, but do not feel able to support them.

26. We are in favour of permitting marriage with a divorced wife's sister or divorced husband's brother. While we are aware that there might be some abuse, we have been impressed by the evidence of the manifest injustice of the present law in a number of cases and believe that there is no doubt that, on balance, the reform is a desirable one.

G. GROUNDS FOR DIVORCE

27. Genuine failure of marriage relationship should be grounds for divorce.

The present position regarding divorce and the grounds on which it may be obtained is unsatisfactory in many ways. There is only one logical ground for divorce and that is the genuine and undoubted failure of the marriage relationship.

28. Isolated act of adultery should not be a ground for divorce by itself.

It follows that, for example, an isolated act of adultery should not, by itself, be a ground for divorce. To accept it as such is to encourage the belief that only the sexual aspect of marriage matters. Many marriages have survived a single act of infidelity. If persisted in or if the act of adultery is only one of a number of circumstances indicating that the relationship has undoubtedly failed, then it should be considered on its merits with other evidence.

29. Injustice of present law

The present basis for divorce being that a matrimonial offence has been committed by one partner against the other leads to injustice because the "guilty" party may not be primarily responsible for the general breakdown of the marriage; to the deliberate commission of offences in order to supply grounds; to the well-known difficulties over condonation^{*}, which, with collusion, may be a bar to reconciliation; and to the retention of a legal tie when there is no reasonable prospect of the partners ever coming together again as man and wife.

30. Supporting evidence

If the breakdown of the marriage relationship were taken as the ground, for which adultery, desertion and cruelty would be supporting evidence, but not the only admissible evidence, it would be possible for partners who were convinced that their relationship had undoubtedly failed to apply for dissolution of marriage. Continuous confinement in prison should be taken into consideration as supporting evidence. Mutual consent would be a factor to be taken strongly into account, but the dissolution would not and should not be automatically registered. There would be an obligation to convince the court that there were good reasons for supposing that the breakdown was final and complete. There would be no obligation to resort to reconciliation procedure or guidance, but it should be made available. To insist on its use would, in most cases, defeat its purpose.

31. Either partner to have right to show failure of marriage relationship

Where there was no element of mutual consent, it should still be open to either partner to bring evidence that the relationship had failed and to seek a dissolution. We are in favour of retaining the bar to seeking dissolution within the first three years of marriage, with the exceptions at present in force. These proposals, together with the economic sanctions proposed and the revised procedure concerning access to children[†], would, we believe, secure society against a frivolous attitude towards divorce, while at the same time enabling those who had made a genuine error in their choice of partners to rectify it.

H. SEPARATION

32. Judicial separation

The number of cases is very small, as persons requiring more liberal maintenance than can be obtained in a magistrate's court usually resort to a private agreement. The evils of life-long separation, if against the wishes of one partner, remain and we support the recommendation of the 1912 Royal Commission, that where grounds exist for divorce, the respondent in a suit for judicial separation should be able to ask the court to grant a divorce instead.

33. Separation by magistrates' order: non-cohabitation clause

The addition of a non-cohabitation clause to a maintenance order is now usually confined to cases of cruelty, but we are told that one is sometimes inserted without the parties being fully aware that it constitutes a bar to future divorce proceedings based on desertion. Difficulties arising over the occupation of the matrimonial home have been dealt with under that heading[†].

34. Grounds for separation

Orders for separation or maintenance may be granted to wives on any one of nine grounds; to husbands only if the wife is guilty of habitual drunkenness, persistent cruelty to the children or adultery. We consider that the husband should have redress on the same grounds as the wife but substituting "persistent neglect of the home" for "wilful neglect to provide reasonable maintenance".

35. Duration of orders

Duration of orders for separation or maintenance should be limited to two years. Where the order is in favour of a wife without children, the court should be able to impose it for a shorter period, say, six months.

I. MAINTENANCE (INCLUDING ALIMONY)

36. Amount

The fixing of definite amounts above which maintenance cannot be awarded by magistrates' courts has two disadvantages. It brings an element of class distinction into the law and it makes it difficult to take account of changes in the value of money. The increase made possible by legislation in 1949 was long overdue. We therefore suggest that complete discretion should be given as to the amount, with the proviso noted above that orders should be limited in duration to two years.

37. Payment by wife

Where an order is made against the wife, the court should have discretion to direct her to contribute towards the maintenance of the children or, in exceptional circumstances, of the husband.

38. Enforcement

This is a crucial point. At present the court may order weekly payments into court, instead of directly to the wife. This ensures an indisputable record of payments and lapses. But the wife still has to summons her husband for arrears, which can be wiped out by a term of imprisonment. The court does not trace a man, if the wife has lost track of him. The only effective way to deal with persistent defaulters is to attach wages. This has long been the practice in Scotland. It was recommended for England and Wales in the Report of the 1934 Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and other Sums of Money. It has not been implemented because no government wishes to undertake the extra work and because the trade unions have hitherto been opposed.

39. Attachment of wages

The lengthy recommendations of the 1934 Committee were omitted in the Money Payments (Justices Procedure) Act, 1935, in so far as they would have improved the collection of maintenance and affiliation dues. We consider that the present position, whereby a man may go to prison and the wife resort to national assistance, both being kept by the community, is grossly unsatisfactory. We support

^{*} See paragraph 18 (3).

[†] See paragraph 51.

[†] See paragraph 43.

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FARAN SOCIETY**

the recommendations of the 1934 Committee. Provided that other reforms are enacted, putting maintenance orders on a footing better than they are now, we believe it should be possible to overcome most of the opposition of the trade unions.

40. Aid in tracing spouse

Where the wife has no address for her husband, the court should be responsible for obtaining assistance in tracing him from the police or from government departments such as the Ministry of National Insurance. The address should not be disclosed to the wife without the husband's consent.

41. Maintenance following divorce

An order for maintenance following a decree of divorce should be enforceable in a magistrates' court in the same way as other maintenance orders, but any variation in the order should be made only by the higher court charged with hearing divorce cases. Should special Matrimonial Courts be established, all such work would devolve on them.

42. Assessment and review of alimony

While there can be no dispute that where there are dependent children the wife must receive adequate maintenance for herself and the children, we believe it to be contrary to public policy that persons who are able to work should be free to live idly on maintenance provided by the other party in a marriage. Where there are no dependent children, the age, state of health, and wage-earning capacity of the divorced wife (or in special circumstances the divorced husband) should be taken into account when maintenance is being assessed. The wife should have no automatic claim. We recommend that maintenance be reviewed at regular intervals and re-adjusted or discontinued according to circumstances.

43. Income tax

The present position is that, save where the payment by the husband to the wife is a purely voluntary payment on his part, not resulting from any court order or written or oral agreement between the parties, the wife is liable to tax on the amount received, either by deduction of tax at the hands of the husband or by a direct assessment where it is a "small maintenance payment", as defined by Section 25 of the Finance Act, 1944, as amended by Section 1, Married Women (Maintenance) Act, 1949. This principle follows the normal practice operating throughout income tax procedure, namely that contractual obligations confer relief from income tax on the part of the donor. It is, however, felt by many women to be an injustice that their husbands should obtain tax relief which they would not have secured had the payment been made in the form of housekeeping money in the home. There also seems to be a good deal of misunderstanding on this point.

J. WELFARE OF CHILDREN

44. There is general agreement that it is children who suffer most from broken marriages and that their welfare should be paramount.

45. Custody of children

In addition to putting the well-being of children in the forefront when considering questions of maintenance and the matrimonial home, we believe that there is strong ground for revising the present practice of granting a legal right of access to the children to the parent who does not obtain custody. Until the child is at least fifteen years of age, it should not be subject to divided loyalties and the playing off by one parent against the other. Where older children are concerned it might be quite possible and reasonable to let them indicate with which parent they wish to remain. The court should then take this into consideration when making a decision, having assured itself that the choice has been made voluntarily, and that the children will not be penalised because of the choice made.

46. Young children

We support the present practice of normally placing a young child in the care of its mother, whatever her relationship to her husband, and believe that only in the

most exceptional circumstances should a child under six years of age be parted from its mother. Where neither parent is fitted to take charge, a foster-parent is to be preferred to an institution, but a bad parent is almost always better than none.

47. Interests of children should be represented

A probation officer or court welfare officer should enquire into and represent the interests of the children in all cases where children are involved. By thus giving priority to the welfare of the children, the use of the children as a bargaining counter in the negotiations between the parents could be prevented.

48. Co-respondent to contribute towards children's upkeep

Where a home, in which there are dependent children, is broken through adultery, we believe there is a case for requiring the co-respondent to contribute towards the upkeep of the children. This seems to us more in keeping with present-day thought than the outmoded idea of extracting damages for the loss of a wife, which in our view should be abolished.

49. No distinction in grounds for dissolution between children and other marriages

We consider that the proposals in this section would have a salutary effect on those who might be tempted to endanger a marriage in which there were children. We do not think that there should be any specific distinction between children and other marriages in the grounds for dissolution; only in the consequences when dissolution had taken place.

50. Legitimacy

It is in the public interest that children should be born in wedlock, or appear to be, so as not to feel social outcasts. We therefore recommend that marriage between parents should always confer upon a child born before marriage the status of legitimacy, whether at the time of birth either parent was free to marry or not.

K.—MATRIMONIAL RECONCILIATION SERVICES

51. Reconciliation efforts should not cease when divorce contemplated

Since we believe that every effort should be made to reconcile the two parties to a marriage when marital difficulties arise, it is imperative that these efforts should not cease when divorce is contemplated. But the law, as it now stands is, in one respect, a hindrance to the reconciliation of married people who might otherwise come together again. The Final Report of the Denning Committee for this reason attempted a re-interpretation of the rule as to collusion and, partially, of the rule as to condonation (para. 29 (x) (xii)). But even they stated that, in two respects, the condonation rule inevitably tends to keep a separated couple apart, whatever their inclinations (para. 29 (xii)). Moreover, Professor L. C. B. Gower pointed out to the Anglo-French Legal Conference in 1949 that the Committee's re-interpretations had failed to re-assure cautious solicitors who prefer their divorce clients not to meet.

52. Extension of reconciliation services required

There are many half-broken marriages where there is a far greater need for a service of reconciliation than for facilities to bring the marriages to an end. Social agencies, specialising in this type of help, have for some time now proved their worth, but this is not sufficient. We believe that, after marriage, study of its problems on a general level should be made more widely available. One way of doing this would be to extend the functions of ante-natal and infant welfare clinics so that they became "family guidance clinics". They might organise discussion of the problems of young married people as well as providing case-work help for individual difficulties. Professional workers of the calibre of psychiatric social workers would be required for the latter work.

53. Marriage guidance counsellors must be highly trained

Although the shortage of highly trained case-workers makes this a counsel of perfection at the present time, too much stress cannot be laid on the importance of the best and fullest professional training for all marriage guidance

23 July, 1952]

MR. AND MRS. ELLIS BIRK

[Continued]

to our original proposition that it is for the court to decide on the evidence that is brought before it whether the marriage relationship has broken down. We do not wish there to be any formal procedure just to satisfy what might be at present thought to be the requirements of society.

4268. Am I right in thinking that you would allow the petitioner to come to the court even though the parties were still living together?—You would have to define what you meant by "living together."

4269. Let me define that: living in the same house, but not sleeping in the same bed.—Since there can be a divorce at present on the grounds of desertion between two people who are living in the same house, I do not see that any difficulty is involved.

4270. (Mr. Birk): Would Mr. Birk tell me what he thinks the duty of the State is towards marriage?—First of all, marriage is an institution of which the State must take note and for which it must make provision. Secondly, the State, through various organs of State, must try to encourage education for marriage. Thirdly, marriage as an institution in itself should be encouraged because, as we said, we agree that the family is the essential unit. Fourthly, the State must take note of the fact that all marriages are not successful, and must therefore make provision for the dissolution of marriages which are unsuccessful. At the same time, the State has a positive duty to try to see that marriages are kept together if it is possible to do so, therefore the State must provide services to that end. We think that we covered this largely in the memorandum.

4271. Yes. The point is this, is it not, that the State has to have an understanding of the ordinary man and woman? Do you think the ordinary man and woman understands rules like, for instance, the Ten Commandments better than he or she would understand the principles which you have evolved to govern the dissolution of marriage?—I am not competent to say whether people understand the Ten Commandments better than such a principle. If they do, they very seldom act in accordance with the things they understand.

4272. The point is, is it not, that rules like the Ten Commandments are fairly clear: "Thou shalt not commit adultery," "Thou shalt not covet thy neighbour's wife." It is much easier, is it not, for the ordinary man to obey those rules, if he wishes to, than to act according to the principle which you are suggesting?—I am sorry, Sir, I am afraid I just do not see the point you are getting at. On the one hand, the Ten Commandments are a part of religion; on the other hand, we are dealing with what we consider to be secular proposals.

4273. I was not quoting the Ten Commandments from the religious point of view at all. They were of course a legal code, were they not, when they were instituted? I am only quoting them as an example. A simple rule, "Thou shalt not do this," is much easier for the ordinary person to understand, is it not, than the kind of principle you postulate in this memorandum? Are the ordinary people of this country really able to act in accordance with the ideal which has produced your principle?—As a matter of philosophy I would say that the fact that an ideal may be difficult to live up to does not mean to say that there should not be an ideal. We are concerned here with two separate proposals, as we said, one designed to deal with marriage as an institution, the other to deal with divorce, the remedy for marriages which break down. I think we would say that people understand marriage and the purpose of marriage partially; married people begin to understand, at any rate, after they have had some experience of marriage, but we do not believe that young people know enough about marriage in advance. I cannot see that the comparison of a simple code with something which may be much more complicated but which is designed to deal with specific questions is any real comparison at all. I am still not clear as to the point you are trying to make.—(Mr. Birk): May I add something? The point of your question seems to me to lead rather to the reverse of what you were putting. It seems to me that the expectation that people should both understand and obey the Ten Commandments is much more an ideal than the principle we are putting forward. We are accepting more readily the existence of human frailty

and trying to adjust what can be expected of people to the social conditions of today, and at the same time we are trying to set some sort of standard which will not be too difficult to attain and which will also safeguard marriage. It does not seem to me to be any good saying to people: "Thou shalt not commit adultery," "Thou shalt not steal," when you know quite well that a number of people are going to do so, and that very often the rule that guides them is "Thou shalt not be found out." It seems to me we are trying to face up to the problems in a much more realistic manner.

4274. I am coming to my point now. The State says now, does it not: "You shall not have a divorce unless your husband has committed adultery, or unless your husband has deserted you for three years," and the State is in that way, is it not, protecting marriage? What I understand you to say is: "You shall have a divorce if you have broken up your marriage"—(Mr. Birk): Indeed not, indeed not.

4275. Then will you tell us what you mean?—Another way of putting your proposition is to say "You will be divorced if you commit adultery, or if you desert for three years"; we say "You can only have a divorce if you can prove that your marriage has broken down". We are not interested as to whether there has been a particular act of adultery, we want evidence upon which a court can decide that the marriage has broken down.

4276. But there are certain things, are there not, that one must not do if one does not want one's wife to divorce one, at the moment?—There are certain things that one must not do unless one wants to give one's wife the chance of divorcing one.

4277. But one really will not know what one may do or may not do under your proposal?—You are awfully pessimistic about marriage. I do not think that people get married with the idea of jockeying each other into a position so that one may be able to divorce the other at the earliest possible moment. We believe we have got right to the root of the matter in saying that, if a marriage has broken down, there is no point in the two parties living together any further; such a situation only causes unnecessary unhappiness. If I judge your questions rightly, you seem to be suggesting that it is better that the State should say: "You must not commit adultery, otherwise your wife may be able to divorce you". We consider that the law and the position of the law have got into a curious state at the moment, so that when two people have agreed that they want to get a divorce, because they have to bring certain evidence before a court, they virtually manufacture the evidence. I am convinced that that is bringing the law into disrepute.

4278. Do you not think that the following possibilities might arise under your system? I will quote two: the first is that a wife may want to keep the home together for the sake of the children, but the husband says: "If you do not come with me to the judge and agree that our marriage has come to an end, I will give you such a frightful time as home that you will be glad to come to the judge"—But he can do that already.

4279. How?—If he gives his wife a sufficiently frightful time she will be able to ask for a divorce on the grounds of cruelty.

4280. But that at least is not fiction, is it?—No, that is factual. (Mrs. Birk): But, if I might interpose there, surely today the husband can say to the wife: "Look, I am giving you grounds for divorce. If you do not divorce me I shall give you a frightful time"; he can still blackmail her.

4281. Do you think that happens?—I would say that there are probably some cases where that happens, there is certainly a possibility. Perhaps I may refer to paragraph 39, where we mention the present grounds of divorce, such as adultery, desertion and cruelty, which we say would be supporting evidence. Presumably, if our proposal came into force, the people who would be judges would be the people who are judges under the system existing today, and also the same acts would be put forward as grounds for divorce but they would be put forward in rather a different light. There would not be a jump, as it seemed to me you thought there would be, from the known entirely into the unknown.

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MR. AND MRS. ELLIS BIRK

[Continued]

4282. We should very soon get into the unknown, should we not?—We might in some ways, but not necessarily. What might happen would be that matters which are hidden now would then be brought out into the open as grounds for divorce, instead of, as now, being hidden behind one of the well-worn grounds.

4283. (*Lady Bragg*): You say in paragraph 45:—

"... we believe that there is strong ground for revising the present practice of granting a legal right of access to the children to the parent who does not obtain custody."

What sort of revision have you in mind?—It did seem to us from the evidence put forward by the other members of the group and from our personal knowledge that where custody of a young child is given to one parent, usually the mother, and the father is allowed access, the child may be subjected to divided loyalties and rather tossed from one to the other; and although it might seem on the face of it only fair to give both parents access to the child, nevertheless we feel, however hard it may be on the parent who has not custody, it is going to be for the child's welfare that the child should not be subjected to these divided loyalties, so that until the child is older it might be advisable not to give access to the parent who is not given custody.

4284. Do you think that that practice is not already carried out?—It is not carried out in some cases. There are cases where the mother has custody of the child and the father is allowed access; there is not sufficient evidence to bring to the court to show that the father is a bad influence on the child, but nevertheless this conflict is going on around the child, and may be very injurious to it.

4285. (*Chairman*): Is not the answer that it depends upon the circumstances of each case whether it is better to do the one thing or the other?—Exactly, my Lord, it does.

4286. (*Lady Bragg*): What is new in your proposal?—I think we want to go further than is done today; once again we are putting the emphasis on the interests of the child; I have heard it said, for instance, that where the father is the innocent party in a divorce suit and the mother is given custody because the child is young and it is better for the child to be with the mother, it is unfair for the father not to have access to the child. That is so, but if it is going to be to the child's benefit to be left for some time with the one parent, then we feel that, however unfair it may seem, the child must be left with that parent.

4287. I am also interested in what you say, in paragraph 54, about the probation service. You think that probation officers are not trained fully enough for matrimonial work, and that at present a probation officer's first and foremost duty is being in charge of people on probation, and that matrimonial work is very much a secondary consideration?—Neither of us is a probation officer but we were advised to some extent on this matter by a member of our group who is a probation officer. We did feel that the varying amount of case-work which had to be handled by probation officers did not enable them to specialise in matrimonial work, except in the metropolitan area, and our view is that there should be more specific and specialised training for matrimonial work, and that at least some of the probation officers should to a greater degree specialise in such work.

4288. (*Sir Frederick Borrow*): In paragraph 21 (2) (a) you say:—

"The matrimonial jurisdiction of magistrates' courts should be exercised by a separate panel of justices with proper qualifications, who should sit as a domestic court."

Could you tell me what you consider are the proper qualifications? Does it mean that they should be old, young or middle-aged, married or single, specially trained in welfare; should they all have the same qualifications, or should each one have a different set of qualifications? Should they be appointed from any single class or group?—I think to start with we had in mind that it would be a great advantage if the people who

served on the domestic or the matrimonial court had previously had some experience or knowledge of social welfare work. I think it is also important that—and this may be done in some courts, I do not know—there should be a variety of people, both as to age and views. In the same way as magistrates are now asked if they have any views on housing, so I think that magistrates should be prepared to state if they have any definite prejudice which is going to colour their view in deciding these cases in the matrimonial court. I am afraid this is rather a wide definition, because I think it would be quite wrong at this stage to limit it. Whereas nowadays we are realising that we want people with experience of juvenile delinquency in the juvenile courts, so we should take somewhat the same sort of view with regard to the people dealing with matrimonial cases.—(*Mr. Birk*): The trouble is that it needs a detailed consideration to decide what the qualifications of these magistrates should be. We merely wanted to put forward at this stage the point that they should be people with qualifications rather different from those required of an ordinary justice of the peace.

4289. You go on to say:—

"Furthermore, stipendiary magistrates exercising this jurisdiction should be obliged to sit with a similar panel of lay justices."

So I take it that you would not consider a stipendiary magistrate sitting alone a capable or a proper person to exercise jurisdiction unless he had with him these properly trained lay magistrates? The fact that he was learned in the law would not give him the right to exercise the proper discretion or judgment?—This is a point of some importance. It does not follow, we believe, that because a person has reached high enough in his profession to be appointed a judge, he necessarily has sufficient knowledge of sociology, economics or whatever else might be necessary, to be able to make decisions on the peculiar circumstances of matrimonial disputes. If it were simply a matter, as it is perhaps at the moment, of applying a strict law, then possibly one would say that the matter might be left to the professional judge, at whatever level he may be, but there are so many other factors which have to be taken into account when one is dealing with problems of this sort that we believe the professional judge may need some special guidance to enable him to come to a proper decision in each case. We believe that because a person is appointed a stipendiary magistrate he does not necessarily have all the qualifications required to deal with matrimonial disputes, and that he may need assistance from people who have the proper qualifications.

4290. I take it that the professional judge at the stipendiary magistrate level would not be qualified or capable, but, as a judge of the Divorce Division, then he would be capable?—No, Sir, but one of the things we have to take into consideration when submitting evidence to a Royal Commission is not only what is right but what is possible. We thought it might be possible to add these laymen to the stipendiary magistrate's court, but we could not imagine in our fondest dreams that anybody would recommend that, for example, a judge of the High Court should sit with a number of laymen beside him as assessors. We turned our backs to the wind on that point.

4291. Thank you very much. In paragraph 21 (2) (b) you say:—

"The business of the courts should be organized in such a manner as to reduce waste of time to a minimum and a time-table for the business of each day should be published."

Do you not think that that is completely impossible? Cases in the domestic courts vary in the length of time taken; some cases would be simple and some would be long. Would it be possible to publish a time-table? Could you reduce the time taken by each case to a minimum; has not every case to be tried upon its merits?—It is an awfully difficult problem, but it might for example be helpful if it were to be known which case was going to be taken first in the day so that some of the applicants might be able to attend later in the day instead of everybody having to be at the court at the beginning. I speak with some hesitation here, because I do not practise in the magistrates' courts, therefore I do not know very much

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MINUTES OF EVIDENCE

TAKEN BEFORE THE

ROYAL COMMISSION
ON

MARRIAGE AND DIVORCE

19

NINETEENTH DAY

Thursday, 24th July, 1952

WITNESSES

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THE VERY REVEREND J. H. CRUSE
THE REVEREND HARRY BAILEY
THE REVEREND P. GARDNER-SMITH
MR. LESLIE BROOKS
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Union



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THE ROYAL COMMISSION ON MARRIAGE
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NINETEENTH DAY

Thursday, 24th July, 1952

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PAPER No. 55

MEMORANDUM SUBMITTED BY THE MODERN CHURCHMEN'S UNION

I. The Modern Churchmen's Union

1. The Modern Churchmen's Union is a society of clergy and laymen, founded in 1898 for the advancement of liberal religious thought. Among its past Presidents have been the following:—

The Very Reverend Hastings Rashdall, Dean of Carlisle.

Professor Percy Gardner.

The Very Reverend W. R. Inge, Dean of St. Paul's.

The Very Reverend W. R. Matthews, Dean of St. Paul's.

Sir Cyril Norwood, President of St. John's College, Oxford.

The present President is Sir Henry Self, K.C.B., K.C.M.G., K.B.E., B.Sc., B.D. The Union has always taken a definite attitude on the question of marriage and divorce, and is opposed to the rigidist interpretation of the Christian standards. It has issued various memoranda on the subject.

2. The following members of the Union gave evidence before the Royal Commission on Divorce and Matrimonial Causes (1909), namely, Canon Hastings Rashdall, Dr. W. R. Inge, and the Reverend C. W. Emmet.

II. General principles

3. We have not been able to see the evidence which is being submitted on behalf of the Church of England, but we know that there is a considerable body of opinion in the Church of England which would not endorse what is described as the official point of view. We are as anxious as anyone else to uphold the Christian ideal of marriage, "the marriage of one man and one woman for life, to the exclusion of all others on either side", an ideal which is sometimes expressed in the ambiguous phrase "the indissolubility of marriage". But we believe that this ideal is best maintained not by the rigidist view that marriage is incapable of dissolution but by the recognition that in certain cases divorce is necessary and permissible as being the lesser of two evils.

4. We know that this view has the support of a large number of clergy and, we believe, of the majority of the laity of the Church of England. (See Appendix I.)

III. The New Testament evidence

5. It will, no doubt, be represented to the Commission that the evidence of the New Testament is wholly in favour of the rigidist view of the indissolubility of marriage. We desire to assert strongly that the facts

do not bear out this conclusion. Though it is beyond question that a permanent union is an idea held forth throughout the New Testament as representing the essential nature of marriage, it cannot be deduced from the text of the New Testament that the dissolution of a marriage which has broken down is in all cases forbidden to a Christian. The New Testament is not to be treated as though it were a fully-developed code of law, and the authority of Christ was claimed for customs which were contradictory.

IV. The practice of the Church

6. Throughout the history of the Christian Church there has been continued tension between the ideal and what was regarded as practical in a particular situation. The Eastern Church allowed divorce and re-marriage in certain cases, while in the West the rigour of the absolutist position was modified by a subtle legal system which in effect made divorce possible and allowed decrees of nullity to be issued in great numbers.

7. In the Church of England "from about the year 1550 to 1602 marriage was not held by the Church, and was therefore not held by law, to be indissoluble". (Sir John Stoddart before the Lords' Select Committee, 1844.) After 1603, however, divorce *à vinculo* could only be obtained by Act of Parliament. The Divorce Act of 1857 was supported by a large number of churchmen, including Talk, Bishop of London, and other bishops. The rigidist attitude adopted by the High Church party then and now ignores the practical modifications made by the medieval Church, and we prefer the position expressed by the historian, Mandell Creighton, Bishop of London (1897-1901): "We as Christians abhor divorce; but when a divorce has been judged necessary are we to refuse any liberty to the innocent or wronged party? It seems to me a matter of discretion on equitable grounds in each case. I could not advise any of my clergy to refuse to solemnise a marriage of an innocent party who genuinely desired God's blessing. I prefer to err on the side of charity."

V. The present ecclesiastical position

8. *Dual standard.* The Christian ideal of marriage is of significance for the Commission because it applies to all marriages, and ought to be the guiding principle in all legal systems. We believe that there is evidence, including the continued establishment of the Church in this country, that the Christian ideal is accepted by the State. The aim of our legal system should therefore be to apply Christian standards as far as is practicable to

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THE VERY REV. DR. W. R. MATTHEWS, THE VERY REV. J. H. CRUSE,
THE REV. HARRY BAILEY, THE REV. P. GARDNER-SMITH AND MR. LITTLE BROOKS

[Continued]

to give an answer to the question? Then do you wish to add anything to the memorandum?—I think it is unnecessary to do more than to repeat that which I think is clear enough in the memorandum, that we are here because we think that we stand for the point of view in the Church which has not been adequately represented by the Archbishop, although at the same time we agree with him that the grounds of divorce should not be extended. I think perhaps our main interest and desire is that we should keep the law of the nation with regard to marriage on lines which could be described as Christian, and we believe that the view which we put forward as to the nature of marriage is the correct view as to what marriage actually is, not for professing Christians only but for everyone.

4305. I see that the Modern Churchmen's Union is a society of clergy and laymen, founded in 1886 for the advancement of liberal religious thought. You set out the very well-known names among its past Presidents and you tell us that the present President is Sir Henry Self. You remind us that members of the Union gave evidence before the Royal Commission on Divorce and Matrimonial Causes which was set up in 1909 under the Chairmanship of Lord Gorell and you set out your general principles. You say:—

"We are as anxious as anyone else to uphold the Christian ideal of marriage, 'the marriage of one man and one woman for life, to the exclusion of all others on either side', an ideal which is sometimes expressed in the ambiguous phrase 'the indissolubility of marriage'. But we believe that this ideal is best maintained not by the rigid view that marriage is incapable of dissolution but by the recognition that in certain cases divorce is necessary and permissible as being the lesser of two evils."

Then you go on to describe the practice of the Church, and for the reasons which I have already stated I do not desire to ask you any questions on this subject. Then in Section VI, you say in paragraph 11:—

"We do not consider that the grounds of divorce should be enlarged to include any others than those for the time being in force. We think that the provisions of the 'Herbert Act' of 1937, now embodied in the Matrimonial Causes Act, 1950, are sufficiently wide with the possible exception of a fresh ground for habitual drunkenness. Further, we do not think for the reasons hereafter set out that the jurisdiction to hear and determine causes that alter the status of married persons should be delegated to any person below the dignity of a judge of the High Court or such persons of equivalent rank and status as the Lord Chancellor may appoint."

I have two questions on that. First of all, you refer to the "... possible exception of a fresh ground for habitual drunkenness". Is it the view of the Union that it is desirable or undesirable that such a fresh ground should be introduced, or have you formed no fixed conclusion on that subject?—We have no fixed conclusion. We regard it as open to discussion. My own personal view would be against admitting that as an additional ground, but I expect that some of my colleagues would have the opposite view.

4306. Would any of your colleagues desire to express any opinion, or do they prefer to leave it at that?—(Mr. Brooks): I think, Sir, that the Dean is right not to recommend that it should at the moment be made an additional ground. I think that it would be difficult to decide what habitual drunkenness is, in the sense that at the moment it would be rather difficult to determine to what degree a man would have to be an habitual drunkard before his wife could obtain the relief.

4307. Then you refer to the Herbert Act of 1937. Is it the view of your Union that that Act on the whole has proved to be a beneficial or a detrimental step, or have you formed no views about it?—(Dr. Matthews): I think on the whole we should agree that it was a beneficial step.

4308. I will turn now to the paragraphs headed "Bar to the granting of a decree". In paragraph 19 you say:—

"We do not consider the bar to a divorce within three years, except in cases of exceptional depravity or hardship, serves any useful purpose, and may well be a hardship to the innocent party and a temptation to commit adultery."

That is a view which is contrary to the view expressed by a good number of the witnesses before us. They think that the three years is a useful "settling down time", and that the bar prevents young couples who perhaps have had early trials and squabbles from having recourse to the Divorce Court. What do you say to that point of view?—(Mr. Brooks): We discussed that point of view, and we came to this conclusion, that when a marriage has been broken down by reason of the adultery of one of the parties, it is very rare that any form of reconciliation can be successful. We had in mind the number of war marriages that were broken up at a very early stage in the marriage, we consider, by reason of the fact that when two young people were married on a leave and the husband had to return to the Forces after a very short honeymoon, the wife, if she had lived a chaste life before her marriage, found it very difficult to wait until her husband returned for his next leave, before she again enjoyed the matrimonial life which she had had for only a few days, and this might have been a cause for sending her astray with some other man. We feel that this position may also arise in peace time when a marriage has broken up at a very early stage; if the wife has to wait for three years before she can become free again she may very well commit adultery and have to ask the discretion of the court, whereas if she had been allowed to get her divorce immediately the husband had committed the matrimonial offence she would have married again in the normal way and not have made herself an adulteress unnecessarily.

4309. Surely that point of view goes on the footing that once a matrimonial offence has been committed the marriage is at an end? Does that leave any scope for the Christian virtue of forgiveness? Supposing there has been adultery at an early stage in the marriage, possibly one of those casual acts which everyone condemns, but which a wife might forgive, the three years' bar on divorce at least gives a period during which, except in circumstances of exceptional hardship or depravity, the two persons have got to remain husband and wife. That does give an opportunity for reflection, and possibly for forgiveness, by the injured party. There is a further point. Adultery is not the only matrimonial offence. Other matrimonial offences might have been committed before the parties have properly settled down to married life, and the three years' bar on divorce again gives time for reflection and forgiveness. In saying that I am not expressing a personal view but merely putting the other viewpoint which has been emphasised by other witnesses. What do you say to that aspect of the matter?—We feel that if the wife or husband were prepared to forgive the offence, that forgiveness would be given readily at the time, and no period of waiting could increase the possibility of forgiveness. With regard to the grounds other than adultery, desertion, of course, would in any event run for the three years, and so the three years' waiting period would not be necessary. Where there has been cruelty, forgiveness would be far more unlikely, because cruelty by its nature would consist not of one single act but of several acts over a period, and therefore the question of forgiveness for one act would not arise. There might be a series of acts continuing, as so often they do, for years and years before any action is taken.

4310. In paragraph 20 you say:—

"Although reconciliation of the spouses is the ideal, the fact that they have arrived at the time for consulting solicitors and contemplating proceedings is an indication that they are beyond the stage when they can be reconciled. If the spouses were capable of being reconciled such reconciliation would be achieved before legal action was contemplated."

Is it not perhaps a little pessimistic to say that when parties consult solicitors they are beyond the stage when they can be reconciled?—We think that forgiveness from the Christian standpoint would come, as I said before, at a very early stage, and we feel that if a party has got to the stage that he or she wants to invoke the assistance of the law the time for reconciliation and forgiveness has passed; ways of bringing about a reconciliation have already been explored, otherwise legal advice would not have been taken. May I add this, that of course the moment the parties begin to ventilate their grievance, either to their legal advisers or, and especially, in open court, then the chances of reconciliation are practically negligible.

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THE VERY REV. DR. W. R. MATTHEWS, THE VERY REV. J. H. CRUICK, THE REV. HARRY BAILEY, THE REV. P. GARDNER-SMITH AND MR. LESLIE BROOKS

[Continued]

4311. In paragraph 25 you say:—

"Further, we consider that when a guilty wife is awarded the custody of the children of the marriage and is living with and being supported by a co-respondent who was the cause of the marriage being broken, the co-respondent should be ordered to contribute in part to the support and education of the children."

At what stage did you contemplate that the order should be made? The co-respondent, of course, might or might not be before the court. Is the order to result from enquiries to be made by the court subsequent to the proceedings or while they are going on?—I think the Union had in mind this position, that when a marriage has been dissolved and the wife marries the co-respondent and obtains the custody of the children, then the husband is in the unhappy position of not only having lost his wife and his home and his children, but, in the majority of cases, of being asked and having to support his children: in so doing he supports in a small measure the co-respondent and his wife. We feel that if the wife has married the co-respondent and has the custody of the children, the co-respondent should be asked to share the responsibility for their maintenance with the husband; the co-respondent has, in fact, taken these children as if they were his own into his home and he enjoys what pleasure there is from the possession of children in a household.

4312. Your suggestion is really limited, as I understand it, to cases where the guilty wife has married the co-respondent?—Yes, I think that must be so.

4313. If your suggestion included the case where the wife is living with the co-respondent and being supported by him, that would involve certain enquiries being made to ascertain the facts, whereas if the suggestion is limited to cases where she has married the co-respondent the administration of the proposal would certainly be much easier.—I do not think we limit the proposal to the cases where she has married the co-respondent. We would also include the case where she was living with the co-respondent but not married to him. However, that situation would be very unlikely to arise as the Divorce Division very seldom allows children, unless very young, to live in a household where adultery is taking place.

4314. That is quite true. You speak of the guilty wife. What would you say to cases where the husband was the guilty party? Supposing the woman named was wealthy and, say, a boy was living with the guilty husband and the woman named, is there any reason why she should not contribute in order, for instance, to send the boy to a better school and so give him a better education?—None at all. I think it applies equally in that case.

4315. Then you come to the question of divorce by consent, and you set out very fully and clearly your reasons for thinking that that should not be allowed. You say:—

"We are opposed to the dissolution of any marriage save for a matrimonial offence, adultery or insanity. We do not think that a marriage should be dissolved merely by the consent of the spouses to a dissolution, but only after a matrimonial offence has been committed. . . . A marriage, whether it be entered into in a church or in a registrar's office, is binding upon both parties."

You also point out that:—

"It is not the husband and wife alone who are concerned in the marriage. Divorce by consent is undesirable not only from the point of view of family life but also from that of the State."

Then you refer to children of the marriage and you end up by saying:—

"A marriage that can be fulfilled or broken at the volition of the contracting spouses would be contrary to public policy."

Is that statement based upon the reasons which have already been set out, or is there something further which comes under the heading of "public policy"?—(Dr. Matthews): It is based upon the reasons which have been set out, I think.

4316. (Lady Bragg): May I ask who has drawn up the memorandum?—(Rev. H. Bailey): The Modern Churchmen's Union appointed a Committee to deal with this matter. The Committee, some of whom are sitting at

this table, is the body which has actually drawn up the memorandum and the supporting evidence, all of which is contained in a pamphlet which we have published under the title *Marriage and Divorce in the Church of England*. The names of the members of the Committee are detailed in this pamphlet, which contains in addition four or five very important short articles which substantiate our case.

4317. May we assume that all the members of the Union have seen the pamphlet?—No, it has not been circulated in full to all our members, there has not been time for that, but I think the general view is that it does very broadly represent the view of members of the Modern Churchmen's Union, and indeed the view of other churchgoers who are not members of the Union.

4318. I noticed that you said that it had the support of a large number, indeed the majority, of the laity of the Church of England.—We have not been able to take any sort of Gallup Poll of opinion, but all of us have found in working together on the Committee that clergy, laymen and laywomen whom we have met have in a very broad way expressed a general approval of the views which we present to you.

4319. (Chairman): I observe that the memorandum before us is included in this booklet.—That is so, Sir, the reason being that you will remember that the Commission very rightly desired that the original memorandum should be as short and concise as possible. We complied with that request but when we published the pamphlet it was only right that we should publish the supporting evidence for the views expressed in the memorandum. (Chairman): It is very helpful to have it.

4320. (Lady Bragg): You say that the terms of the Herbert Act are sufficiently wide with the possible exception of a fresh ground for habitual drunkenness. In answer to my Lord Chairman it seemed to me that you assumed it would be the drunkenness of a husband. I would like to know if you considered the case of a wife who is an habitual drunkard, and who has broken up the home?—(Dr. Matthews): Yes, we did consider that. I think we would like to take the same point of view with regard to her as with regard to the drunkard husband.

4321. (Mr. Bates): Mr. Dean, the last sentence of paragraph 8, which is headed "Dual standard", reads:—

"We are utterly opposed to the setting up of two standards of marriage, one recognised by the State and the other by the Church."

There is a point of view, is there not, that it would be for the good of true religion if the Church did insist upon a higher standard in relation to marriage than non-Christians will accept, and it is also suggested by some that the Christian standard is not the standard which is now acceptable to the majority of people in this country? Would you feel, supposing it were true that the majority of people in this country did not accept the Christian standards of marriage, that it would be right for the State to impose those standards upon them?—I think our view is that although, of course, there are very large numbers of people, perhaps the majority, who make no outward profession of the Christian faith, the main feeling in the country is that people do not want to depart from what they understand to be Christian standards. I think that if, say, this Commission were to state quite plainly that it intended to recommend that the law should be changed so that it no longer conformed in any sense to Christian standards, there would be a considerable amount of outcry in the country. Therefore we feel that the law should at any rate represent what one might call a minimum Christian position with regard to marriage. It is, of course, true that the Church must require from its members a stricter conduct than from those who do not profess to be its active and practising members. I do not think we want to suggest that the law should attempt to impose upon everyone the kind of discipline which the Church ought to attempt to impose upon its members, but we are strongly opposed to the idea that there is one standard which should be upheld in the Church, and a totally different standard which should be upheld by the non-churchman.

4322. And would you feel that if the grounds for divorce were extended, the State would be going dangerously far away from the Christian ideal?—I should feel so, yes.

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THE VERY REV. DR. W. R. MATTHEWS, THE VERY REV. J. H. CRASS,
THE REV. HARRY BAILEY, THE REV. P. GARDNER-SMITH AND MR. LESLIE BROOKS

[Continued]

4323. In paragraph 29 you say that you also object to divorce by consent in relation to a childless marriage, and you then go on to say, in paragraph 30:—

"A marriage that can be fulfilled or broken at the volition of the contracting spouses would be contrary to public policy."

Do you regard it as equally contrary to public policy that people without children should be able to break up their marriages by consent as people with children?—Of course, there is an obvious difference in the case of people who have no children, because the argument based on parental obligations does not apply. There is, however, the other aspect, that marriage should be a stable institution; to allow the fact that everything does not go as well with the marriage as the parties have hoped to be sufficient ground for breaking the marriage up, would, I think, be a weakening of the stability of marriage as an institution.

4324. But not so great a weakening as if divorce by consent were extended to parents?—No, I agree with that. As I said, the factor of the need for parental care for the children would not be present in that case.

4325. (Mr. Young): As clergymen you must come into contact with people a great deal. Could you tell me what are you conscious in these contacts of there being a substantial body of opinion in the country in favour of the introduction of divorce by consent or after a period of separation?—(Rev. H. Bailey): I should say not. Speaking as an incumbent, it is a point of view which I cannot ever remember being put to me by any lay people at all. I think the Dean is right in saying that the main body of the people in this country are broadly Christian in their approach to divorce; the idea of having divorce by consent really is not in the minds of most of them. What I think most people are concerned about is the much more serious problem, as to what to do when there has been a breakdown in the marriage.

4326. May I ask the other witnesses if they are aware of there being a substantial body of opinion which would desire divorce after a period of separation, say, of five or seven years, where there was no prospect of the spouses coming together again?—(Very Rev. J. H. Crass): Do you mean by that that after a period of separation either party could procure a divorce, against the wishes of the other?

4327. Yes, I wish to know if from your contacts with people you do or do not think that there is a substantial body of opinion in the country in favour of such an alteration?—I should not say that it was a large body of opinion. I should say that there are a certain number of very hard cases where the wife has grounds for divorce but retains the marriage bond out of vindictiveness. On the other hand, I do not think that there is a widespread opinion that it would be just that a person's marriage should be dissolved against his or her wishes when, in fact, he or she has not committed a matrimonial offence. I think it would be felt that that was unjust. If I might add this with regard to your earlier question about divorce by consent, I think a lot of people, when they are talking simply about divorce and not about marriage, do in a rather ill-defined way favour divorce by consent. I think they talk about it as rather a civilised way of dealing with the situation, with no bad feelings on either side and so on, but I think their attitude is quite different when they are talking about marriage. If one introduces divorce by consent one alters quite fundamentally the status of marriage. In all my experience of dealing with people who are going to be married and people who talk about marriage, even when their home has been unhappy, I have found that those people desire greatly that the status of marriage should not be weakened even when they themselves have made a complete failure of it. In the case of re-marriage, they want to establish by this re-marriage that it is permanent marriage they want; divorce by consent would take away the principle of permanency in the marriage bond.

4328. (Mr. Maddock): In paragraph 24 under the heading of "Maintenance" you say that the earning capacity of the wife should be taken into consideration. Have you any reason to suppose that that is not done at the moment?—(Mr. Brooks): There is no universal rule that the earning capacity of a wife should be taken into

account, although, to the best of my recollection it was always taken into account during the war when everybody had to do something in a national emergency. But now the fact that a woman is young is brought out on an application for maintenance before the registrar; but it is not a universal rule by any means that a wife should be considered to have an earning capacity. In fact, when the parties before the court are wealthy it is thought sometimes that as the wife of a wealthy man she should not be expected to have an earning capacity. I have had that remark made to me by a registrar.

4329. (Mr. Mace): I would like to know whether you desire to express any views on the law prohibiting marriage with certain relations by affinity. Have you any views as to whether a wife should be entitled to marry her divorced husband's brother? Please understand that I am not asking you to express an opinion straight away. I wondered whether you desired to express to the Commission any views on that.—(Dr. Matthews): This Committee has not considered that subject, and I could not give any views as representing its opinion.

4330. May I turn to paragraph 25 where you suggest that "... the co-respondent should be ordered to contribute in part to the support and education of the children." I foresee that if that proposal be recommended it might be extended to ordering the co-respondent to make contribution to the wife, and so relieve the husband of contributing maintenance for his ex-wife. Have you considered that?—(Mr. Brooks): The answer to that, I think, depends entirely upon whether the co-respondent marries the wife or not after the decree. If he marries the wife, then, of course, the husband would be absolved from maintaining his wife if the co-respondent was able to do so; a husband usually is only asked to maintain a guilty wife if in the opinion of the court she is deserving of what is known as a compassionate allowance, for instance if the marriage has been going on for so many years that it would not be right to leave her without any means of support notwithstanding that she is at fault.

4331. Do you think it would be a deterrent to adultery if a co-respondent knew that he might be ordered to keep and maintain the wife and the children whether or not he married her?—We think it might well be a deterrent.

4332. Therefore your recommendation might have that extra strength?—Yes.

4333. (Mr. Lawrence): Following the questions which Mr. Mace has just put may I ask this? Is the suggestion that the co-respondent should make this contribution to the maintenance of the children made irrespective of the state of his knowledge with regard to the status of the woman with whom he committed adultery? Take the case where a man has committed adultery with the woman without knowing that she was a married woman or knowing that she was the mother of any children, and he finds himself cited as a co-respondent in a subsequent divorce petition. Would you base his liability to contribute upon the fact that he subsequently continued to live with her or married her, or upon his association with her in the circumstances giving rise to the petition?—We feel that if a man has had sexual intercourse with a woman he takes the risk of any penalties that may fall upon him afterwards, and the onus is upon him to find out first whether he is seducing another man's wife or whether he is not.

4334. Do I take it, Mr. Brooks, that the answer to my question would be that in the view of the Union the liability should stay irrespective of the state of the co-respondent's knowledge?—Yes, that is so.

4335. (Lord Keith): If Parliament thought it fit, whether on the recommendations of this Commission or otherwise, to make some extension in the grounds of divorce, would it not be unwise to commit yourself or the Modern Churchmen's Union in advance as to whether the parties divorced under such extended grounds might be re-married in church or not?—(Dr. Matthews): It would be unwise, and it is very difficult to answer a hypothetical question anyhow. As I think I said before, one would have to know what the extended grounds of divorce were, but looking at the situation as it is, our view is that none of those grounds that has been suggested appears to us to be legitimate, and we should, so far as

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[Continued]

we could, tell the parties that divorces granted in such cases were not those that we should regard as properly given.

4336. But I gather that you would not definitely commit yourself or the Union until you saw what, if anything, was done?—No, I do not like to commit myself to any view on a hypothetical case, but our definite conclusion is that we are satisfied with the law as it stands with regard to the grounds of divorce.

4337. (Mr. Flecker): Mr. Denis, you would agree, I think, that the present law as it stands is based on the conception of a matrimonial offence, and that I suppose derives from what I believe is called the *Matthews Exception* by theologians. Some of the witnesses have challenged that conception, and have based their suggestions not on the principle of extending the grounds for divorce but on that of changing them. I wonder whether you could help us on that at all. Do you feel that it is in accordance with modern Christian thought to retain this doctrine of the matrimonial offence as the one basis for divorce?—That seems to be a question which is partly legal. I suppose that when one is drawing up laws one has to deal in offences, they are something which can be defined, and if they are defined then one has a clear conception of what constitutes a breach of the law. I do not quite see how a legal system could proceed on any other basis than by defining rights and offences. Could you envisage a kind of system which did not proceed in that way?

4338. It has been suggested to us that it should be possible for a court to decide that a marriage had completely broken down, and in those circumstances to grant a divorce.—I wonder what kind of evidence there would be as to the marriage having broken down?

4339. One factor would be a very long period of separation. Such a factor would be contrasted with the single act of adultery which under the existing system would be a sufficient ground for dissolution of the marriage. You would take the line that the suggestion would not work and therefore that it is not worth consideration?—I should think that there would be very great difficulties, and I can imagine that such a system might lead itself to considerable abuse. One party to the marriage who wanted to get free of the marriage might make it extremely unpleasant for the other party who did not want to get free of the marriage.

4340. Supposing there is no matrimonial offence and the parties have simply separated for seven years and one wants a divorce, do you think it should be granted?—I think I must revert to the first principles, anything which suggests or tends to suggest that marriage is not a permanent alliance of one man with one woman is, I think, bad, and in so far as that suggestion would have that tendency, I should be against it.

(Chairman): Thank you very much for your memorandum, for this helpful booklet and for all the help you have given us in your evidence this morning.

(The witnesses withdrew.)

PAPER No. 56

MEMORANDUM SUBMITTED BY MR. GEOFFREY H. CRISPIN

1. Introductory

The writer of this memorandum is a barrister-at-law practising in London: his practice is fairly evenly divided between the King's Bench and Probate, Divorce and Admiralty Divisions of the High Court, and he appears in not less than four hundred undefended causes a year, and about fifty defended causes. He is willing to give oral evidence if so required.

2. Presentation of petitions

It is submitted that the present bar to the presentation of a petition for divorce within three years of the marriage (save by leave of the judge in cases of exceptional hardship or exceptional depravity) should be reduced to one year, and that the rule as to the leave of the judge being required should be abolished. The new rule should apply to all petitions for divorce, judicial separation, restitution of conjugal rights (if returned) and for nullity on the ground of wilful refusal and incapacity. The purpose, or one of the purposes of the present rule (which does not at present apply to nullity), is to enable the question of reconciliation to be fully considered. In the writer's experience the sooner a marriage breaks down the less chance there is of reconciliation: it is in the long-standing marriage, with children, that reconciliation is more possible. Further, different judges inevitably have different standards as to what constitutes exceptional hardship or exceptional depravity, and there is no real uniformity: it is disturbing that the result of an application should depend upon the particular judge. It is appreciated that some lack of uniformity is inevitable, as, for instance, some judges are more easily convinced of cruelty or adultery than are others. Finally, a determined spouse is not deterred by the refusal of leave, and can present a petition for judicial separation; if the suggested amendment is adopted, then this artificial procedure will not be available.

3. Judicial separation

It is submitted that this should be retained, although the conclusion is reached with some hesitation. There are persons who have a conscientious objection to divorce, although they are very few and the writer has found a very slender religious or conscientious basis for the objection. Generally speaking, judicial separation is sought because the spouse seeking it (usually the wife) is not willing to release the husband to another woman. On the

other hand, there are cases where dissolution would prejudice the expectations of children under a settlement, in that children of another marriage would be entitled to share, or even to have the whole of a settled fund appointed to them. But it is submitted that the Commission should consider whether, after five years, a respondent in a suit for judicial separation should at the discretion of the court, and subject to proper safeguards as to settlements and otherwise, be granted a divorce. This could not affect the conscience of the original petitioner, and would be in the interest of the community generally.

4. Nullity

It is submitted that the Commission should consider whether it should not be possible to petition for nullity on the ground that the marriage was induced by the serious fraud of the other spouse. It is appreciated that the problem is a difficult one, but there do occur cases in which there has been the grossest fraud and in which there is no remedy.

5. Restitution of conjugal rights

It is submitted that having regard to the extension of the powers of the High Court to make financial provision in cases of wilful neglect to maintain (under Section 23 of the 1950 Act), this remedy serves no useful purpose: it is used almost entirely as a weapon by wives to obtain maintenance from husbands they would not have had. The writer has never known a decree to be obeyed: there is no sanction to enforce it. On the one occasion the writer did have, when the husband returned to the wife, she was so alarmed that she at once applied by summons to the judge to remove from the file the certificate of compliance with the order that had been filed. In that case, the certificate had to be invented by the writer, as even the Senior Registrar had never come across one. It is sometimes said that the decree is useful as establishing desertion if it is not obeyed: but it is really quite superfluous, and the same result can be achieved by the deserted spouse writing a suitable letter to the other offering to resume cohabitation.

6. Jurisdiction and domicile

(a) By a recent amendment in the law, a wife who has been continuously resident in England for three years can bring proceedings irrespective of domicile. The same

15. Decree absolute

(a) The present period of six weeks after decree nisi is too short: the time for appeal is also six weeks, and a respondent who is out of time for his appeal for a few days through no fault of his own, is now powerless: it is submitted that the time for decree absolute should be three months.

(b) At the present time it is only possible in the vast majority of cases to obtain the rescission of a decree absolute. (Two examples—and they may be the only ones—are where the respondent was not in fact served at all, and where the respondent has died before the decree absolute.) It is submitted that the court should have a much wider discretion to rescind decrees absolute, with proper regard to the position of third parties, such as after-born spouses. Too often petitioners flout the law, and (for instance) not having disclosed their own adultery, are safe as soon as the decree is made absolute.

16. Collusion

Not very long ago Lord Manscroft averred and Lord Merriman denied in the House of Lords the prevalence of collusion. Of course, it all depends upon what is meant by "collusion", but in the popular as distinct from the narrower legal sense, there is a very great deal of collusion in divorce matters. There may be no actual bargain for money or for money's worth, but there is often an understanding, for instance, in relation to children. It is thoroughly undesirable, and the court ought to enquire more fully into the matter at the hearing, not merely contenting itself with an oath as to the absence of collusion, which the petitioner does not in the least understand. Much greater use should be made of the power to call in the help of the King's Proctor.

17. Maintenance

(a) Under this head is included alimony pending suit as well. It is submitted that there should be no order for alimony pending suit in undefended cases, except for special reason shown to the registrar: suits come on for hearing so quickly that there is often no compelling reason for an order: "special reason" might include the age and health of the wife and the existence of young dependent children.

(b) As to permanent maintenance, in which it is intended to include maintenance, permanent alimony, and periodical payments (more or less the same things under different names) the present rule or practice is too rigid. In general a successful wife petitioner gets one-third of the joint incomes: in some cases this is too much and in others too little. There is no justification for giving a young and able-bodied wife whose marriage has been dissolved after a very short married life this proportion, where there are no children. In such cases a nominal order is often sufficient to protect the wife: it is submitted that it is a social evil to have young wives living on their former husbands in this way, while those husbands are struggling to maintain another family.

(c) It is appreciated that there is no hard and fast rule as to one-third, but that is the practice that is applied, and it is almost a rule now. It should be made much more flexible and it is submitted that two-fifths should be the upper limit, with a maximum aggregate of one-half of the husband's income being required from him in cases where there are children.

(d) Further, it is submitted that in appropriate cases the registrar should have power to order, instead of maintenance, a lump sum payment to be made by the husband, payable if necessary by instalments over a period of say five years, to extinguish his liability altogether so far as the wife is concerned, although this would not usually be appropriate in cases where there are children. But the husband could be given power to apply later on for a lump sum composition.

(e) Insufficient regard is paid at present in assessing maintenance to any matrimonial offences or quasi-matrimonial offences on the part of the wife and not infrequently one finds a wife whose adultery with more than one man preceded that of the husband obtaining a substantial order. As the law stands at present the husband is in the difficulty that he is stopped from relying upon matters he might have raised in the suit itself, so that if he lets it go undefended he is at the mercy of the wife. It is submitted that a wife who has herself committed adultery

during the married life together should be entitled to maintenance only in special circumstances and not as of right, except perhaps where the adultery was condoned or condoned by the husband.

(f) In cases of judicial separation or rescission of conjugial rights (if the latter is retained) the proportion of two-fifths should be one-fifth, as at present for alimony pending suit (which proportion should be retained). The result would be that judicial separation would almost disappear.

(g) The enforcement of orders for maintenance is often difficult for the wife: it is submitted that the court should have power to order that employers should deduct maintenance from the man's wages and send it direct to the wife, in appropriate cases, such power to be exercised with proper safeguards and only after serious willful default.

(h) It might also be considered whether a maintenance order, nominal as well as otherwise, should be registrable as a charge against any real property owned by the husband: indeed, fully to protect the wife, it might be that a petition containing a prayer for maintenance should be similarly registrable: too often there are cases of husbands transferring their property to someone else in order to defeat the wife.

18. Property

(a) Quite apart from the position as to maintenance, there is a need for a review of the position as between husband and wife in regard to the ownership of property, especially the matrimonial home and the furniture, as well as the tenancy of the home if it is rented. It is submitted that in the absence of written evidence to the contrary, in the form of a document actually signed by the other spouse, the home and contents should be deemed to be jointly owned in equal shares, irrespective of who actually paid for it. An attempt would have to be made to apply some safeguards, to prevent obvious abuses, but even if this could not be done, the advantages of the proposal would be enormous.

(b) As to tenancies, most of which are controlled by the Rent Acts, the present position is highly unsatisfactory: if the husband is the tenant and leaves the wife, then the landlord can obtain an order for possession. Possibly the simplest solution would be to treat all tenancies of houses occupied by married couples as joint tenancies. Another way would be to give the county court judges power to substitute one for the other in cases in which the marriage (or perhaps the married life) had broken down.

19. Married Women's Property Acts

At present proceedings can be brought in any Division of the High Court as well as the county court: it is submitted that greater uniformity would be secured by limiting the jurisdiction to one Division, preferably the Divorce Division retaining the county court jurisdiction. Further, at present a wife can issue a writ against her husband in respect of her separate estate, but not a husband against a wife: there is no justification for the retention of the rule and the same procedure should apply in each case.

20. Children

Children are generally the worst sufferers in divorce matters and are the least protected. The subject is an extremely wide one, and the writer does no more at present than to suggest that in all cases where there is any issue as to custody, care and control, or access, the Official Solicitor should automatically be appointed to represent the children. A step has been taken in this direction by the judges in referring cases to the welfare officer, but something much more is needed. The writer is not sure that this is not the most important matter covered by the present memorandum.

21. Magistrates' courts

(a) Jurisdiction.—The position as between husbands and wives should be made the same, so that, for instance, a husband as well as a wife can obtain an order on the ground of cruelty or a declaration as to desertion.

(b) "Cruelty" should be substituted for "persistent cruelty".

(c) Children.—In cases in which the custody of children is in issue, the probation officer should automatically be appointed guardian ad litem to represent them.

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(d) *Appeals*.—These should be to a single judge and not to a Divisional Court; there is a precedent for this in that appeals in respect of justices' orders under the Guardianship of Infants Acts go to a single judge of the Chancery Division; the procedure should be assimilated to that in the Chancery Division at present, where additional evidence may be given.

(e) *General*.—At present when a wife applies for an order before justices she is sometimes met with the reply on behalf of the husband that a petition is due to be presented, and the application is adjourned *absolutely*. It is

submitted that there should be a stay only if the petition has been filed before the issue (not the hearing) of the summons.

22. General

The writer is conscious of the fact that he has only touched upon the various matters to which he has referred, and that there are many others as to which he has said nothing at all. But he hopes that what he has said may be of assistance, and if required, he will gladly amplify any of them.

(Dated 2nd January, 1952.)

EXAMINATION OF WITNESS

(MR. GEOFFREY H. CRISPIN; called and examined.)

4341. (Chairman): Mr. Crispin, you are a Barrister-at-Law practising in London. Do you wish to add anything orally to your memorandum?—(Mr. Crispin): There are three things, my Lord, which I would like to add. The first is this—divorce on the grounds of incurable insanity came into force in the Matrimonial Causes Act, 1937, but I had not appreciated myself, until a few days ago, that the certification of that insanity had to be in England and not elsewhere. That provision is now to be found in the last words of Section 1 of the Matrimonial Causes Act, 1950. The point I have in mind is this: I had a case the other day, the first of its kind which I have come across, where the husband, domiciled in England, was in Canada some twenty or so years ago, where his wife was certified. She has been in a mental home in Canada ever since, and he can get no relief. I have wondered whether the Commission would consider whether it is not desirable, subject to proper safeguards, to extend the rule with regard to incurable insanity.

4342. Would you refer us to the words in the Act which you have under consideration?—Yes, my Lord. They are in sub-section (2) of Section 1:—

"(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—

(a) while he is detained in pursuance of any order or inquiry under the Lunacy and Mental Treatment Acts, 1890 to 1930, or of any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1854, or the Yarmouth Naval Hospital Act, 1931, or is being detained as a Broadmoor patient or in pursuance of an order made under the Criminal Lunatics Act, 1884;"

4343. I follow, these are all English statutes.—And the very last words of the sub-section are: "and not otherwise."

Secondly, I would like to put right a technical matter. I said in my memorandum that it was necessary for a woman named in a suit to obtain leave to intervene. That is the old rule, she does not now need to obtain leave, she can intervene as of right now.

Thirdly, I have said what I have in my memorandum with regard to trial of undefended cases by commissioners, county court judges in particular, out of a sense of compelling duty in the matter, and not from any criticism of those county court judges. But I do feel that there is a duty which one has to perform and that can only be performed by a member of the Junior Bar who deals with those cases. Leading counsel rarely deal with undefended cases; judges do not know what is happening because they are not there; the Court of Appeal does not know because there is very rarely an appeal in undefended cases.

4344. So you as a junior member of the Bar thought it right to put your experience before the Commission, as the discharge of a public duty?—That is so, my Lord.

4345. Would you now turn to paragraph 2 of your memorandum, which is headed, "Presentation of petitions." You submit:—

"... that the present bar to the presentation of a petition for divorce within three years of the marriage (save by leave of the judge in cases of exceptional hardship or exceptional depravity) should be reduced to one year, and that the rule as to the leave of the judge being required should be abolished."

In other words, there should be an absolute bar for one year and no longer?—Yes, my Lord.

4346. The contrary view has been put to us very strongly. It is suggested that if there is a three-year period, or even longer, that gives more time for a young couple to settle down, and possibly such offences as adultery, committed on one occasion, would be more likely to be forgiven if there is a longer period for reflection. What would you say to that?—I disagree, my Lord. My experience is to the contrary, I regret to say. I go on to say later in paragraph 2 that in my experience the sooner a marriage breaks down the less chance there is of reconciliation. I think that once it has broken down, if it is at the end of six months or a year, there is very little chance of reconciliation. That is my unfortunate experience.

4347. But you think that a marriage always breaks down because of one act of adultery?—No, not always, certainly not.

4348. Then, at the end of that paragraph, you say:—

"Finally, a determined spouse is not deterred by the refusal of leave, and can present a petition for judicial separation: if the suggested amendment is adopted, then this artificial procedure will not be available."

I wondered why you called the petition for judicial separation an artificial procedure, because at least it has the advantage that it leaves room for reconciliation, whereas divorce is final.—I may be unfortunate in my experience, but I have never known of a case of reconciliation after a decree of judicial separation.

4349. That is why you have described it as an artificial procedure?—Yes, my Lord.

4350. I see. Then in your third paragraph, dealing with judicial separation, you say:—

"But it is submitted that the Commission should consider whether, after five years, a respondent in a suit for judicial separation should at the discretion of the court, and subject to proper safeguards as to settlements and otherwise, be granted a divorce. This could not affect the conscience of the original petitioner, and would be in the interest of the community generally."

I want to ask you some questions about each of those statements. In the first place, why could it not affect the conscience of the original petitioner? Can one not conceive of cases where a grievously wronged woman, who thought divorce was wrong, might take proceedings for judicial separation and get a judicial separation, and yet her conscience might be very much affected if her husband, the guilty party, obtained a divorce decree against her?—What I had in mind, my Lord, was that one is told in so many judicial separation cases that the reason judicial separation is sought—one does not dispute it—is that the conscience of the petitioner will not permit him or her (generally her) to ask for a divorce. But if the other spouse obtains a divorce, then my submission is that that would not affect the conscience of the innocent spouse, who is asking for judicial separation, and in conscience could not ask for divorce.

4351. You may be right, but on the other hand I rather suspect that there are some people whose conscientious scruples would not extend to being divorced at all, putting an end to the marriage.—But that is a passive position if they are divorced, whereas if they seek a divorce they have to do something active.

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4352. You may be right in saying that it could not affect the conscience, at any rate I see what you had in mind. Then you go on to say that such a proposal would be in the interest of the community generally. I think probably you have in mind there that the respondent to the decree of judicial separation may have formed another union, an illicit union, and may have had children, and that in the interests of the community that situation should be regularised?—That is precisely what I had in mind, my Lord.

4353. On the other hand, there is this point which has been raised by various witnesses. The proposal would give an opportunity to an individual to take advantage of his or her own wrongdoing, and it is surely contrary to the practice of the law that somebody should come forward and say: "I committed adultery, I am living in adultery, therefore give me a divorce"—I entirely agree, my Lord. I appreciate that there is something illogical in the suggestion I make, and I apprehended that I should be asked questions about it. There is an illogicality there, but there it is, I feel so strongly about the undesirability of permanent judicial separation if it can be avoided. I should like to see it put an end to as far as possible in this way.

4354. After weighing up the advantages and the disadvantages, you come down on the other side?—Yes, and the proposal gives the court a discretion, because there are other cases to which I have referred, where settlements are involved.

4355. Then the next paragraph is headed "Nullity", and you submit:—

"... that the Commission should consider whether it should not be possible to petition for nullity on the ground that the marriage was induced by the serious fraud of the other spouse. It is appreciated that the problem is a difficult one, but there do occur cases in which there has been the grossest fraud and in which there is no remedy."

Would you for our assistance elaborate that by giving instances of these cases? I am not quite sure what you meant by "the grossest fraud".—The instance which comes most readily to my mind is this. A woman pretends she is, say, fifteen years younger than she is, and marries a young man. I have had two such cases this year; one was that of a woman of forty-seven—I think she said she was thirty-three—and the other was of a woman of well over forty, who said she was twenty-four, and who married a very young and inexperienced man in his early twenties. That is the sort of fraud I have in mind.

4356. Then in paragraph 7, under "Grounds for divorce", you say:—

"(c) *Desertion*. It is submitted that desertion for one year should be a ground for divorce: there is no magic in the present three years, and once desertion has continued for a year the chance of reconciliation is remote."

Of course, that chance does still exist, but I gather that in your experience reconciliation has never taken place?—I have known cases, my Lord. I have known cases after the three years, of course. I cannot say that they are any more numerous after one year than they are after three, but I think the chances are remote. That is my experience.

4357. Then under "Adultery" you say:—

"It is submitted that it should be considered whether in all adultery (and possibly cruelty) cases the court should be given a discretion whether or not to grant a decree."

Two things occur to me on that. First of all, is that not rather hard on a petitioner, and secondly, does it not give rise to uncertainty in the law—and uncertainty is not generally a good thing? As regards the first point, at present if there is adultery or cruelty, the injured spouse has the option whether to seek the relief of divorce or not. Would it not be a great hardship if he or she had to go before the court not knowing whether, even if the facts were proved up to the hilt, he or she would get the divorce which was sought?—What I had in mind there, my Lord, was this, that one has cases where there has been a single act of adultery committed when, perhaps, a man or woman was under the influence of drink. It was bitterly regretted, there was no sense of injury to the other party at all. And if it were known that the granting of a divorce was a matter of discretion, I think that in

these cases there would be a chance of reconciliation. One is anxious to preserve marriage, and I really think that in such cases there is a chance of reconciliation.

4358. Of course, if you made a law of that kind it would have to refer to all cases, would it not? That is to say, in thousands of cases people would come before the court with evidence of adultery or cruelty, but still in doubt whether they would get a decree. That would lead, would it not, to uncertainty in the law and possibly great expense being incurred for no object? Certainly in the law is rather important, is it not?—Yes, indeed, my Lord, but it might also make for reconciliation. People might think twice before they commenced proceedings. Thousands of husbands and wives do forgive the other spouse for an act of adultery, and you might get many more who would do it in those circumstances.

4359. Of course, it is again a question of weighing up the advantages and disadvantages?—Yes.

4360. One other question on that: on what principles do you suggest the court should exercise its discretion?—I venture to submit, my Lord, that it should be entirely on the basis of any possibility of reconciliation, and probably also the interest of the children. I think that would have to be taken into account. It is so very difficult to say on what basis discretion should be exercised in these as indeed in all cases.

4361. Is not that difficulty a reason (I do not say it is a compelling reason) against giving a discretion which might be exercised differently by different judges?—We had the same position arising as suits where the petitioner himself or herself has committed adultery. We have now got a code laid down by *Blair v. Blair* as to cases in which discretion should be exercised.

4362. That is quite true, but it is not quite the same thing that a wholly innocent petitioner coming before the court should have a real doubt as to whether he would succeed. However, I do appreciate the advantages as well as the disadvantages in your suggestion. Then, under (d), "Willful and unjustifiable refusal of sexual intercourse", there is a sentence, beginning: "The present position is that a wife who submits to sexual intercourse on one occasion only may be comparatively secure for life,..." There you mean secure in the sense that she can thereafter refuse sexual intercourse?—Yes, and secure financially.

4363. And you continue: "... although it is true that as appropriate cases such refusal of intercourse might amount to cruelty or might justify the injured spouse in leaving the matrimonial home, and either putting the other in desertion or preventing himself from being in desertion: but there are difficulties if, for instance, the one or two acts of sexual intercourse have resulted in a child." That is a very substantial difficulty, is it not?—If there is a child it is, my Lord, indeed.

4364. Might not one put it a little higher, and say that that would be a vital objection?—I would not put it so high, my Lord, even in those cases. Again I think the matter should rest in the court's discretion, because proper provision would have to be made for the child and perhaps for the mother. But sexual unhappiness, as I say later in that paragraph, does lead to a very great deal of matrimonial trouble, so no doubt the Commission has been told.

4365. You suggest that if the refusal of sexual intercourse is continued for say, three years, even if there is a child it should be a discretionary ground for divorce?—Yes, a willful and unjustifiable refusal, my Lord.

4366. Then "Imprisonment for five years or more" is your next heading, and you say:—

"It is submitted that the spouse of a person who has been sentenced to a single sentence of imprisonment for five years or more (possibly indeed three years) or aggregate sentences of seven years or more should be entitled to petition for divorce, and the court should have a discretion to grant a decree subject to proper safeguards."

Then you speak about the great hardship upon wives in such cases, and you say that "possibly such imprisonment could be brought within the definition of desertion". Again it occurs to me, what would be the principles on which, in your submission, the court should exercise a discretion? *Ex hypothesi* there has been no cruelty and

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no adultery.—The sort of thing I had in mind was if the spouse who was not in prison were an accomplice or something of that kind. That is all I have in mind.

4367. Then could you not put that as an express limitation?—Yes.

4368. Provided the petitioner satisfied the court that he or she was not in any way party to the offence?—Yes, and that his or her conduct did not conduce to the commission of the crime.

4369. In paragraph 16, you refer to certain dicta about the prevalence of collusion, and you say:—

"Of course, it all depends upon what is meant by 'collusion', but in the popular as distinct from the narrower legal sense, there is a very great deal of collusion in divorce matters. There may be no actual bargain for money or for money's worth, but there is often an understanding, for instance, in relation to children. It is thoroughly undesirable, and the court ought to enquire more fully into the matter . . ."

Supposing there has really been a matrimonial offence, so that there is no deceiving of the court on that account, is it undesirable that there should be an arrangement as to the children?—I think it is thoroughly undesirable without the court's knowledge and consent, because that ignores the welfare of the children, which is what matters most. A bargain between the spouses is not concerned so much with the welfare of the children.

4370. But if that matter comes before the court, the custody of the children will be within the discretion of the judge, will it not?—Yes, indeed, but consent orders as to custody are very frequently made. It is only when there is a contest as to custody that the matter does come to the court.

4371. Is that an invariable rule?—Not invariable, but very nearly. One often gets this position: the husband petitioner does not ask for custody of the children and the guilty wife has the children. It may be perfectly proper, I do not question that. But such an arrangement is quite frequently made in advance, and it may be entirely wrong in the interests of the children that the wife should have them. There are not many circumstances in which that would arise, for I think that the mother should as far as possible have the children, guilty or innocent.

4372. It occurs to me that there might be cases where there was going to be a divorce and where sensible arrangements were made beforehand—the parties might both be fond of the children. Sensible arrangements made beforehand might not be open to objection from any point of view of public policy—I quite agree, but those arrangements should be brought to the notice of the court and the decision should be left to the judge.

4373. You had in mind . . . ?—Concealed arrangements, my Lord.

4374. I see, thank you. I note what you say on the question of property, under paragraph 18. You realise, I suppose, the difficulties of legislation on these lines?—Yes, my Lord, indeed.

4375. But you think an attempt should be made to deal with the matter?—It has been done elsewhere, I believe, in some of the Dominions.

4376. What would you say as to the rights of third parties, for example, where the court wishes to make an order about furniture or a tenancy? The furniture may be on hire-purchase, and of course in the case of a tenancy there is a landlord concerned. Would you say that the firm or the landlord should be consulted, or that nothing should be done to prejudice their interests, or how would you suggest that the matter should be dealt with?—I shall take the hire-purchase case first, if I may. So far as that is concerned, the furniture would be the property of the owning person, or company as it generally is, and provided the instalments were paid by someone, that is all the owner is entitled to be interested in. So far as the tenancy is concerned, the proposal would, if a true, prejudice landlords, but I think landlords would have to put up with it. They have to put up with a good deal today, and that is yet another thing they would have to put up with.

4377. They might find themselves, in place of a perfectly solvent tenant who was able to pay the rent, left with somebody who was not able to pay the rent?—Then they

could obtain an order for possession without difficulty, my Lord.

4378. (Lord Keith): There are just three points I had noticed, Mr. Chapin, arising out of your evidence. First of all, take your proposal that a respondent in a suit for judicial separation should after five years get a divorce. Take the case of a husband who, by the conduct of his wife, such conduct as does not give ground for divorce, is forced to leave her and live away from her for five years. Why should he not be in as good a position to get a divorce as the husband who has been judicially separated for a matrimonial offence?—I think the answer (that I would make to that is, that if the wife's conduct has been so bad as to compel the husband to leave, there has been constructive desertion and he can get relief for that.

4379. I am not quite so familiar with constructive desertion, you know, as an English lawyer.—I realise that.

4380. But take it that the conduct is not such as to give rise to constructive desertion, and the husband goes away and lives separate for five years. Why should he be in a worse position than the husband who has been judicially separated for a matrimonial offence?—I do not see why he should, my Lord, but my difficulty is to see how that case can arise. If the conduct is such that the husband has to leave, there is constructive desertion, otherwise it seems to me there is a consensual parting.

4381. Let us leave out for the moment the conduct of the wife. Let us assume that the parties just cannot get on together, that they are always fighting, and that married life has really become impossible, and that one of them goes away and lives away for five years. Why should he or she be in a worse position than the spouse who has been judicially separated for a matrimonial offence?—Because he has gone away of his own volition. To allow him a divorce would be to introduce divorce by consent. A spouse would know that by going away he or she would be able to get a divorce after five years.

4382. It turns simply upon this view of divorce by consent?—Yes, my Lord.

4383. I think I see your distinction. The next point I want to ask about is the case of fraud, leading to nullity. There are at present in the English Act a number of grounds of nullity which are really in the category of fraud—I suppose that of the pregnant woman who marries . . . —Venereal disease, and epilepsy, my Lord.

4384. These are instances of fraud, are they not? At least, they are instances of fraud if the person who is marrying knows that they are grounds of nullity and does not disclose them before marriage?—If he or she knows.

4385. If he or she knows, but then we are all presumed to know the law?—This is a question of knowing the facts, is it not, my Lord? A woman may marry and not know that she is in fact pregnant.

4386. I quite see that, but a woman who knows that she is pregnant might marry without disclosing that fact to her prospective husband. You would put that in the category of fraud?—I have never considered it from that point of view. I think that it is a species of fraud, yes.

4387. What I am getting at is this: do you have in view simply a general ground of nullity, that marriage entered into by a fraud on the part of one or other of the spouses should be a ground of nullity?—No, my Lord, I think that one has got to attempt a much clearer definition than that. One has got to specify the fraud in some way.

4388. The only additional case you have specified is the case of the party who deceives as to age?—That is so, my Lord.

4389. If we are going to make any recommendations on this, and have got to specify the grounds, and not have simply a general fraud clause, I would like to know if you have any other suggestions?—Another one does occur to me, my Lord, and that is the case, shall one say, of a widow with children whom she is educating at an expensive school. On her re-marrying she loses perhaps an interest that she had in a settled fund, and she is induced to marry, or she does marry as a result of a representation made to her by her second husband that he is a wealthy man and able to support the children adequately, and then she finds herself in poverty as a result of marriage. That is another example which occurs to me.

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4390. You have brought an illustration into my mind. Take the case of a prospective wife who does not disclose that she has already got children—and she marries, and then the husband finds that he is saddled with two or three children. I suppose that would be another case of fraud?—I think that might be considered, my Lord. It depends on the age of the children, of course. It is covered by your words "saddled with", I think.

4391. That might be, but children of any age might sometimes be a burden to a step-father. However, these are illustrations?—Yes.

4392. And they all come within your conception of fraud?—Yes, and subject to the discretion of the court in every case.

4393. My difficulty is—and you will appreciate it, Mr. Crippen—that you seem to me really to be leaving it to us to specify the instances of fraud which might give rise to this remedy?—Yes, my Lord. I have given instances. I could have said a lot more in this memorandum, but I was trying to keep it as brief as I could. They are some examples, and I have no doubt there are others.

4394. I have only one other question to ask you, and it is about these 100,000 former Polish subjects. You are suggesting that in their case *de facto* separation for seven years should be a ground for divorce in the discretion of the court?—Yes, my Lord.

4395. That, if confined simply to these people, would introduce a rather novel conception into divorce legislation, would it not? We would really be legislating for Polish subjects?—Not only Polish, my Lord. The large majority of them are Polish—I said 100,000, I think it is 170,000 in fact, including a large number—not nearly so many, of course—of Lithuanians, Letts and Estonians, and people from other countries in Eastern Europe. It would be a new departure I sincerely agree, but there are these men, and to a lesser extent women, in this country. They have absolutely no prospect of ever returning to their own country, none at all, and you have the position that they are contracting alliances in England and unable to marry. My proposal would entail special legislation, but we had the same sort of thing, did we not, in the War Marriage Act during the war, where we conferred judicial jurisdiction to give wives a right to petition in this country through their husbands were domiciled overseas.

4396. But this is much more than giving jurisdiction. It is not only giving jurisdiction, it is introducing *de facto* separation as a ground for divorce?—That is so.

4397. That is what makes this so special?—It is special. I put it on grounds of public policy, that it is so undesirable to have this large number of illicit alliances which there are existing today, and the parties unable to obtain any relief. I know of very many cases myself, because I am concerned with a large number of Polish divorces. Where the husband has totally acquired a domicile in this country and can swear that he has, then he may be able to get relief here.

4398. Could a great many of these cases not be met by the procedure for dissolution of marriage on the presumed death of the other spouse?—I deal with a number of these cases also, but the difficulty is, as you know, that where the spouse is in Poland it is impossible to communicate with them, and thus you cannot swear that you believe them to be dead.

4399. No, but all you need to swear is that you have no reason for believing them to be alive.—But I am not dealing with that class of case at all. They do not present a great deal of difficulty. I am not sure offhand to what extent the jurisdiction in that class of case depends upon domicile. I have an idea it does not, but I am not quite sure.

4400. (Mr. Maddocks): I do not suppose that you often appear in a magistrate's court nowadays?—I was in one last Saturday afternoon, for the first time for about three years.

4401. In paragraph 21 (a), you suggest that appeals, instead of going to a Divisional Court, should go to a single judge, as happens in the case of appeals in respect of justices' orders under the Guardianship of Infants Acts?—Yes.

4402. What is the advantage?—I think that it would result in a great saving of judicial time, and I cannot see any reason for the distinction between the Chancery Division and the Divorce Division in this matter.

4403. You are taking up the time of only one judge instead of two?—Yes. It does lead to difficulties in the Divorce Division when two judges are tied up for a very long time in a term, as happens now in a Divisional Court, because, with the legal aid system, there are a great many more of these appeals to a Divisional Court. From a practical point of view, I do know that it is inconvenient to tie judges up for a long time.

4404. That would also apply in the Queen's Bench Division, it would tie up three of them there?—Yes, but I think that the difficulty applies more in the Divorce Division.

4405. Your point is the saving in judicial time?—Yes, I feel very strongly about it.

4406. I would like to know what you think of the suggestion, which has been put before us by one or two magistrates, that there should be an appeal on fact to the quarter sessions just as there is in criminal cases, so that the witnesses could be called all over again, that is to say, a complete re-hearing, just as there is in criminal cases? The reason advanced is that it is so easy for a single magistrate, or for a bench of magistrates, to go wrong on fact, and that there is very little chance of their being put right on fact today, provided there is evidence on the note to support their decision.—I think that that is taking too modest a view of the ability of the magistrates. I do not think that magistrates go wrong on fact so often as your question would suggest. Where questions of law become so important, and one gets very difficult questions of law arising in the Divisional Court at times, I think that it is much better to take the appeals to the High Court. You could if necessary have the same provision as in the Chancery Division, whereby additional evidence can be heard.

4407. I believe that under the rules the Divisional Court can if it likes hear further evidence?—It can if it likes, but it very rarely does so.

4408. I have never known it to do so.—It is quite usual in the Chancery Division on guardianship of infants appeals.

4409. (Chairman): Might I ask whether in addition to hearing further evidence the Divisional Court is at liberty today to recall the same witnesses and hear them again?—I do not know the answer, my Lord. I should have thought it was.

4410. (Mr. Maddocks): May I put to you this situation, Mr. Crippen? Someone comes to you and says that he wants to appeal from a decision in the magistrate's court; the first thing you say to the solicitor is: "Get me the note", and it is only if there is nothing on the note which will support the decision that there is any hope of the appeal being allowed by the Divisional Court. That is right, is it not?—Yes.

4411. (Chairman): On fact, that is?—On fact, yes.

4412. (Mr. Maddocks): So that it comes to this. Justice is done or not done in accordance with whether the clerk has taken a good note or a bad note? (Chairman): Are you not assuming that the magistrate has gone wrong? (Mr. Maddocks): Yes, I am making that assumption, or at any rate that there is a likelihood of his having gone wrong. If there is something on the note to support the magistrate the Divisional Court will not interfere, will it?—That is so, but then you have this position, do you not, that in the vast majority of cases the magistrate is right in his decision? That is my experience, in the enormous majority of cases. You are going to have an extremely cumbersome procedure if in all matrimonial cases you are going to give a right of appeal to the quarter sessions. I think it is thoroughly undesirable. You are going to clutter up the quarter sessions with a lot of matrimonial appeals which are quite unnecessary, because there is generally a lot of feeling between the parties, and the party who has lost will appeal, in nine times out of ten, if he can get legal aid.

4413. (Sheriff Walker): In paragraph 8 (a) you refer to the petitioner having to swear certain things about the absence of collusion. Is it not the practice for the petitioner, before he takes that oath, to be advised by his solicitor as to what it means?—The solicitor very often does not know what collusion really is, Sir.

4414. You prefer, as I understand it, to abolish the formal oath and to have questions asked in court?—I

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much prefer that specific questions should be asked in court as to whether there has been a bargain of any kind, or words to that effect.

4415. Is counsel to put those questions to his client?—Yes.

4416. Explaining in each case what collusion means?—No, one does not use the word "collusion" if my suggestion is adopted. One refers to "bargain", which is so much better and so much more explicit. The bargain may not be collusive, but when one discovers what the bargain is, if any, then one can determine whether there has been collusion.

4417. Then suppose that counsel fails to put those questions?—The judge will see that he does, Sir. The question would be asked as a matter of course, just as one asks the petitioner for his or her address.

4418. Does this proposal link up with paragraph 16, where you deal with collusion itself?—Yes, Sir.

4419. I think I follow that paragraph, but do you think that in every case where there are children of the marriage the court ought to enquire into the question of custody?—Not in every case. I do not think that could arise. Take the case of a perfectly innocent mother, with young children, petitioning for divorce. She is obviously entitled to them, and nothing should prevent her having them.

4420. Is it your experience that in many cases the question of who is to have the custody determines whether or not the action may be defended?—I would not say in very many cases; in a number of cases it does.

4421. The great majority of divorce cases are undefended, are they not?—Yes.

4422. And in a large proportion of the cases which are defended, is it your experience that they are really defended on the question of custody, or a question of money, or something like that?—No, I would not say a large number. Money, to an appreciable extent, yes; children to some extent, and one does find very often in a defended suit that a defence may quite often collapse if the parties can reach agreement as to the children. One does find that perhaps more than with agreements as to money. I am not suggesting that these are improper agreements, because very often one has to see the judge.

4423. I would like to put to you a particular case. Suppose each parent would be quite a satisfactory guardian for the children (that often happens), and assume that the mother has been guilty of adultery, actively, but that that would be a difficult matter to prove. If the husband raises an action of divorce, and if the parties have agreed about the custody, very often the case will be undefended, will it not?—Yes.

4424. Suppose the mother wants her children very much, and the father says: "I will let you have the children", and the woman does not defend, is there anything improper in that?—Putting it in that way, I do not think that there is, because I take the view that in any event the mother, as far as possible, should have the children. I think that there are very few circumstances in which the mother, guilty or not, should be deprived of the children. But if one puts it the other way, then I think there might be difficulties, and it might be said to be improper; if it is the father who is to have the children, I should always look on such an arrangement with suspicion.

4425. Suppose there has been an arrangement beforehand that the mother is to have the children, then she probably would not defend? That often happens?—Yes, that does happen.

4426. In such a case the husband would not in his petition say anything about custody?—No, he would not say for it.

4427. In that case, is it your suggestion that the court should have to make some enquiry?—Yes, because the circumstances that you have in mind rather look as if there has been a collusive arrangement, that the wife shall not defend in return for having the children and alimony—and that means that there has been collusion. That is the bargain on which she does not defend the proceedings, that she is to have alimony and custody of the children.

4428. Is that collusion?—I should have said so.

4429. Assuming that the wife has been guilty of adultery, she has no genuine defence?—She might have a defence of cohabitation.

4430. I am assuming she has got no defence at all.—Then if she is going to be paid anything at all, by way of compassionate allowance, the court should be informed what has been done.

4431. Suppose the court takes up an agreement which has been made about custody. Might not that simply induce the wife to enter a defence?—If I may return to your last question for a moment, who is to determine whether or not she has a defence, in advance? She may not think she has, but she may have.

4432. Is there not often underlying these questions the difficulty of proof? A woman might be guilty of adultery, but it might be a rather expensive matter to prove. That happens sometimes, does it not? If the wife is not going to get custody, as had been agreed or arranged, might she not simply enter a defence in the hope that the husband would be unable to prove the truth?—Is he going to be any better able to prove it if she does not defend it?

4433. If the parties have arranged custody in advance, then very often the wife—in the type of case I put to you—would simply not defend it at all. The divorce would go through undefended, and custody would be as arranged?—I think that that is undesirable, because it does not consider the interests of the children.

4434. In the case I mentioned, the husband would not in his petition say anything about custody. How then do you suggest that custody should come before the court? Who is going to bring in the question of custody? The husband is content, the wife is content.—The court cannot make the husband have the children, but the court can enquire whether there has been any bargain or arrangement with regard to the children, and the court would then have a discretion whether or not to grant a decree. Indeed, if there were collusion, I am not sure whether there would be a discretion—the court would then not grant a decree. I think it would be a good thing if that happened more often.

4435. Assume that the court makes enquiry and is told quite frankly by the husband when he goes into the witness box: "Yes, we have made a bargain about the children", do you say the court should then say: "This is collusion"? I want to see how that connects up with collusion.—I am not sure that it is collusive, because it might be in the best interests of the children. That might have to be gone into as well. I think that the court would have to adjourn in order to enquire as to what was right for the children. One might get this position, of a husband who is very anxious to be divorced, in order to marry somebody else, not having committed adultery, whilst the wife has, and he will do anything to get his freedom, without considering the welfare of the children, which is of such vital importance.

4436. (Mr. Young): I do not think that you were fair to yourself on the question of insanity, when you said that the certification of insanity had to be in England. I think that since 1950 one can also get divorce in England if the spouse was detained in Scotland, Northern Ireland, or the Channel Islands.—That is quite right. That was a slip of the tongue.

4437. (Mr. Beloe): Am I right in thinking you consider that the question of the children is so important that, whenever there are children of a marriage which is sought to be dissolved, the question of the children should be brought before the court as a substantive issue?—No, I do not think so. It would be far too cumbersome, and, I think, unnecessary.

4438. You think that the children are all right in the cases where custody is not brought before the court?—Generally speaking, the children are all right. But if one had this position in a petition, that the husband was going to get custody of young children, whether the wife was innocent or guilty, or if there had been some bargain between the parties, details of which emerged at the hearing, then I think that in the interests of the children someone should be appointed—an official solicitor, I would suggest—to look after the welfare and the interests of those children.

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MR. GEOFFREY H. CRISPIN

[Continued]

4439. But if the question of the custody is not brought before the court, how do you know that the children are all right?—You do not know, Sir, but generally they are.

4440. How do you know that?—I have no actual means of knowing, except from personal experience and getting about the world. One can draw one's own conclusions, that is all, Sir. I do not base my view on anything I have learned in the law, but purely from the point of view of a student of social conditions, one might say. I might be quite wrong.

4441. You referred to these women, sometimes known as "baby-snatchers", who marry very much younger men. Can you think of any way by which that situation could have been prevented?—Yes, and I might have mentioned it here. It has occurred to me from time to time that that situation might be avoided by making it compulsory to produce a birth certificate, or else satisfactorily account for its absence, before marriage.

4442. Can you think of any way in which it would be possible to avoid the possibility of a man or woman with venereal disease getting married to somebody?—I cannot, Sir, because it is a secret thing and a man is not bound to disclose it. He may not even know he has it.

4443. (Lady Bragg): Mr. Crispin, am I wrong in thinking that a judge can make an order for custody of children whether or not he has been asked?—He can only make an order for custody of children if he is asked to do so by one party or the other. (Lady Bragg): I had not understood that. (Chairman): I think Mr. Justice Pearce has doubts, and perhaps we could discuss the matter and look into it. We do not want legal authorities to differ.

4444. (Mr. Lawrence): Mr. Crispin, may I go back to paragraph 2? Your suggestion is that there should be a complete ban on the presentation of a petition for one year, with no provision at all. What is the object of imposing even that one year's ban?—Because I think that, from the point of view of society, the parties should be given a breathing space; if there has been a matrimonial offence during that time, there is a possibility that they might settle down together.

4445. If one year, why not two or three at present?—I appreciate the difficulty, but I do think it is undesirable to have a shorter period than one year. One would perhaps have marriages entered into even more recklessly than some of them are today. If the parties are led to think: "After a month I can present a petition for divorce".

4446. Of course, the imposition of any ban at all is to some extent anomalous, is it not?—Yes, it is.

4447. If the right to relief in the Divorce Court is founded upon the commission of a matrimonial offence, it is generally desirable that the court should be prompt to grant that relief and not withhold it when the right is complete. So that that anomaly would have to be justified by some matter of public policy, I suppose?—Yes, and it is an anomaly—I do not know if it is confined to this country, I think it is largely confined to Great Britain. I do not think it applies in many of the Dominions; I know it does not apply in some.

4448. (Lord Keith): Do not say, "Great Britain".—No, I should have said in England, I am sorry. I know a little about English law, but I do not pretend to know anything at all about Scottish law.

4449. (Mr. Lawrence): I gather that you suggest that the present proviso should be abolished. Have you found in experience that there are difficulties arising out of the wording of that proviso, difficulties in defining what is the norm of depravity, for instance?—Yes, extreme difficulty.

4450. Beyond which depravity becomes exceptional?—Yes, or hardship becomes exceptional. But the danger today, in my experience before judges in chambers, is that it is much easier to get leave to present a petition within three years than it was when the Act first came into force. It is much easier today, and I think more

applications do succeed than did a few years ago. Certainly more of mine have done, and I think more of other people's.

4451. Would you see any objection to this: supposing there were set up adequate machinery of which the parties could avail themselves for the purpose of any possible reconciliation, then there should be no ban at all for any period whatsoever upon the granting of relief by the courts?—No, provided the possibility of reconciliation has been properly ventilated. Then, reconciliation has, of course, to be bilateral. You cannot have unilateral reconciliation, that is always the difficulty.

4452. (Mr. Macle): I want to return to the point Lord Keith put to you. The number of petitions filed for judicial separation in 1951 was 107, in 1950 it was 83. Would you agree that there must be a great number of husbands who left their wives but entered into an agreement as to maintenance?—Yes, undoubtedly, Sir.

4453. To enter into an agreement properly to maintain the wife, without being brought before the court for an order of judicial separation, shows that the man has a sense of responsibility?—Yes, I think it does.

4454. Then your suggestion that after a period of time the defendant to a judicial separation case should have the right of divorce would result in giving a man who was forced to maintain his wife an advantage over a man who accepted his moral responsibility?—Yes, it would appear so, Sir.

4455. Please do not misunderstand my questions, but your experience is primarily of counsel?—That is so, Sir.

4456. So that with regard to reconciliation you do not meet the case which has become reconciled within the three years?—I should say this, Sir, that my experience is not only as counsel but to some extent over a period of time as a poor man's lawyer.

4457. Sitting how frequently?—I was sitting for a time, a period of three or four years, once a week in my home in a district where there was no poor man's lawyer organisation, and people used to come to me from quite a wide area of Hertfordshire. I generally had half-a-dozen or perhaps eight on Wednesday evenings.

4458. Then in that duty you would acquire the experience of a solicitor?—Yes, that is so.

4459. Seeing the client direct?—Yes.

4460. Did you not find then that during that period of three years, with proper services reconciliations can be effected?—Yes, but very rarely, Sir, that was my unfortunate experience.

4461. How long ago was it when you were sitting as a poor man's lawyer?—Up until October, 1950.

4462. Once a case has completed its course in the courts and you return your brief you rarely hear anything more about it?—Yes, quite often. There are questions of maintenance to be gone into, the custody of children at times.

4463. That is still the continuation of the case?—That is so.

4464. When the case is finished in the courts and the final order made, unless there is an application to vary the order, you, as counsel, hear no more about it?—Very rarely, Sir.

4465. If either of the parties gets into other difficulties or requires other legal advice he is able to say: "How are you getting on with things now?"—Yes.

4466. Perhaps a different solicitor, but if they do consult the same solicitor he is able to say: "How are you getting on with things now?"—Yes.

4467. And he is in a better position to find out if there has been a reconciliation?—Yes, I think he is, Sir.

(Chairman): There are no more questions, Mr. Crispin. We are very grateful to you for your memorandum, and for your help this morning.

(The witness withdrew.)

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PROFESSOR DAVID R. MACE

EXAMINATION OF WITNESS

(Professor DAVID R. MACE; called and examined.)

4468. (Chairman): Professor Mace, you very kindly wrote offering, if we should wish it, to give evidence on certain aspects of the subject under our consideration. You are still, I understand, a Vice-President of the National Marriage Guidance Council, but you point out that you wish to offer your evidence as a private individual?—(Professor Mace): That is so, my Lord.

4469. You spent some ten years actively engaged in the Methodist ministry; you hold the degrees of Bachelor of Science, London University; Master of Arts, Cambridge University; Doctor of Philosophy, Manchester University. Your specific field of academic interest for many years has been the subject of marriage and the family, viewed particularly from the sociological angle. You have been closely connected with the Marriage Guidance Council since its inception in 1938 and were its General Secretary from 1942 to 1947. I think you personally opened and directed the first marriage guidance centre to be set up in this country, and you were responsible for bringing the National Marriage Guidance Council into being. Is that so far accurate?—I think so, my Lord.

4470. And you have written several books on the subject of marriage and a very great number of articles both in this country and the United States, and your newspaper and magazine articles have brought you continuously throughout the years heavy correspondence which has helped you to understand the needs and problems of ordinary people. You are at present Professor of Human Relations at Drew University, Madison, New Jersey, United States of America. You have been coming and going across the Atlantic for some five years. During that time you have participated in many important conferences on the other side, including the White House Conference on the Family in 1949 and the White House Conference on Children and Youth in 1951. You are a member of the American Association of Marriage Counsellors, a director of the National Council on Family Relations, and international editor of an American journal called, I think, *Marriage and Family Life*?—That is so.

4471. As you have not submitted to us a memorandum setting out your views, I shall have to ask you to set them out in answer to some rather general questions from me. I think it would be convenient if, after you have given us your views, I then give the members of the Commission an opportunity of asking any questions they wish. First of all, I should be glad if you could give us any help you can on the subject of a comparison of the marriage conciliation services in this country and some other countries, particularly the United States.—Would you like me to speak for a few moments and you interrupt me as you wish?

4472. Yes. I think what we should prefer is this—I have given you a topic—would you make any observations upon it that occur to you as being helpful to the Commission?—I am anxious that I may not weary the Commission with material which is not relevant to them and of interest to them, and I hope, my Lord, you will feel free to stop me if I do so. (Chairman): I will. (Professor Mace): Thank you very much, we understand each other. My experience of conciliation services in other countries is really limited to experience in America. Such experience as I have of countries other than the United States is slight and, moreover, I have not found evidence that in those other countries there was anything of great importance to me. The tendency, as I see it, is for most other countries to look to Britain and the United States for guidance and direction in this field. For convenience, I will divide the term, "marriage conciliation services", into three headings. First, there are those unorganised, independent, private services which are rendered individually by professional and other people to men and women in marriage difficulty, which are very hard to chart or to assess, because they do not come under any systemised institution, and unquestionably the great bulk of conciliation work is done in that way by professional and other people. Secondly, I would group those conciliation services which are organised, but entirely independent of State or legal machinery—services which are available to the public if the public wish to use them, but only on application from the public, and on the initiative of the persons concerned.

4473. Could you give specific examples in this country?—Certainly—the Marriage Guidance Council is an excellent example of such a service in this country. The third category of conciliation services I would classify as those which are in some way directly connected with, or set up under the auspices of, domestic relations courts, magistrates' courts, divorce courts and the like. The distinction between each of these three is not absolute, but it will help us to clarify our thinking, I suggest, if we have those three divisions in mind.

As to the first, to make a comparison between this country and the United States is always an extremely difficult undertaking, as the members of the Commission will realise. But I would say, in general terms, that probably professional individuals as a whole have been more active in the United States in this kind of work than in this country, for several reasons. First, perhaps because the problem of marital disharmony has been out in the open for a much longer period in the United States than it has here. As you are aware, the divorce rate there has been high by our standards for a considerable period of time, and the problem has therefore asserted itself and has had to be met. Secondly, perhaps because in the United States the public are more ready to pay fees for this kind of service, and therefore there is a possibility of a professional person making a living or part of a living by directly offered services of marriage conciliation.

4474. Are you speaking now of people who make a profession of giving advice on reconciliation?—Not exclusively. I am speaking now of professional and other qualified persons who, as the whole or part of their work, undertake marriage conciliation. I am distinguishing those from well-meaning relatives and friends who try to help, but whom I would wish to exclude from this category and any category I am employing at the moment.

4475. (Lord Keith): Are these people ministers, doctors?—Yes, ministers, doctors, to a limited extent lawyers, social workers, psychologists and others.

4476. (Chairman): Why I was moved to ask the question was that I did not quite know, unless you were in fact referring to that type of person, how any member of the public could know that the advice was available.—The members of the public do not necessarily know that such advice is available. But they tend to turn to that class of person, because they have confidence in that class of person. In some instances it is made known that advice is available; in some instances it is not. The point I am making is that the great bulk of marriage conciliation work is still in both countries done in that unorganised way. If I were to attempt a comparison it would be a comparison based only on personal impressions. I would say that ministers in the United States are probably doing more than ministers in this country—although I have a lively appreciation of all that is being done and has been done by the clergy in this country. But I think that the clergy are doing more in America, partly because they recognise the task of conciliation as more immediately within their pastoral province, partly because they have had better training to do it in the theological seminaries, and partly because members of the population are more ready to approach ministers on these personal matters in the United States than they are in this country. Of doctors I would be inclined to say that there was no very material difference in the amount of conciliation work that was done by them on either side of the Atlantic. Social workers, I think, must be largely excepted from this category, because nearly all their conciliation work is done through agency organisations, and they therefore fall into my second general category. Of lawyers it is difficult to speak because one does not get to know what they do in the direction of conciliation; therefore I am not prepared to make a judgment so far as they are concerned. To sum up, I would say that in this first field of conciliation service, more is being done in the United States than in Britain.

4477. I think that you yourself have already made the comment that, especially in the case of a clergyman, he cannot very well advise unless people give him the opportunity to do so?—I think that is a vital part of the argument.

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4478. It is rather a question of how many people have formed the habit of coming to their clergymen for advice?—That is the point. Turning to the second category, the services which are organised through agency means, I would say that the situation in America is broadly similar to the situation in this country, but when one comes to details the similarity does not persist. Broadly, there are two types of agency which offer conciliation services, other than those organised through and in connection with the courts. There are the agencies which are in effect social services—extended and expanded to meet this new need as part of the subtle but profound reorganisation of social services generally away from the relief of material distress towards the task of dealing with personal difficulties. I would say that in America that movement of social service towards the area of counselling, and even towards psycho-therapy, has travelled very much further than it has in this country. Throughout America, the Family Service agencies, as they are called, are doing a very great deal of matrimonial conciliation. In some cases, it represents the bulk of all the work that they are doing.

4479. Are these agencies giving their services free or for a fee?—I was about to say that these agencies are in the main supported by the community chest. Members of the Commission will doubtless know that in America the charitable and welfare services in a town or city are often united, as far as their financial needs are concerned, and a drive is made each year through the so-called community chest to raise money, which is allocated in an agreed proportion among all of them. Most of those agencies, therefore, receive income through the community chest. The community chest is in some areas falling away in its efficacy at the present time, and some of these agencies are having to charge small token fees; but, generally speaking, these services may be regarded as available free to the public.

The second group of agencies are those agencies which are, for the most part, independent of community chests and other resources, and are offered by groups of professional people. These may include social workers, but generally the social workers play only a subsidiary part. The services are generally offered through churches, or in connection with hospitals and clinics, and operated by a group—a team of professional people coming from various disciplines. There are many such organisations in the United States. They are very varied, because they are subject to no kind of central direction or control. They give their allegiance to no agreed set of principles or standards, and therefore they are extremely difficult to assess, but they count for a good deal in the total picture which the United States presents at the present time. There is, of course, no ultimate reason why the two kinds of agencies which I have described should not work closely together or even coalesce, except that it happens that the social workers prefer to work on their own through their own agencies, and do not work very much with the other groups, but hold their own separate conferences and the like. To some extent, but with a good many variations, that, I think, is also the situation in this country.

The next category is that of agencies which are connected with courts in some way or other. You may notice that I am saying very little about the situation in Britain; I am making the assumption that the members of the Commission are very familiar indeed with it, and would be weary of repetition. I am describing the situation in the United States and leaving you to make the comparison in large measure.

4480. If there are any special points on which you think more could be done in this country, I am sure the Commission would be glad to hear your views.—I would just like to add this to what I have said. So far as organised agencies are concerned, I am well satisfied that while some of these agencies in the United States, in both of the groups I have described, are of admirable quality and are doing excellent work, others are of dubious quality. I have noted many times the severe problems created in the United States by the lack of central co-ordination, the lack of unified standards and agreed principles, the lack of any kind of proper coverage of the country as a whole, because these agencies have arisen in a very random way. I have many times returned to this country with a feeling of gratification that here, in our much more unified pattern, and particularly in our centrally directed programme for the selection and training of counsellors, we have something infinitely better. In fact, I would say

without any hesitation that, to the best of my knowledge, we have here in this country, in terms of an overall service to the community, the best marriage counselling services in the world, and I think it is good for us, while we are looking at our inadequacies, to take heart and be thankful for that.

I do not think that there are any fundamentally important areas within the orbit I have covered in which the Americans can teach us anything of outstanding importance. I could wish that the training of clergy to do this work were more rigidly advanced in this country, but I know that it is being advanced perhaps as rapidly as possible. I could wish that marriage counsellors in this country could learn something from the very best marriage counsellors in the United States, who have impressed me deeply with their knowledge and confidence and skill; but, broadly, I feel when I return from the United States to this country that I receive a picture of which I have no reason to be ashamed.

To turn to the category of those conciliation services which are fairly directly attached to courts; here we are at once launched into the subject of the degree of persuasion and compulsion which is justifiable in offering conciliation services. Indeed, "offering" is not the appropriate word, if compulsion is the condition. In the United States, a great deal of experimentation has been carried out in the domestic relations courts and divorce courts in the direction of allying conciliation services with the legal procedures through properly appointed officers. I have seen some of these courts in operation and I have heard at great length accounts of the methods and procedures employed and proposed. Perhaps outstanding amongst these proposals is that of Judge Alexander of Toledo, Ohio, who, as the Commission is doubtless aware, has laid very interesting proposals and plans before the American Bar Association, which has set up a sub-committee to investigate them. Judge Alexander is himself in his court in Toledo trying to implement his proposals experimentally. I have visited also one or two domestic relations courts in the area of New York and sat through their sessions, and been impressed by the wisdom and skill and insight with which these exacerbated problems were handled by judges. Nevertheless, I have a stop in my own mind when I consider that kind of procedure carried to that extent.

4481. Are you referring there to rules under which any couple or individual seeking matrimonial relief must attend a reconciliation court?—Indirectly I am, but what I have in mind directly—and perhaps I can make it very clear by giving an illustration—is the kind of court which has been termed into a kind of "coy-ai-together-in-the-parlour-and-talk-it-out" method of handling the problem. I know of one court where the judge does not sit in the court room any more, but sits in an adjoining room at a table and has the couple on the other side of the table and has in attendance a clerk with all the data. The judge talks the thing out and only comes into the situation in the status of a judge when it appears that nothing can be done at a more human level. I was particularly thinking of that type of court, but I would include the kind of arrangement you have indicated. I have some hesitations about that, but hesitations of a different nature, and I would rather keep the two questions separate at this point if I might.

4482. What I wondered was whether in any State of the United States there is any system whereby people are bound to consult reconciliation officers before proceeding to get a divorce?—I am not in a position to answer that question with certainty, my Lord. I do not think that there is any such enactment, but there is pressure at the present time in that direction in the State of New Jersey, where I live. This past winter there has been a group set up to press for that very type of legislation but the proposals have been treated with some coldness by the legal authorities in the State, and the matter is now under furious discussion. I do not know that there is actually any such enactment in force; I am not aware of it, but I might easily be mistaken.

4483. At any rate, what you are speaking of now is not compulsory reconciliation proceedings?—No, I am speaking now of any kind of conciliation service directly attached to, and under the auspices of, a court of law. I do not think that there is any parallel in this country unless it be the procedure in the magistrates' courts, which

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[Continued]

make widespread and very efficacious use of probation officers. But there is no real parallel in this country, and therefore a comparison is not possible. Only a description of what is happening in America can be given and I have given that in brief, but will be very happy to expand what I have said if you wish.

4484. I would like to ask one question. When you speak of domestic relations courts, are you speaking of special tribunals set up to deal with domestic relations, or are you speaking of a procedure such as that adopted by Judge Alexander in dealing with domestic matters?—I am speaking of the latter; whether the former would apply I am not quite sure. The judges seem to be able to take a good deal of liberty in the way they handle their domestic relations cases and, of course, the impressive effect of the new approach in dealing with juvenile cases has inclined many judges to try the same methods in domestic cases, and they seem to be able to get away with it in a way which is to me quite remarkable. The way they juggle with the law of the State, quite frankly, amazes me. But whether or not there is any enactment which officially permits the judges or even requires them to follow these procedures, I am not aware.

4485. I see, thank you—I am really opening up the subject, my Lord, in the hope that you and the members of the Commission will press me on points on which you want answers. You would wish me to continue? The question of persuasion and compulsion inevitably arises as soon as you begin to think of conciliation services attached to courts of law. So far as my own views are concerned, I am not in favour of compulsion. When I gave evidence before the Denning Committee I was asked what would be my opinion of the use of the marriage guidance services in this country for referral from the courts by command of the court. I said that I hoped that they would never be used in that way, because that would fundamentally destroy a certain principle, which is implicit in our marriage guidance services, namely, that we offer help to those who desire it and seek it, but we never forcibly help upon those who are not interested in receiving it. Therefore I am against the use of compulsion, partly because it is invariably, I think, of little effect. You can do people good by compulsion in certain areas. I suppose that an inoculation carried through at the initiative of the police, but in these personal matters the fact of compulsion destroys a relation which makes beneficial results attainable. I am against it also because I think that we must be very careful in this matter of conciliation not in any way to violate the freedom and independence of the individual to live his own life in his own way. However, that does not dismiss the matter by any means, for there is no doubt at all that while the State stands to offer the legally permissible remedies to men and women who, through marriage, have fallen into trouble, the State also is concerned with the other side of the matter, namely, to keep the resort to those remedies down to the irreducible minimum. Society is concerned not only with offering relief to those who, in marriage, have found unhappiness and disaster, but is concerned also with the evil results arising out of the break-up of homes. Therefore I would not say that the State, acting through the courts, could not do something effectively in this matter. I would permit the principle of persuasion. I think that there are probably a few persons who go through the divorce courts, who, with a little kindly restraint and persuasion, would not and need not do so. I do not think that their number is as large as some would lead me to suppose, but there is without doubt a number, and that number is worth saving and worth helping and worth being concerned about. I would therefore consider that the linking of some sort of conciliation services with the courts would be permissible and indeed desirable, and in many respects I have been impressed with what the Americans have been doing in this way. But I have had, as I indicated a few moments ago, certain stops in my mind, and perhaps I can clearly indicate what these stops are by saying under what conditions I would myself feel happy about conciliation services offered through, and in association with, the courts.

The first condition I would lay down would be that the word "persuasion" should be taken very seriously; that the offering of such services and the description of the nature of those services, and even warnings as to the

undesirable results of breaking up a home when such services might offer another solution, would be desirable and wholly permissible. But where any kind of resistance is met, I think it would be highly important that attempts at persuasion should at once come to an end, in order that people might have free access to their legal rights. The second condition that I would lay down would be that the use of persuasion as a means of marriage conciliation attached to the divorce courts should not be just the superficial type of persuasion to which most couples contemplating divorce have already been exposed from friends, relatives and well-wishers generally—the kind of persuasion which says "Now, pull yourselves together and go back and have another try". Most couples in marriage difficulty have already done that several times and, unless persuasion can really introduce new factors into the situation—new resources and fresh insight—then it is likely, I think, to be of little avail. Therefore, persuasion should be based on the certainty that new resources can be made available to the couple. And the purpose of the persuasion should be to convince them that there are ways of looking at their problem into which they have not yet entered, and that if they could see their problem in that new light, with help in these new ways, they might themselves come to desire the reconciliation which they do not think they desire now. That is to say, the persuasion should have some solid content, by offering opportunity for the full exercise of counselling skills.

The third condition I would lay down would be that conciliation work as such should never be mingled with the administration of law. I say that in spite of the very successful efforts made in some of these domestic relations courts in America which are impressive to look at, and very impressive when written up in the *Reader's Digest*. But in spite of that, I feel that there is a basic and serious danger involved in any attempt to mingle the function of judgment and administration of the law, on the one hand, and the function of marriage counselling and conciliation, on the other. They are mutually exclusive functions, which must be kept apart. Therefore, I would myself have hesitation about allying counselling services directly to courts. But I would have every support for the provision of some kind of intermediary who, at as early a stage as possible under the direction of the court, could, as it were, sift out from those seeking divorce the persons likely to be able effectively to avail themselves of skilled counselling, and who could use such ways and means as were in his power to direct those persons to seek competent help.

To the extent to which the Americans do more than that I cannot go with them, but to the extent to which they are doing that, I am wholly with them and would be very happy to see some such arrangement made available here in this country. I think it would do great good.

4486. As I understand it, you are suggesting that the judge should not himself deal with the matter of reconciliation, but should have some organisation available, to which he could suggest recourse in suitable cases?—Not only that, but also that, if possible, this organisation should be operative before the couple ever come before the judge. The judge could, if necessary, even at that stage refer to the organisation, provided the couple were entirely willing to do so, but I would like to see it done even before the petition is filed.

4487. I understand that. I was thinking for the moment, having been a judge myself, of the functions of the judge as you saw them.—You have fully discerned what was in my mind.

4488. I think we have got your ideas very clearly, unless there is any further point you wish to make?—I would like to turn now to the effect of strict and liberal divorce laws, respectively, upon attitudes to marriage. I approach that subject, I may say, my Lord, with a great deal of diffidence. I was tempted this morning, before I came here, to pick up my copy of the *Oxford Dictionary* and look at the definition of "evidence", but my courage failed me, for under this heading I feel that anything I say will hardly be capable of definition as evidence. It consists of little more than impressions and I recognise that impressions are dangerous. I could wish with all my heart that we had some evidence on this vitally important subject.

4489. I can assure you that other witnesses have given us their impressions based upon their observation and experience. I am sure that it would be most valuable

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to the Commission if you would give us yours.—I would be happy to do so on that understanding.

4490. It is a matter on which you could hardly give statistics.—Unfortunately not, and that is the difficulty. So far as my observation has gone, I have formed the impression that recourse to divorce in most of our Western societies is conditioned fundamentally by three factors—first, the traditional ethical and religious sanctions to which allegiance is given or, in some cases, perhaps only lip service, within the community. Secondly, the current attitude of public opinion—the rather ill-formed mass feeling in the community about divorce, expressed largely by the greater or lesser degree of social ostracism of those who seek divorce. Thirdly, the legal code of divorce, which I put last because it ought to be the stable and abiding expression of the other two, or whatever compromise has been worked out between them. That being so, it is not a simple matter at all to assess the effect of the legal code of divorce upon attitudes to marriage, because the other factors are operative and sometimes operative in a very vigorous way. However, I have formed the impression that, other things being equal, a strict code of divorce law does tend to restrain people from having recourse to divorce procedures. I am given to understand, and I think there are statistics for this though they may not be of any great weight, that in the various American States, where conditions for divorce vary greatly, there is not the degree of movement from State to State in order to avail oneself of easier laws in another State which might be expected. People tend to accept and abide by the law of the particular State where they live. That is to say—and this is the only point I am making out of the data in question—in States where the divorce law is strict, there seems to be a tendency to accept it thus, and not to seek divorce unless the conditions laid down can be met. That would, of course, not operate where the divorce laws were exceedingly strict. A good illustration of that is South Carolina, where, until two or three years ago, there was no divorce law, but under pressure that state of affairs has been terminated, and there now is a divorce law. A great degree of strictness becomes intolerable to the community, but a limited degree of strictness seems to be accepted by the community. On the other hand, I have formed the impression that where divorce laws become liberal, there appears to be an increasing tendency on the part of married people in trouble to avail themselves of those facilities, other things being equal. Whether there is any discernible limit to that process I do not know. It would be very interesting to try to find out. Obviously somewhere there is a limit. If you make divorce available without effort, there will be a time at which your divorce rate will presumably cease to rise, but there does not seem to be any very strong evidence that that limit is in sight yet in those Western societies which we have a good opportunity to study. Thus, the liberalising tendency to make divorce easier does, in my opinion—and I emphasise that I am only giving you my impressions—does tend to put the idea of divorce more readily into the minds of people, who otherwise under a stricter régime would perhaps not consider it. But, as I have said, if the régime becomes too strict it places too heavy demands on society, which breaks out and rebels. Therefore, there is perhaps somewhere a medium point between strictness and liberality which represents, on the one hand, what will be disclaimed by society, and, on the other hand, what is thought to be reasonably fair and just by the majority of people within society. It seems to me that the unenviable task of law-makers is somehow to try to determine that point. The only further impression that I would mention at this stage is that what I have seen in the United States in this matter seems to be confirmed by the changes of attitude which have been very noticeable in this country over a period of time. I have tried to avoid giving impressions of what has been happening in this country, because those impressions have been available as much to members of the Commission as to myself. But, in this one particular, perhaps I have had an unusual opportunity of feeling the pulse of people's judgments and emotions, in that I have received, over a period of ten years or so, a great many letters from ordinary people in trouble about marriage. Probably every day during that period I have read some of these letters, and I have thought that I noticed through the years an increasing tendency to treat the breaking of marriage more lightly because it was more easy to go about it. The feeling in those early days just before the

war, and at the beginning of the war, was a rather shame-faced and reluctant, "Well, of course, we have to do this and we know it is not really right, but things are desperate and the law is there. What can we do but avail ourselves of it?" That moved on towards a kind of feeling, "After all, the law gives us these facilities; people are taking advantage of them, why should not we?" Moving on again to a still more liberal attitude, "Well, there is the law and we are not living together and we shall not be happy, and why cannot I have my freedom?" Moving still further to the point at which these people may say, "Other people can get a divorce; they can trump up evidence, why should I be treated thus because I cannot trump up suitable evidence?" There is a gradual feeling—an admission perhaps rather than a considered judgment—which treats the terminating of marriage more lightly. Probably because it is more easy to terminate it, more people are doing so. Those are impressions, my Lord, and I do not advance them as evidence in the strict sense of the word.

4491. We are much obliged. May I say this about the question of the value of education and preparation for marriage as a long-term means of preventing avoidable divorce, on which you offered to give us your views? It is my view that, strictly speaking, that is not within our terms of reference—or, at any rate, it is not for us to suggest methods of education. But, as we have heard a good deal of evidence on the subject, the Commission would be glad to hear what you have to say about it. It may be that we shall want to make some observations about it in our Report. Would you tell us what, in your view, is the value of education and preparation for marriage as a long-term means of preventing avoidable divorce?—I shall be very happy indeed to be allowed to say a few words on that subject. There is nothing in this field about which I am more deeply persuaded than that the attempt to prevent marriage breakdowns and divorce decreases in efficacy with the advance of the condition of marital disharmony and maladjustment. It is possible clinically to define specific points in the development of marital maladjustment, from the first inception to the last dismal decay and disintegration of the relationship, and to recognise that assistance, guidance, conciliation, counsel, call it what you will, applied at these successive points is of rapidly diminishing effectiveness with the advance of the condition. And it is possible to go further. Indeed, it is an inevitable corollary of any such clinical examination of the nature and progress of marital disharmony. It is possible to recognise that the very inception of serious disharmony almost always stems back to some inadequacy of one or both of the personalities—some state of ignorance or misapprehension, some faulty emotional conditioning—which was present before marriage. Therefore, if there is one thing about which I am more deeply convinced than any other it is that conciliation in late stages of marital disharmony is only touching the very surface of this great and lamentable social and personal problem. The real solution lies in long-term effective education and preparation for marriage, and it would be very much my hope that this Commission might see its way to make some recommendation that that fundamental aspect of the subject be further explored and attended to. Anything done in the later stages is of comparatively little consequence compared with what can be done preventively earlier on, and I speak there not only of what I have seen and learned in the field of marriage counselling, but also of what I have seen to be possible in some of the best pieces of educational work now being carried out in the United States. I am very deeply persuaded of the importance of this preparatory work and of its validity. More than that I think I should not say, because I recognise your generosity in allowing me to speak on this subject.

4492. Could you give us a brief description of the nature of this training, of which you so much approve, in the United States. When does it begin and what is done exactly?—It is at the moment only in its beginnings. It has had its real beginnings in the universities. Without doubt the leadership is in this whole field of working for better marriage and family relationships, both from the preventive and remedial angle, has come, in the United States, from the universities. In well over 600 universities and colleges in the United States, very full and detailed courses on marriage and family living are now available in the form of "life adjustments" courses, which can be taken by students in any faculty, and which they can

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unlike towards the points which they meet gather for their ultimate academic achievement. These courses are being very widely used now, but it is recognised that, valuable as they are, they involve beginning at the least effective end, and now the movement is towards taking the same kind of programme—suitably adjusted—into the high schools, which deal with young people during their adolescent years from about fourteen to eighteen. There has been a great extension of such courses in the high schools. I am not speaking now of sex education in any narrow sense at all; I am speaking of education for family living, covering a very wide field. Going along with that programme, there is a great deal of experimentation—some of it extremely significant—in parent education, in the recognition that the real formation of emotional attitudes, which will later be decisive in marriage, takes place within the relationships between parents and children in the home. All of that is educational in the widest sense of the word, and it will all ultimately, when the Americans have had time to work at it a little longer, merge into a total pattern in which they will seek to give to young people—I was going to use the word "conditioning", you may not like the word, but let it stand—will seek to give to young people the right sort of conditioning towards the not uncomplicated art of living effectively within a family either as a husband or as a wife—as a father or as a mother.

I know that to speak of the Americans making great strides in this direction, in the face of the appalling American divorce rate and looseness of standards in certain directions and so forth, is at once to invite criticism. But I am convinced that behind all the rather confused and chaotic scene which America presents to the observer, there is deep down a vital piece of educational work in the direction of preparing for family life going on. Some researches have been carried out to follow up this educational work, and all of them have convincingly demonstrated the unquestioned efficacy of such training.

4493. Has there been time to observe the results, for instance, that people who have taken those courses are less likely to become divorced?—Yes. There have been researches made following up the university students who have had the courses, comparing them with students who had not had the courses. Of course, you must be careful about researches of that kind because so many factors enter into the case. I would not give great weight to those particular statistics, but the cumulative evidence is to me convincing.

4494. (Dr. Robertson): Might I ask with regard to the Family Service agencies of which you spoke earlier, do these function at all through the maternity and child welfare service?—No. I was speaking of quite separate and autonomous organisations, which are social welfare agencies as such. I would refer to agencies for marriage counselling associated with maternity and child welfare organisations as being in my second group rather than in my first. There are only a few and I would not class them in the same group as the social welfare agencies.

4495. There is no link up?—Hardly any.

4496. (Sheriff Walker): Professor Mace, does Judge Alexander of Toledo, about whom you spoke, exercise divorce jurisdiction?—He does.

4497. And in regard to the instance you gave of Judge Alexander himself trying to effect reconciliation, can you tell me whether the parties concerned had instituted an action of divorce before him?—Not in all cases, but in a few cases. I think that, generally, when it comes to a specific action for divorce, the regular procedure of the court is followed, but I am not very sure on this subject. If you press me further about the precise details, I am afraid I shall have to say I cannot be of much use to the Commission. It would be easy to get the information, but I do not happen to have it here.

4498. It was the detail I wanted to know, so that I should have the picture in my mind. I was wondering if this was an instance in which a petitioner had petitioned for a divorce, and the respondent was defending, and that Judge Alexander invited them into his room to talk about it?—I do not imagine that Judge Alexander himself carries out the kind of procedure I have described, and I am glad of the opportunity to correct that possible impression. Judge Alexander, I believe, sits as a judge in his court, but what he has done at Toledo is to build up a staff of marriage counsellors, and by some means,

persuasion is brought to bear upon those who are seeking divorce to be interviewed by the counselling staff at the court before they appear formally in the court. I think that Judge Alexander, in certain instances, would be quite ready himself to sit down with a couple, but not in the court and under the formal conditions of judicial procedure.

4499. Do you know whether any reconciliation has actually come about through that form of procedure?—Yes, it is definitely claimed that it has had very successful results. Of course, successful results require definition. Always in these matters in a difficult situation there are so many factors operative that what may appear to be a success may be very short-lived. If you have enough persuasiveness and charm you can send almost any couple home arm in arm if you keep on long enough and are sufficiently coercive, but what happens next day or in a week is another matter. (Chairman): I think we have applied for particulars in respect of each of the States in America, and that might supply what Sheriff Walker is asking for.

4500. (Sheriff Walker): Yes, my Lord, that would satisfy me. There is only one other matter, Professor Mace. You spoke about the pre-marital training that is given so much in America. Could you give me particulars? What would an adolescent boy at a university be taught?—I would be very happy to give you some details about that, because I am myself, at the university where I am working, offering such a course. It is a course of forty lectures on the subject of marriage, in which I try to cover the field fairly thoroughly. Some people are astonished that you can produce forty lectures on the subject. I can assure you I do so without any difficulty and, I hope, without undue repetition. That course is followed up, for students who desire it, with a similar course of forty lectures the year after on parenthood and family living. So you see I get a chance of forty lectures one year and forty lectures the next year, a total of eighty lectures with a particular group of students. I will give you more detail of what I say if that is what you wish?

4501. I did not want to know how many lectures, but rather what subjects would be taught?—I would begin with a sociological introduction to the subject in order to get it in its setting. I would then proceed to consider the nature of the marriage relationship, the nature of . . .

4502. Pause there; you deal with the nature of the marriage relationship, but what exactly do you tell the students about it?—It would take me a long time to begin to summarise.

4503. (Chairman): Might I make a suggestion? I see that you have written several books. Is there any book which contains the substance of your forty lectures?—No, unfortunately there is not.

4504. I hoped there might be some way in which Sheriff Walker could be enlightened without . . .—I am anxious to be of service to Sheriff Walker, but to do justice to myself by being very brief, and to do justice to him by being adequate, is a dilemma I am in a difficulty in solving. (Chairman): I must say I sympathise with your difficulty. (Sheriff Walker): Thank you, Professor.

4505. (Mr. Young): You spoke, Professor Mace, about divorce-mindedness. There are many elements underlying that and I am rather interested in them. May I suggest other factors to you which may make people more divorce-minded? There has been a tremendous development, has there not, in publicity—in the sense that there are very few people now who cannot read or write. You would agree with that, would you not, in comparison with seventy-five years ago?—Yes, there is greater solidarity in people's thinking.

4506. There has been a development also in literature—in the sense of factual as opposed to emotional literature?—Yes.

4507. Books are cheaper—books on the subject are available to everybody?—Yes.

4508. And we have the radio, upon which very often topics of divorce law, and so on, are discussed and broadcast to millions of people. That did not happen years ago?—No.

4509. And we have the Press, which is now a universal thing; people read Sunday papers which are very widely circulated and in which these topics, including, I think,

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some contributions of your own, are widely disseminated. We have also, of course, a tremendous movement of population today as compared with seventy-five or a hundred years ago.—That is true.

4510. And also the development of a great many voluntary organisations, which offer to help people out of their difficulties? Do you agree?—Yes.

4511. When you add up all that—is it not exceedingly difficult, if not impossible, to say that people are more divorce-minded because the grounds of divorce have been extended?—I did not say that. I said that one of the reasons why people are more divorce-minded, and one of the reasons—and I accept all the other factors that you have given and I can add some more—one of the reasons is the fact that divorce is more readily available. I would say that, and I would say something further. You have referred to the greater ease by which there is an exchange of views between people, through the Press, radio, books and so forth. We must remember that the views which are expressed are views based on the current and existing data, and one of these data, and not an insignificant one, is that divorce is now readily available, whereas divorce was previously not readily available, so that the way in which people discuss marriage and the aspects of marriage which they discuss will be conditioned by the greater availability of divorce. Therefore, the greater availability of divorce, besides being one reason among others, is also a factor influencing several of the other reasons which you have given. But more than that I would not say. I would never say that the widespread availability of divorce today is the one factor which has made people divorce-minded, because I could conceive of a society where you could have divorce without effort and without conditions, and yet where there would be no divorce—where people would find divorce so antipathetic, where people would have religious and ethical restraint, and public opinion would be so hostile to it that no one would dare to use the facilities available.

4512. Assume that you left the grounds of divorce as they are or even extended them, but you prohibited all reference in the Press, radio, literature and in any other form of publicity, to divorce. Would not that have a tendency to reduce divorce?—I think it might, but how practical the matter is . . .

4513. I am not suggesting that it is practical, I am merely suggesting it as a test of whether you can extricate out of all these factors whether it is really possible to say that people are more divorce-minded because of additional grounds of divorce?—I repeat that I think that the availability of additional grounds for divorce has contributed to an increased divorce-mindedness. If that is accepted, I am satisfied; if that is not accepted, then I could not agree.

4514. But it cannot be disentangled from the other factors?—To some extent it could, but some of the factors are so closely allied with the status quo, which after all is the subject of discussion in papers, the radio and the like, that its disentanglement is impossible in these areas. There are other areas possibly, such as the movement of population, where disentanglement would be possible, but it would be a difficult task.

4515. (Mrs. Allen): On the question of training, may I ask if the same principle as you adopt in your university is carried through in other universities and in the high schools?—There are many universities where it is being done. The number of universities where there are what we call functional courses on marriage, as distinct from purely academic courses on anthropology and sociology and touching upon marriage, has been cited as well over 600. The length of the courses would, I think, be roughly comparable with the course I give. Most American universities are divided into two semesters, and there are mostly two courses in each year, so I think the answer to that is "yes".

4516. And the high schools?—I have no figures there. Nobody knows, because in America there is no Ministry of Education, and every local community is its own education authority. To secure reliable information would be extremely difficult. I can only say that there is some very significant work being done—I have seen it myself—and there is a marked tendency for it to increase. It is opposed by the Catholics, not because they oppose education for family life, but because they do not wish

members of their own faith to receive it through the public schools. So, from that point of view, the development of this programme is somewhat hindered, but it is nevertheless increasing. There are some places of work that are discreditable and unsatisfactory but, by and large, I think that the movement is sound.

4517. And have the people who undertake this work any special training?—Yes, for the most part the people who are doing this kind of teaching have had training for it. It is now possible at a great many American universities to do special training in education for family life.

4518. (Mr. Beale): Would it be true to say that children in the United States on the whole stay at school longer than the children in this country?—I think that is so; far more go to college or university.

4519. So I suppose it would be true to say that the educational system would have a greater opportunity of dealing with this subject in the United States than in this country?—Yes. The universities have a unique opportunity in the United States. There is no other country in the world which, *pro rata*, has anything like so large a university population. It is for that reason that this movement in the universities is so significant, because the universities play such a tremendously important part in the life of many members of the community.

4520. It is also true, I believe, that more girls go to university in proportion than they do in this country, and that the universities are more fully co-educational than in this country?—Yes, I would agree.

4521. So that the conditions are rather different?—There is a far-reaching difference between a university in this country and a university in the United States.

4522. I wonder if I might turn to other possible means of preventing marital trouble. To your knowledge, is it the fact that in any of the States the preliminaries to marriage are more difficult than in this country?—To my knowledge they are much more easy, if you mean the specific approach to getting married?

4523. I did mean the actual civil steps which you have to take.—The notice required, and so forth, and the hours at which marriages can take place tend to suggest that marriage is very much easier in the United States than here. Ministers complain that they can do little in the way of marriage preparation in some instances, because people will come walking along in their working clothes and demand to be married immediately in the minister's home. It is easy, it is not necessary to be married in church—the parson produces the necessary certificate and that is all that is required. They will knock the minister up in the middle of the night in order to be married, or they will race off in a car to some magistrate or justice of the peace and knock him up. The preliminaries are not very exacting; that is my impression.

4524. Would you say that there is any relationship between the ease with which one can get married and the rate of divorce?—Probably there is such a relationship, but it would be one factor among many. But I think that if a few not too discouraging hurdles were placed in the way, particularly of very young people who plan to get married—certain inevitable delays and the like—then some of them might have time to think better of it, and I think that such people are the type who later on are liable to come into a divorce court. So I think there would be a relationship, it might not be very great, it would be one factor among others. I certainly think that marriage contracted rather hastily and under these circumstances is not likely to impress young persons as a matter of great weight, dignity and sanctity.

4525. It is probably impossible for you to answer this question, but I think it is worth asking it. The laws of marriage and the laws of divorce are different in each State?—That is correct.

4526. Have you any idea, first of all, whether there are more divorces where it is easier to get a divorce?—I think the answer is yes, but the reply must carry the qualification that there would be some limited tendency in such cases for people from other States to migrate in order to avail themselves of the opportunity. This does not take place to the extent which one might expect, but it does take place.

4527. I believe that the divorce rate is very high in Nevada?—Yes, that is a case in point where the figure is trustworthy.

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4528. It is a sort of safety valve for film stars?—And other wealthy people who can afford to take a plane and spend six weeks in Nevada. I am sorry I come so ill-equipped with precise information about these matters. The information can easily be got, but I do not happen to have the statistics at my finger tips.

4529. (Chairman): Might I say that we have sent a questionnaire to the United States through the Foreign Office requesting various particulars of the law in each of the forty-eight States, as perhaps it would be fairer to wait for that—I think that the Commission would be well advised to wait for that because my replies may not be accurate, and I give them with a certain diffidence. I would, incidentally, be very ready, if I could be of service to the Commission, to secure any specific data on the other side which is not easily obtainable through Government sources. But I prefer anything I have said here this afternoon of a statistical nature to be viewed with reserve, because I cannot carry these figures in my head, and I have not really come prepared for questions of that type. (Chairman): We are very grateful to you for your offer, which I will certainly bear in mind.

4530. (Mr. Bole): I have one other question, and that is, whether there is any relationship between the illegitimacy rate and the severity of the divorce laws?—You mean in States where divorce is difficult to obtain. I simply do not know, but again the answer could easily be obtained.

4531. Then might I ask this? I think that this is perhaps an easier question, I fully realise that the other two have been difficult. Are the reconciliation arrangements available in the courts more numerous where there are more liberal divorce laws, and is it found that there is less need for conciliation arrangements where the divorce law is severe?—I very much doubt whether the availability of conciliation services bears any real relationship to the severity or otherwise of the divorce law. The inception of conciliation services is usually the work of an inspired individual or group of individuals who set in motion these organisations and arrangements. Perhaps in States where the divorce law was liberal, and where therefore the incidence of divorce was high, the incentive to take such action would be greater, but I do not think that there is any significant relationship upon which any conclusion can be built between the two. May I for a moment hark back to your previous question and warn you that, in any assessment of illegitimacy figures in the United States, it is essential to distinguish between the white and negro figures. It is a very important distinction that has to be made because the environmental factors are so different.

4532. Thank you very much. The next point I would like to ask you is whether any public funds, whether they be municipal, State, or Federal, are made available for a voluntary marriage guidance society?—I think not. You must remember that the constitution of the United States is at this point fundamentally different from that of our own country. It is not normally the custom of the Federal Government to make grants to this kind of work. The only such grant that I am aware of is a fairly substantial grant made to the Marriage Council of Philadelphia—but only because that Council is carrying out, under the direction of the Federal Government, an extensive and important piece of research. There is no other Federal aid I know of to any marriage conciliation agency of a voluntary type. I am not aware that there is any State aid, as opposed to Federal aid, available to such institutions. Most of the aid for work of that kind normally comes through the community chest and is the result of direct donations from the citizens.

4533. Finally, on a question on which you have not touched at all in your most interesting talk, have you any impression as to the stability of the children of divorced parents and their capability to face problems?—I have some limited experience, because many of my students are the children of divorced parents and I have come to know them very intimately. I have certainly formed the impression that the students who were the children of divorced homes have suffered emotionally in consequence—not in all cases, but as a number of cases which have seemed to me impressive. Of course, I have no reliable statistical basis of comparison. I find that many of my students who have been the children of divorced parents develop personality difficulties, which, I think, they would

not have developed otherwise, and which, when I try to help them, seem to be very closely related to the breakdown of the parents' marriage.

4534. My reason for asking that is this. It has been said to me on more than one occasion that in the United States—I know people talk very vaguely about the United States, but I think they mean the part of the United States in which it is more easy to get a divorce—children have become accustomed to divorce and can cope with it in a way that the children in this country cannot?—That is true in the sense that there is not the same social rejection of the child of divorced parents by other children, as still to some extent, I think, obtains amongst children in this country. There are so many children in any given school in America whose parents are divorced that a very clear and invidious distinction is not normally made, and in that respect the children have a rather easier time. But I have no reason to believe that in terms of the deeper emotional upheavals resulting from the break-up of the parental home they suffer any less than the children in this country.

4535. (Lady Bragg): Professor Mace, I should like your opinion about a point of view which was actually suggested to me in America, on the question of education for marriage. Do you find that at its present stage of development, this preparation for family life makes for a form of self-consciousness on the part of younger parents? Do they have a perpetual anxiety in their behaviour towards each other and towards their children? The young mother, when the first child is born, is worried as to whether she is about to do some long-term mischief—either emotional or physical—by the simplest action?—I do so very clearly recognise what you have described. I have encountered it again and again. Yes, that does happen. That attitude is not necessarily, however, very closely associated with the fact that education for family life is given. It is something which is operative on a number of other levels in American society. You must remember that the Americans have not been involved in a very profound struggle for existence at elemental levels for some time. It is a land of plenty, and when people no longer have to struggle desperately for the necessities of life, they tend to become pre-occupied with non-essentials. It is true to say that many American mothers are just as fastidiously pre-occupied with the question of whether their children get the right amount of calories or vitamins, or whether they have all the shots for all the possible diseases they can contract, as they are concerned as to whether psychologically they have handled the child rightly in this texture or the other. I think that that particular reaction is one to which young American parents are very susceptible at any level. However, I will grant you that one effect of intensive education for family life is to some extent to create a certain amount of anxiety in parents, which may in some instances have an undesirable effect. But I think that the danger involved is out of all proportion to the advantage gained by helping young people to be enlightened about the nature of their relationships. If they did not have that kind of anxiety lest they were doing the right thing, they would have much more insidious anxieties of another nature which would perhaps not come to light, but which would be the result of ignorance. So I do not feel that the argument has weight when all the factors are taken into consideration.

4536. (Sir Russell Brain): Professor Mace, I am sure you are familiar with the views of anthropologists on marriage, including those of Dr. Margaret Mead. Would you agree that throughout the world there is a very wide variety of patterns in marriage?—Indeed there is.

4537. And many divergent patterns seem to succeed provided they have social sanction in a particular community?—Yes.

4538. Do you think that what has been called divorce-mindedness represents a conflict between the views of a considerable number of individuals in a society and the long-standing social sanctions with regard to marriage?—To some extent, I think, that is undoubtedly a factor. I hinted that when I said that I thought that recourse to divorce was usually conditioned by three factors. I indicated that I thought that the legal codes were ideally the expression of some kind of compromise between the traditional ethical and religious sanctions and the public

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opinion prevailing at the time—the emotional climate of the time. These two very frequently do come into conflict, especially in times of profound social change—and we are living through such times now.

4539. I think you said that in America there are some States in which the social sanction is strict and others in which you described it as liberal. I imagine that there would be a third group which might be described as intermediate?—Yes, I think so.

4540. This may be a difficult question to answer, but I do not think you said which of these systems seems to you to make for the happiness and stability of the society?—I do not know that it is a question I could answer, except in the terms in which I have already hinted at an answer. (Chairman): Might I ask whether you are speaking of social sanctions, that is the general attitude towards divorced persons, or of the strictness of the law? (Sir Russell Brain): I think Professor Mace was alluding to the strictness of the law.

4541. (Chairman): I see, you used the word "sanctions" and I was not quite sure—I have already, I think, suggested that it is my impression that where a law becomes so strict that it is seriously out of tune with the kind of resultant of the existing ethical and religious sanctions, on the one hand, and the current emotional climate, on the other, then you have a crisis. And the results of maintaining the law at that level of strictness will be serious, because people will rebel against it and will think that it is even virtuous to defy the law. On the other hand, if the law goes beyond the point of that resultant in liberality, then it will tend to increase the movement of the resultant away from stability. This is very complicated to answer because the question raises a nice philosophical point, but my own feeling is that I want to see our society determine that resultant accurately and express it fairly and justly in the law. That does not bring us down to earth at all, I know, but is that what you wanted me to bring out?

4542. (Sir Russell Brain): I think I understand what you mean. I want to ask rather a different question. I think you have just come from Scandinavia. Are you familiar with the divorce laws of Norway?—Not as familiar as I ought to be. I have been there on a vacation, and my contact with the situation in relation to marriage and divorce in Scandinavia is very superficial.

4543. At any rate, it is very much easier to obtain a divorce there than here?—Yes.

4544. Have you any views as to what effect, if any, that has had on the happiness and well-being of the Scandinavian peoples, whether it has produced results which, we are told, will follow in this country if there is any extension of the grounds of divorce?—I would really be speaking without any real foundation of knowledge if I tried to give an answer. I just do not know.

4545. Do you think that the same effects would necessarily follow in different countries, for example, that a similar relaxation would produce the same effects in Norway as it would in Nevada or some such place as that in the United States?—Not being able to make a real judgment about the effect, I could hardly follow that judgment and apply it elsewhere. I cannot even make any judgment on the Scandinavian society. I feel that this is a question which could only be answered by someone who has a fairly extensive knowledge of the Scandinavian peoples and their psychology in relation to their social institutions.

4546. Could you say what has been the effect in the United States in those States where divorce has been much easier?—I thought I had already indicated that my impression is that it has made people more divorce-minded, to use the phrase which is in currency at the moment.

4547. I do not mean quite that, I mean the effect on their happiness and welfare generally. The national welfare, we are told, would suffer if certain changes are introduced here.—You mean that there would be greater poverty, a spirit of relaxation, freedom from brooding anxiety, and so forth, in States where divorce was easily available?

4548. I did not mean that; I am referring to what witnesses have told us, that relaxation in the divorce law would produce ill effects on the national character.—Witnesses have said that that is true of Scandinavia?

4549. No, not Scandinavia, in the United States?—I simply would not be able to make a judgment on that either. I live in the State of New Jersey, where the divorce law is broadly similar to that of this country. I have not been long enough in the State in question and would have to live for years in the State in question and really get the feel of it, to make a judgment so difficult as that. I have not been long enough in any State where the divorce law is liberal to be in a position to answer such a question as that, I am sorry.

4550. (Mr. Flecker): Is there any literature readily available about the courses in education on preparation for marriage, which are conducted both in college and in high school in the United States?—There is a vast literature, for many of the professors who have given these courses have written large and impressive text-books embodying the material of their courses in a way which I regret to say I have not, otherwise I would have been happy to put it at the disposal of Sheriff Walker, who asked for it. There are others who have done so, and there are quite a couple of dozen standard texts which do in fact embody the material given in such college and university courses.

4551. And high school ones as well?—Yes. There are fewer of those because the development in the high schools is more recent, but I can think now at once of two excellent standard books produced by very competent people, and there are more coming along.

4552. You mentioned that you receive constant letters from people who are in matrimonial difficulties of one sort and another. It seems to me that, in this country, at least, we are told that there is less ostracism now of people who do not strictly observe the "old-fashioned" code. Public opinion is not so much against what our ancestors used to call "living in sin". Would you agree with that?—Yes, quite definitely.

4553. On the other hand, there seems to be an outcry from people who claim that the present divorce laws are unfair to them, that they are kept in bondage, and who grumble at having to have an illicit union, which gives them a sense of being ostracised. Can you reconcile those two attitudes?—These attitudes derive from rather different groups of people, of course.

4554. I should have thought that those who have formed illicit unions would be the people who profit from the fact that there is less ostracism?—You mean that they would not bother whether they were married or not, since it did not seem to matter to their social standing?

4555. Exactly.—There is a certain amount of truth in that. It does appear on the face of it rather puzzling. But when you talk with these people, you do discover that while outwardly they may appear to flout accepted standards of marriage, yet deep down most of them feel the need for the security that a socially approved relationship such as marriage gives. And, of course, there are certain legal advantages and securities which are unobtainable without a valid marriage, and these things matter to them. I think that those two factors perhaps make some contribution towards an explanation. Whether they offer the whole explanation I am not sure, there may be other factors as well.

4556. It is rather tempting to say to such people, "You have obviously shown by your actions that you do not care a bit about accepted views of marriage, then why are you caring about having the divorce laws altered in order to make your relationship a legal one"?—Of course, there is not a total lack of social ostracism, there is only a relaxation. If one speaks to such persons and gets beneath the surface to their feeling of isolation and exclusion by certain friends, their hyper-sensitivity to certain social groups, one realises that social ostracism has by no means ceased to exist.

4557. (Mrs. Jones-Roberts): When you described the conciliation services in the United States, Professor Mace, you enumerated three categories. First of all, the professional person who meets people in distress in the ordinary course of his or her work. Then the social welfare centres, which I gather are more or less equivalent to our Marriage Guidance Councils, and, thirdly, some kind of service which is attached to the courts. Can you give us your impression—you could not possibly give figures I know—of the scale on which people resort to these social welfare centres, that is, to the equivalent of

24 July, 1952]

PROFESSOR DAVID R. MACE

[Continued]

our Marriage Guidance Councils here?—Yes, I think I can do that, because I have had contact with a good many of them. My impression is that the situation is much the same as it is in this country, that there is a great demand for the sort of help which those agencies give, depending to a large extent on the effectiveness with which the services are made known to the public. When the public do know that the services are available, and are assured that those services are competent, there is no lack of men and women who with gladness and eagerness will seek them. The best available services in the United States, to my knowledge, are under pressure and have difficulty in coping with the number of men and women seeking their assistance. Is that the answer to your question?

4558. Yes, thank you very much. Now the second question is this: certain witnesses have told us that the Marriage Guidance Councils in this country seem to attract more what they call the middle classes, whereas the working classes are cared for more by the probation service attached to the magistrates' courts. Have you observed any division of that kind in the United States?—A similar, though not identical, division. The arrangement of courts in the United States is a little different from our own. Divorce has been so easily accessible that it has not to nearly the same extent been customary for people to seek the type of orders which are available in the magistrates' courts in this country, and which in some way legalise separation of husband and wife. Therefore that parallel could not be drawn, but a corresponding parallel can be drawn in that perhaps there is a slight preponderance of the middle classes making use of the professional type of organisation which I have described, and more of the working classes using the type of social welfare organisation which I have described. For example, I can think of people who have said to me, "We want help about our marriage, but we do not feel that we should go to the Family Service Agency in our community, because that is for people of a rather different class from ourselves". These are the people who would go rather to the centres and clinics organised by professional groups. There has been that distinction.

4559. And along what lines do you envisage development in the United States? Along the lines of social welfare centres or some service attached to the courts, or perhaps not at all?—The situation in the United States is extremely chaotic at the moment because, as I have said, there is not any recognised and accepted central co-ordination. The American Association of Marriage Counsellors is at the moment making a heroic effort to bring order out of chaos in two ways; first, by attempting to insist upon certain standards of personality and professional qualification for all marriage counsellors, which we wisely did at the beginning in this country, and so we have no such problem. Secondly, the American Association of Marriage Counsellors is at the moment making a survey of all the existing agencies in the United States in an attempt to evaluate the quality of their service. When that survey has been completed, I imagine that the result will be that the Association will be prepared to give certification to certain agencies, which it considers to be offering satisfactory services, and to withhold that certification from others. Whether that will have any effect

upon the unsatisfactory agencies, I do not know, it may or it may not. But there is at the moment a marked concern among responsible people in this field in the United States that the whole service of matrimonial consultation should be tidied up and co-ordinated, and that some kind of generally accepted standards of working should be applied. Thus, I would say that there is a good chance that in the next five or ten years the rather chaotic situation in the United States will be tidied up, but it is an unenviable task.

4560. (Lord Keith): Professor Mace, what proportion of students at your University attend your lectures on marriage relations?—The courses in question are available only to students in the second two years. The students in the first two years can only attend the courses on personal application, that is to say, if they are going to get married they can come and see me and I certify their attendance. Thus the course is mainly confined to what are called upper classes. I would say that about one-fourth of the entire student body takes my courses. Whether that would be a representative estimate for the universities as a whole, I do not know, it is very debatable.

4561. Let us cut out for the moment your first-year students who, I understand, do not join. . . .—The first two years: the bachelor's degree is a four-year course in the United States.

4562. I see, then these lectures are part of the Bachelor of Arts course?—Not quite. American universities permit a certain small proportion of fully recognised courses to be given on the subject of what they call "life adjustment". They permit students to take a strictly limited number of courses in "life adjustment", that is to say, a student who is graduating in mathematics can take my course and have the credit for that course applied to his degree, but only to a very limited extent is that permitted. It is regarded as a kind of pastoral function which the university fulfils towards its students. Therefore the students who take my course come from all faculties.

4563. Take the twenty-five per cent. Can you divide that between men and women?—Yes. Sixty per cent. of women to forty per cent. of men, which happens to be almost exactly the distribution of the sexes in the University as a whole.

4564. You mean that there are more women than men students?—There are more women than men. That is not unusual in American universities.

4565. Would you say that it was the more serious-minded of the students who composed that twenty-five per cent. that attended your lectures?—I would say that the majority fall into that category, but I would say that there was a small minority from the opposite category.

4566. You mean that there is a small minority who attend out of curiosity?—A small minority, exactly.

4567. (Chairman): Am I right in thinking that for no students is attendance at these lectures compulsory?—Yes.

(Chairman): I have no further questions. Thank you very much for coming to help us. It has been most useful to us.—Thank you, my Lord, for the opportunity.

(The witness withdrew.)

(Adjourned to Monday, 27th October, 1952, at 2 p.m. Hearing to be resumed in Edinburgh.)

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PRINTED IN GREAT BRITAIN

THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE

TWENTIETH DAY

Monday, 27th October, 1952

PRESENT

The Rt. Hon. Lord MONCKTON OF HEDDINGTON, M.C. (Chairman)

Mrs. MARGARET ALLEN
Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
Mr. R. BILLOP, M.A.
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Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 57

MEMORANDUM SUBMITTED BY THE RT. HON. LORD COOPER, O.B.E., LL.D., LORD PRESIDENT OF THE COURT OF SESSION

1. The only matter on which I consider it appropriate to tender evidence to the Commission on behalf of the Court is the question raised by that part of the terms of reference which directs the attention of the Commission to "the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife", and to the propriety of changes in the law or its administration in that respect.

2. Prior to 1830 actions affecting status were the exclusive concern of the Commissary Courts, which had inherited the powers and duties of the pre-Reformation Courts Christiana. Upon the abolition of the Commissary Courts, the Court of Session Act of 1830, Section 33, conferred privative jurisdiction in such actions upon the Court of Session. The actions enumerated in the Act (as amended by the Conjugal Rights (Scotland) Amendment Act, 1861) were declarations of marriage, or nullity, of legitimacy and of bastardy; actions of divorce and of separation *a mensa et thoro*; actions of putting to silence; and actions of aliment between husband and wife instituted in the Court of Session. The jurisdiction of the Sheriff Court in actions of aliment was construed as limited to awards of interim aliment in cases where there was separation *de facto* or *de jure*.

3. So matters stood from 1830 until 1907, when the Sheriff Courts (Scotland) Act of that year re-defined and extended the jurisdiction of the Sheriff Court in terms which required to be re-enacted in 1913 because of conflicting decisions as to the effect of the Act of 1907. The 1913 Act conferred jurisdiction upon the Sheriff Court in "actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment or interim aliment; and actions for regulating the custody of children"; but this provision was qualified by (a) an express exclusion from the Sheriff's jurisdiction of "declarations of marriage or nullity of marriage, and actions the direct or main object of which is to determine the personal status of individuals" and (b) a power to the Sheriff on cause shown or *ex proprio motu* to remit to the Court of Session actions of separation and aliment, adherence and aliment, or interim aliment or actions for regulating the custody of children.

4. Actions for aliment and for regulating the custody of children are not in the strict sense actions affecting status, and actions for adherence and aliment and separa-

tion and aliment leave the marriage the unaffected and have become of much less importance since the Divorce (Scotland) Act, 1938. Putting these aside, all actions "the direct or main object of which is to determine the personal status of individuals", and in particular all actions of divorce, nullity and declarator of marriage, are the exclusive concern of the Court of Session and have been solely cognizable in the Court of Session since 1830.

5. In my opinion no sufficient justification can be alleged from the standpoint of public convenience for transferring this jurisdiction in whole or in part from the Court of Session to the Sheriff Court. On the contrary, I consider that any such transfer would be attended by grave objections from the standpoint of the due administration of the law.

6. I append a statement based on such official statistics as have been published, showing the volume of work of this class which has been handled in the Court of Session during the last twelve years. No purpose would be served by carrying the investigation further back, since the position was transformed by the war and by the Act of 1938. The great mass of the business consists of undefended actions which account for about ninety-eight per cent. of the total. Defended actions, of course, absorb much more judicial time, as the proofs in such cases sometimes last for a week or more. In the peak year, 1946, when the total rose to about 3,000 cases, the judicial establishment of the Outer House of the Court of Session was five judges, and Inner House judges had to lend their assistance to the Outer House judges on overtasking this exceptional addition to their normal work. But the establishment of the Outer House has since been increased to six judges, and the number of "consistorial causes" has fallen to about 2,400 per annum, near which figure it appears to be more or less stabilised. With the judges, court staff and court accommodation at present available, it has proved possible, and should continue to prove possible within the predictable future, to dispose of these cases without delay and without serious interference with the ordinary work of the courts. Indeed occasions have occurred when diets of proof were being offered too soon to enable the solicitors to make the necessary preparations or to secure the attendance of the witnesses. To suit the convenience of parties and witnesses, much of this work is taken on Saturdays, and

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 LORD PRESIDENT OF THE COURT OF SESSION

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 D.B.E., LL.D., LORD PRESIDENT OF THE COURT OF SESSION

much during broken weeks at the beginning and end of terms, when it causes the minimum interference with other judicial work. Arrangements can always be made for evidence to be taken urgently on commission (or before the court) where a witness is going abroad, or is infirm, or otherwise not reasonably capable of attending the proof. There are no complaints of delay. The average interval during session between an application for a diet of proof and the diet is about four to six weeks. It has never proved necessary in Scotland, as in England, to resort to special expedients, by the appointment of commissioners or others, to dispose of the work. The transfer of the work to the Sheriff Court would not result in any saving of time to the litigants. In the lesser courts, such as Lanarkshire, it is questionable whether the extra work could be overtaken without the appointment of additional Sheriffs and clerical staff.

7. From the standpoint of the litigant of small means the expense of a visit to Edinburgh has ceased to be material now that legal aid is in operation. Moreover, it is necessary to observe that very few persons are parties to a divorce action more than once in a lifetime, and it does not seem an unduly burdensome requirement that for so unique a purpose they should resort to the capital. Numerically, the bulk of the cases originate in Glasgow and district, from which Edinburgh can be reached by an hour's rail journey. In many cases, equal or greater expense and inconvenience might well be occasioned by conveying the parties and their witnesses in one or other of the Sheriff Courts (many of which are remote and difficult of access), than by centralising the work in Edinburgh.

8. There are fifty-seven Sheriff Courts in Scotland, extending from Lerwick to Wigtown and from Stormont to Perthshire, and there are fifty Sheriffs Subordinate and twelve Sheriffs Principal. None of these cases has ever handled an action affecting status, and some of them have not often handled a separation and aliment on an adhesion and aliment. Detailed figures are not available but during the ten years to 1948, the total number of all "actions relating to separation, aliment, adhesion and aliment, etc." in all the Sheriff Courts of Scotland only averaged 257 per annum, an average of under five per court. The figures for 1949 and 1950 are 249 and 235, respectively. In undefended actions there is, of course, no appeal unless decree is refused, and there would therefore be no opportunity to the Court of Session in the vast majority of cases to exercise supervision directed to securing uniformity in the administration of the law by a large number of separate and unconnected courts. The jurisdiction in divorce and similar cases is notoriously one of great delicacy and especially so in undefended actions, and in the course of the 120 years during which they have exercised that jurisdiction the Court of Session judges have built up a corpus of decisions and practice rules with which the Bar and the Edinburgh

solicitors are generally familiar. When points of special novelty or difficulty arise, the Lord Ordinary can "report" the case to the Inner House, and so secure an authoritative decision which will usually enter the reports. If jurisdiction in divorce cases and the like were to be transferred to the Sheriff Court, it is certain that counsel would rarely be employed, at least in undefended cases; and it is to be feared that, with the best will in the world, a large number of Sheriffs, acting in isolation and with the assistance only of solicitors hitherto unfamiliar with the conduct of this class of litigation, could not achieve the due and uniform administration of the law in the fashion possible in the Court of Session.

9. Independently of these considerations, it is a matter of difficulty to see how the jurisdiction of each of the Sheriff Courts could be determined with proper regard to the interests of the parties and to the requirements of international law.

10. For these reasons I am of opinion that the special requirements of Scotland can best be met by adhering to the existing law as to jurisdiction in matters affecting status. The same conclusion based on similar reasoning was reached by the Royal Commission on the Court of Session, to whose Report of 1927 (Cmd. 2861, pp. 40-42) I would refer.

11. I am authorised by all the judges of the Court of Session (except Lord Keith, who, as a member of the Commission, has not been consulted) to state that they concur in this memorandum.

(Dated 24th October, 1951.)

APPENDIX

COURT OF SESSION

FINAL JUDGMENTS IN DIVORCE AND SEPARATION ACTIONS

Year	Divorce	Separation	Total
1939	884	4	888
1940	865	4	869
1941	772	2	774
1942	1,027	2	1,029
1943	1,317	5	1,322
1944	1,745	4	1,749
1945	2,237	3	2,240
1946	2,911	2	2,913
1947	2,527	2	2,529
1948	2,049	2	2,051
1949	2,442	4	2,446
1950	2,216	7	2,223
1951	—	—	2,500 (estimated)

NOTE: Since legal aid came into operation this year, from 50 per cent. to 66 per cent. of these cases have been brought by "assisted persons".

PAPER No. 58

SUPPLEMENTARY MEMORANDUM SUBMITTED BY THE RT. HON. LORD COOPER, O.B.E., LL.D., LORD PRESIDENT OF THE COURT OF SESSION

1. I desire to bring down to date the Appendix to my original memorandum by adding the following particulars:—

FINAL JUDGMENTS IN DIVORCE AND SEPARATION ACTIONS

Year	Divorce	Separation	Total
1951	1,957	2	1,959
1952 (to 1st Oct.)	1,938	4	1,942
(estimate for year)	—	—	2,800

2. To obviate possible misunderstanding I would observe that the official statistics have hitherto been confined to decrees of divorce and separation. In addition there is a small flow of minor consistorial actions, the figures for 1952 to date being as follows:—

Declarator of nullity	11
Dissolution of marriage on presumption of death	13
Declarator of marriage	3
Declarator of legitimacy	1
Adhesion and aliment	6

In future such decrees will be separately shown in the official statistics.

3. While it is hoped that the war peak of pressure is past, the figures are not declining to the extent anticipated, partly in my view because, as a result of legal aid, many cases are now being brought founded upon grounds of action which emerged many years ago. These arrears ought to be worked off fairly soon, but it is not yet possible to forecast the probable normal.

While the burden on the judges of dealing with these undefended actions is very considerable, it has continued to be possible to dispose of the work without delay, and there are no complaints. It will be noted that the separation action is almost extinct.

I refer to the Civil Judicial Statistics for 1951 (Cmd. 8637) for a useful graph showing the trend and details of the divorce actions for the ten-year period, 1941-51; and for a table showing at whose instance the action was brought, the duration of the marriage, and the extent to

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which children of the marriage were affected. These statistics disclose:—

(a) that actions at the instance of husbands and of wives were roughly equal in number;

(b) that in the majority of cases the marriage had lasted for from five to twenty years; and

(c) that there were children of the marriage in roughly two-thirds of the cases.

4. I have considered the memorandum submitted by the Faculties of Procurators of Greenock and Paisley. Their views were dealt with by anticipation in my original memorandum, to which I would only add these supplementary comments.

5. The two Faculties whose views have been presented are two out of the thirty-three legal societies enumerated in Schedule IV to the Solicitors (Scotland) Act, 1933, and the population of the areas which they serve represents only a fraction of the total population of Scotland. Their memorandum must therefore be taken as embodying a minority opinion, which is not shared by the majority of Scottish practitioners.

6. One hundred consecutive cases selected at random from those initiated in the Summer Session of 1952 have been examined with a view to discovering the permanent address given by the pursuer, the assumption being that it would be from the address that the pursuer, and perhaps supporting witnesses, would have to travel to the court before which the proof took place, unless of course evidence was taken on commission. The addresses are as follows:—

Glasgow	...	...	...	...	15
Aberdeen	...	...	...	...	10
Dundee	...	...	...	...	7
England or abroad	...	...	...	...	8
Paisley	...	...	...	...	6
Edinburgh	...	...	...	...	6
Greenock	...	...	...	...	2
Other parts of Scotland	...	...	...	...	46
Total	...	...	...	...	100

Of the forty-six cases from "other parts of Scotland", thirty gave addresses from rural areas remote from any Sheriff Court, and the forty-six addresses included a number from distant districts in the Highlands and Islands, including Shetland and Orkney.

7. A separate test was made by examining one hundred consecutive cases selected at random from those in which proof took place during the summer of 1952 with a view

to discovering in how many all the witnesses adduced came from the same place, and in how many one or more of the witnesses came from a different place from the pursuer. It will be kept in view that in ordinary cases the offence is often committed at a distance from the marital home, and that "head" or "detective" witnesses are frequently brought from a distance and often from England. The test showed that all the witnesses came from the same place in fifty-five per cent. of the cases and that in forty-five per cent. one or more were brought from elsewhere, often from a distance.

8. If desired, these statistical analyses could be carried further, but it is thought that the results are typical of the ordinary run of cases, and they indicate that to dispense the work amongst some fifty odd courts from Lerwick to Stranraer would on balance create as much inconvenience and expense in conveying and accommodating the witnesses as it would save, and in some instances more, and the difficulties would of course be gravely accentuated if, as may happen in any case, the action proves to be defended.

9. As regards the judicial expenses of a typical undefended action—of which about sixty-six per cent. are now conducted with legal aid—the Auditor of the Court of Session has provided the following details:—

Edinburgh solicitor's fees	...	...	£
Correspondent (if any)	...	...	25
Counsel and clerk's fees	...	...	10
Fee fund dues	...	...	10
	...	...	2

£47, or
if no correspondent £37.

To save the trouble and expense of preparing detailed accounts for audit, provision has been made in legal aid cases whereby payment can be obtained on a inclusive fee of £22 where only an Edinburgh solicitor is employed, and of £32 where there is a local correspondent, plus outlays in each case. The above figures do not take account of the travelling or other out-of-pocket expenses of the witnesses, which vary widely from case to case from nil to an appreciable sum.

There is no means of estimating what accounts could be taxed in Sheriff Courts if divorce actions were transferred to them, but it is difficult to believe that much, if any, saving could be effected except by the expedient of disposing with the services of counsel. If, of course, counsel were employed outside Edinburgh, the cost would be materially increased.

(Dated 22nd September, 1952.)

EXAMINATION OF WITNESS

(THE RT. HON. LORD COOPER, O.B.E., LL.D., Lord President of the Court of Session; called and examined.)

(Chairman): Lord President, you have been kind enough to come here today to assist us on certain of the matters within the scope of our Inquiry. I think that before I put any questions to you, I might say, first, that the members of the Commission have welcomed this opportunity of coming to Scotland. In recent years several Royal Commissions have visited Edinburgh, but I believe I am right in saying that this is the first occasion on which the law of divorce and related matters have been the subject of an Inquiry by a Royal Commission in Scotland. We come here because we feel that it is fitting that Scottish witnesses should be heard in Scotland on matters which so intimately touch upon the social fabric of their country. We appreciate that the problems which we have to consider are not always the same in this country as in England and Wales, and we are aware that some of us have much to learn—not all of us, because Scotland is well represented on this Commission. We are grateful that you and others are coming here to help us.

Secondly, I think it is desirable that I should make some general observations similar to those which I made on the occasion of our first public meeting in London as to our procedure in hearing evidence. I feel sure, Lord Cooper, that what I am about to say will not surprise you, but it may be helpful to some other witnesses. In

the case of every witness who has so far been asked to give oral evidence in Scotland, we have before us a memorandum submitted to the Commission either by the witness personally or by some organisation which that witness represents. Each witness can rest assured that we have read that memorandum with care, and that we shall consider it very fully before we arrive at any conclusion. Moreover, that memorandum will be deposited with our Report, as part of the evidence which was laid before us. Consequently, there is no need for any witness to repeat by word of mouth what has already been said in writing by that witness, or by the organisation which he or she represents. The object of this public hearing of oral evidence is three-fold. First, to enable each witness to make an opening statement (if he or she so desires) by way of supplement to the written memorandum, or by way of further explanation of anything which he or she thinks may be a little obscure. Secondly, to enable any member of the Commission to question the witness on any matter in the memorandum or outside it; and thirdly, to enable members of the public to have first-hand knowledge of the Commission's proceedings.

Finally, we want every witness to take particular note of this. We may ask you questions which are in the nature of cross-examination on your memoranda. This is not done in any hostile spirit. We merely wish to

test each witness's evidence by putting to him or her some arguments on the other side which appear in other memoranda, so that the witness may have a chance of dealing with those arguments. In saying this I speak for all my colleagues. We all have open minds and are only anxious to weigh in the scales to the best of our ability the views put before us.

4568. (Chairman): Lord Cooper, you are the Lord President of the Court of Session, and you have very kindly put two documents before the Commission. Before I turn to these documents do you wish to add anything to them?—(Lord Cooper): I think that the only thing I need say, and I have already said it in the first memorandum, is that, representing the Court of Session, we desire to offer no contribution on what I might call the matters of high policy with which your Commission is concerned. So long as the law is clear we are willing to work it whatever it may be, and therefore the matters to which we have devoted our attention are primarily matters of objective fact and figures, and the administration of the law whatever the law may be. That is all I think I need to say in supplement to the memoranda.

4569. Your first memorandum was submitted about a year ago, and it deals with only one matter. In paragraph 1 you say:—

"The only matter on which I consider it appropriate to tender evidence to the Commission on behalf of the Court . . ."

—that is the Court of Session—

" . . . is the question raised by that part of the terms of reference which directs the attention of the Commission to 'the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife', and to the propriety of changes in the law or its administration in that respect."

Then in paragraphs 2, 3 and 4 you summarise the history of actions affecting status and you state the present position at the end of paragraph 4, in which you say:—

" . . . In particular all actions of divorce, nullity and declarator of marriage, are the exclusive concern of the Court of Session and have been solely cognisable in the Court of Session since 1830."

Then you express the view which is the main theme of this memorandum:—

"In my opinion no sufficient justification can be alleged from the standpoint of public convenience for transferring this jurisdiction in whole or in part from the Court of Session to the Sheriff Court. On the contrary, I consider that any such transfer would be attended by grave objections from the standpoint of the due administration of the law."

In paragraphs 6 to 9 you state your reasons, and I have one or two questions to put upon these, but I think it will be more convenient to put them when I come to your supplementary memorandum. Then you refer in paragraph 10 to the same conclusion based on similar reasoning having been reached by the Royal Commission on the Court of Session in 1927?—Yes.

4570. Your first memorandum finishes by saying:—

"I am authorised by all the judges of the Court of Session (except Lord Keith, who, as a member of the Commission, has not been consulted) to state that they concur in this memorandum."

I imagine, Lord Cooper, that no judges would be particularly anxious from any personal desire to have divorce jurisdiction restricted to them?—I think, Lord Morton, that I might stress that. From the standpoint of the judge—and I think that this is true of England as well as Scotland, as Mr. Justice Pearce will know—divorce cases, particularly a long run of divorce cases, present very little attraction at all. I imagine that there are few judges who would not be glad to be relieved of this class of duty for ever. But it is not from that standpoint, but from the wider standpoint of public interest and the due administration of the law, that I advance the view that the jurisdiction in Scotland should remain in the hands of the Court of Session.

4571. You have an Appendix to your memorandum giving the figures of final judgments in divorce and separation actions since 1939. I observe that the peak year

was 1946 when the total was 2,913, although it had only been 886 in 1939. From 1946 there is a gradual decline, until we come in your supplementary figures to the year 1952, in which you estimate that there will be a greater number?—That is true.

4572. To what do you attribute the increase as compared with 1939?—In recent years the increase, in so far as I can find a cause for it, is due to the fact that with the assistance of legal aid a number of persons are bringing actions for divorce, founded upon what I might call stale grounds that might have provided the basis for an action at any time in the last ten years. Occasionally I myself take a day of civil divorce in order to get first-hand experience, not more often, I might say, than I think suitable, and on the last occasion I did so one ground for action was actually twenty-four years old. I took occasion to enquire of the pursuer in the witness box why he had waited so long and he gave the answer that he had had no money and was apparently unaware of the fact that even long before legal aid was introduced he could have got his divorce carried through for practically nothing under the old Poor's Roll procedure. I find on enquiry among some of my brethren that these cases are not uncommon, and I am hopeful that the arrears which result from that cause will soon be worked off and that we shall establish a new level of work in the region of 2,900 to 2,500.

4573. Possibly less than that?—Possibly less than that. I should also like to supplement the statement of statistics by saying that in the inter-war years before 1939 when, of course, conditions were very different both in law and in society, the number of divorces per annum ran year after year in the region of 500 to 530 so that the maximum figure for 1946 is nearly six times the inter-war average.

4574. Of course you had in 1938 the enactment of the Divorce (Scotland) Act, 1938, which substantially amended the law?—It did.

4575. May I come to your supplementary memorandum? In paragraphs 1 to 3 you bring up to date the Appendix to your original memorandum and I only have one question to ask on these paragraphs. Is it the fact that there are still very few defended actions? What is the sort of proportion of defended actions to undefended?—About ninety-eight undefended for two defended—two per cent. defended.

4576. Then in paragraphs 4 to 9 you deal, by way of reply, with the memorandum submitted by the Faculty of Procurators of Greenock, which has the support of the Paisley Faculty. In paragraph 5 you point out that the two Faculties which I have just mentioned are two out of the thirty-three legal societies enumerated in Schedule IV to the Solicitors (Scotland) Act, 1933, and you say that their memorandum must therefore be taken as embodying a minority opinion which is not shared by the majority of Scottish practitioners. Then you take one hundred consecutive cases selected at random from those initiated in the Summer Session of 1952, "with a view to discovering the permanent address given by the pursuer, the assumption being that it would be from this address that the pursuer, and perhaps supporting witnesses, would have to travel to the court before which the proof took place, unless of course evidence was taken on commission". Then you set out the addresses which include fifteen from Glasgow, ten from Aberdeen, eight from Dundee, seven from England or abroad, six from Paisley, six from Edinburgh, two from Greenock, and forty-six from other parts of Scotland. You comment that:—

"Of the forty-six cases from 'other parts of Scotland', thirty gave addresses from rural areas remote from any Sheriff Court, and the forty-six addresses included a number from distant districts in the Highlands and Islands, including Shetland and Orkney."

Even in these remote districts, and certainly in Glasgow and Aberdeen, there is a Sheriff Court nearer at hand than Edinburgh?—Yes.

4577. May I take an instance where there might be hardship in the present state of affairs? Suppose that a lady in Inverness had reason to complain of alleged adultery by her husband in the neighbourhood of Inverness. In that case, if the jurisdiction were transferred to

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the Sheriff Court, she could go to the lawyer with whom she is familiar, he could appear before the local Sheriff and the whole case could be disposed of. The witnesses would not have to travel to Edinburgh and she would not have to employ an advocate or an Edinburgh agent. Cases of that kind would, I suppose, involve some hardship?—Certainly. It is very easy to discover cases where the sort of situation which your Lordship postulates would arise. But I am dealing with the manner on what I might call a statistical basis, having regard particularly to the fact that it is extraordinarily difficult for the court's staff to determine at the early stages of the action whether it is going to pan out in the way you indicate. It might prove to be defended. It might be that witnesses were required from another place. The purpose of the test shown in paragraph 6 was only to give you a rough indication of the local sources from which the actions came in a group of one hundred, selected at random. Had I taken another hundred I might have got slightly different figures, possibly substantially different, but it is not really possible to analyse them all.

4578. Your theme in the two memoranda is this, that although there may be cases of individual hardship, on balance it is better that the jurisdiction should remain with the Court of Session?—On balance, yes. And if I might give the very converse case of the one that your Lordship indicated—suppose that you had a case brought in the Sheriff Court at Stornoway requiring the attendance of two detectives and a chambermaid from a hotel in London. The expense of taking them to Stornoway and housing them in Stornoway would far exceed the expense of bringing them to Edinburgh and housing them there.

4579. In paragraph 7 you examine one hundred consecutive cases selected at random in which proof took place during the summer of 1952 in order to discover in how many of these cases all the witnesses adduced came from the same place, and in how many one or more of the witnesses came from a different place from the pursuer. You point out that:—

"... in adultery cases the offence is often committed at a distance from the marital home, and that 'hotel' or 'detective' witnesses are frequently brought from a distance and often from England. The test showed that all the witnesses came from the same place in fifty-five per cent. of the cases, and that in forty-five per cent. one or more were brought from elsewhere, often from a distance."

—Roughly speaking, in half of these cases it is just as convenient to come to Edinburgh as to stay in the local place.

4580. You sum up your view on this by saying:—

"... it is thought that the results are typical of the ordinary run of cases, and they indicate that to dispense the work amongst some fifty odd courts from Lerwick to Stornoway would on balance create as much inconvenience and expense in conveying and accommodating the witnesses as it would save, and in some instances more, and the difficulties would of course be gravely accentuated if, as may happen in any case, the action proves to be defended."

Then you deal with judicial expenses.—Before you pass to that might I make one supplementary observation? The difficulty might be acute in some of the big Sheriff Courts such as Glasgow. The amount of additional work that would be loaded on to the Glasgow Sheriff Court if you put all the divorce cases from Glasgow there would, I think, be beyond the capacity of the existing judicial and clerical staff. I was, as you are probably aware, Lord Advocate for six years, and therefore have applied my mind to similar problems, and from the widest standpoint of public convenience it would be rather ridiculous in these days to appoint, let us say, extra Sheriffs and extra clerical staff in Glasgow to do work which the Court of Session has so far been able to take in its stride. I think that that is a relevant point for the Commission's consideration.

4581. I understand from your memorandum that so far the Court of Session has found no real difficulty in dealing with the volume of divorce cases which come before it, and that you do not anticipate any?—I verified the number up to this morning, and we are still in a position

to give the diets of proof in divorce cases at an interval of approximately six weeks—which is as short as is appropriate to the importance of the case and as short as the legal profession as a whole are prepared to take. If you try to make it go faster than that you would at once get into difficulties with solicitors. And perhaps I might mention, for the benefit of those members of the Commission from England, that we have nothing in Scotland corresponding to the decree nisi—parties can re-marry the moment the divorce decree is pronounced—so that extensively swift disposal of cases is not to be encouraged.

4582. Turning again to your supplementary memorandum, in paragraph 9 you set out the judicial expenses of a typical undefended action—of which about sixty-six per cent. are now conducted with legal aid. Is the figure quoted an estimate or the actual amount allowed by the Auditor of the Court of Session?—This is what the Auditor applies, what he passes in the typical action. Of course, you appreciate, my Lord, that the typical action requires that you ignore actions involving special circumstances. For example, if evidence has to be taken on commission from witnesses abroad, or if you have to engage in any exceptional step or process, then the expenses would go up. But in the general run of cases the position is that a taxed account of expenses is £37 if there is only one solicitor, and £47 if there are two. Then, as I proceed to explain, to save the expense of making out a full-dress account, the solicitor can get through the Law Society an overhead payment of £23, where there is only a solicitor, and £32 where there is also a local correspondent, plus outlays in each case. Outlays, of course, include counsel's fees of eighty-five per cent. in the legal aid cases, so that the all-in cost of a divorce process under the alternative method, where the account is not taxed, is, in round figures, £32 or £42, and if you tax your account it may be £37 or £47. But the picture I would ask the Commission to take away is one which does not suggest to my mind that the cost of divorces in Scotland is in any way remarkable, approximately £60 if there is only one solicitor, and £50 if there are two, shall we say about half the price of a television set.

4583. In the final paragraph you consider what would be the position in the Sheriff Courts if divorce actions were transferred to them and you say:—

"There is no means of estimating what accounts could be taxed in Sheriff Courts if divorce actions were transferred to them, but it is difficult to believe that much, if any, saving could be effected except by the expedient of dispensing with the services of counsel. If, of course, counsel were employed outside Edinburgh, the cost would be materially increased."

Would that be because counsel would charge more to go to a distance?—I am not quite sure what fees are paid now, but broadly speaking in my day four or five guineas was all that was paid for conducting an undefended case in the Court of Session. It may be more now, but if asked to go to Aberdeen for a whole day, counsel would ask twenty-five or thirty guineas, and that is the sort of difference I have in mind.

4584. (Lord Keltie): You point out that the Court of Session has functioned in consistorial cases, actions of status, since 1830. But since the Reformation, I think, actions of status have been dealt with always by a consistorial judge?—That is right.

4585. It was a Commissary Court before 1830 but the Commissary Court was the Commissary Court of Edinburgh.—And very largely manned by persons who were also judges of the Court of Session.

4586. I think there was appeal from the Commissary Court of Edinburgh which went to the Court of Session?—That is correct.

4587. One might say that since the Reformation the Court of Session really has been largely in control of consistorial cases, for a period through the medium of the Commissary Court of Edinburgh?—They have never been in the hands of the local courts.

4588. In paragraph 6 of your supplementary memorandum you have given the addresses of the pursuers in a random selection of one hundred cases. That would not indicate in any sense where the action would be taken if the Sheriff had jurisdiction?—No, and, of course, might I stress that

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these will be the addresses given in the summons? The pursuer might have changed his address before the action came on. One must do one's best with the statistics available.

4589. But if the ordinary principles were to be applied, and Sheriffs were given jurisdiction in divorce cases, the pursuer would really have to follow the defender and go to the Sheriff Court for the area in which the defender was residing?—Certainly I did not intend to suggest by taking these statistics that there might be acceptance of the pursuer's own domicile as a basis for the place of jurisdiction. That would, I am afraid, be rather heretical from the standpoint of marriage and the law.

4590. I just wanted to make that point clear, and if the defender had no residence in Scotland the pursuer would still have to go to the Court of Session?—I presume so, and that, of course, is a very common type of case in divorces, for instance, because you do not know where the defender is, and I cannot see how, from the international aspect, a decree of divorce could be obtained in such a case by a decree from the particular Sheriff in whose jurisdiction the pursuer happened to be residing.

4591. May I take it that your view would be that, from the international aspect, jurisdiction in the Sheriff—as distinct from the central judicature in Scotland—might raise international difficulties in the matter of recognition?—I am sure it would.

4592. The only other point I had in mind to ask you is on the question of expense. In paragraph 9 of your supplementary memorandum you state that the inclusive fee is £22 where only an Edinburgh solicitor is employed, and £32 where there is a local correspondent. That compares, does it, with £37 and £47 on a taxed account?—Not quite. You have to add the outlays, which would include counsel's fee of eighty-five per cent., and court fees, which are a trifle, £2. Broadly speaking, the comparative figures are £32 and £42 as against £37 and £47, respectively.

4593. (Mr. Young): Lord Cooper, I do not think you make any comment in either of your memoranda on the effect on the Bar of the proposal that Sheriff Courts should have divorce jurisdiction. Would you care to make any comment?—I do not think it comes well from me. I would rather leave that to the representatives of the Faculty of Advocates who are well able to speak for themselves.

4594. The other question I should like to ask is this: during the war it was very noticeable that when aliment had to be varied one could get a variation of an order in England very much more quickly than one could in Scotland. One of the suggestions that has been made is that we should introduce in Scotland a procedure for getting aliment in the Sheriff Court on lines similar to the small debt procedure. Would you care to express any views on that?—Are you thinking of applications for aliment as between husband and wife independently of divorce?

4595. Independently, yes.—I do not think I should express any view on that. I have never had occasion to consider the matter and it very rarely happens that it would arise at Court of Session level. It is more a matter for the Sheriff Court or the courts of summary jurisdiction.

4596. (Sheriff Walker): You refer in your memorandum to the practice under which the Lord Ordinary can report to the Inner House in a case of difficulty. If jurisdiction in divorce were transferred to the Sheriff Court the Sheriff Substitute would, I take it, have an equivalent power for reporting appropriate cases?—He would presumably be given such a power by Act of Parliament. He has not got it now, and is so far as he does have a like power now in relation to custody cases, it is exercised very discriminately and a similar power in divorce cases might not be exercised any more freely under a new provision.

4597. But there is a power in the existing Act of Parliament for the Sheriff Substitute to go to the Court of Session in certain cases?—True. I can remember only one such case in my judicial experience.

4598. Then if the proposal, Lord President, is to transfer jurisdiction in divorce to the Sheriff Court as it stands, is

there some peculiarity about appeals in the Sheriff Court that might affect the matter?—I do not think that would affect it much. Presumably there would be an appeal to the Sheriff Principal and thence to the Court of Session, a double appeal.

4599. Take the case of a distant Sheriff Court. The Sheriff Substitute refuses a decree of divorce and the pursuer then appeals to the Sheriff Principal who reverses the decision on the decree of divorce?—In an undefended action that would be the end of it because there would be no defender.

4600. That would be the case where a marriage had been dissolved and one judge had been against and the other had been in favour of such a decree?—And in the first case the witnesses would be over-ruled.

4601. From the legal point of view is that desirable?—Most undesirable.

4602. As a further point on the question of decentralisation of divorce jurisdiction, would it be practised to take divorce cases on circuit?—Yes and no. The question of expanding the circuit system in Scotland is a very wide and difficult question which could not, of course, be solved without legislation and probably without departmental inquiry before legislation, but the one immediate difficulty I see in the way of the adoption of the suggestion, apart from the absence of statutory power, is that on the present judicial complement of the Court of Session it would be a very serious matter to detach judges and send them away to distant parts of the country where they could not be got so readily and could not be readily made available for work with other judges. I do not think that we could afford to use to even a minor degree the circuit system in divorce without having an increase in the total complement of judges. And that might or might not be a good thing, according to the angle from which you look at it.

4603. I think that at one time divorce cases were taken on circuit—by the justiciary circuit, about a century ago?—More than a century.

4604. Civil acts, jury trials for acts of reparation, were sometimes tried on the criminal circuit?—That is going back a very long time. I certainly have no personal experience, and I do not think I have read enough about the practice to be able to say anything about it. The only thing that has survived into modern times is the almost extinct small debt appeal to the justiciary court, and that is a trifling thing.

4605. There is only one other question which I would like to ask. Since the Divorce Act of 1938 introduced the two new grounds of the unnatural offences of sodomy and bestiality, how many such cases have been brought?—I am told that the number of such cases is quite negligible and amounts in the last twelve or fourteen years to eight or ten cases.

4606. (Chairman): Lord Cooper, may I ask you one further question which is outside the scope of your memorandum? In England, as you know, there has recently been appointed an official known as the court welfare officer. There is one court welfare officer in the Probate, Divorce and Admiralty Division. His principal duties are that the judge can call him in to help in matters of custody and access, and if there is a contest he can visit the parents and make a report to the judge on what he has found out. He is also used by the judge as a means of reconciling the parties if that is possible. Would it, in your view, be a good thing if a similar officer were appointed in the Court of Session?—I have had an opportunity of considering this matter and of consulting one or two of my brethren on it. The feeling I have is this, that by comparison with the Probate, Divorce and Admiralty Division the amount of work in relation to contested custody or access cases is much too small in the Court of Session to warrant the appointment of an *ad hoc* official of sufficient experience to be of any real service to us. I made enquiry and found that when questions of custody and access are contested they are, as you must know, very bitterly contested. But in the great majority of cases in Scotland they are amicably settled out of court altogether and the number of contested issues does not exceed about fifteen per annum. This is not nearly enough to keep a welfare officer employed. But, apart from that, we have a practice in

Scotland, which may or may not have its counterpart in the Probate, Divorce and Admiralty Division. Instead of investigating these issues by proof by witnesses, we have for long adopted the practice of remitting to a member of the Bar of special experience—generally nowadays a lady member of the Bar—who does exactly what, I presume, the welfare officer does, namely, visits the children in their homes, probably more than once, and sees their guardian, and then reports fully upon the whole situation viewed from the standpoint of the welfare of the children. Lord Keith will, I think, bear me out that the system has worked very well and much better than the method of treating the issue as a justiciable issue for proof by witnesses. That procedure seems to us, my Lord, to be better adapted to our relatively minor requirements in this class of controversy than the appointment of an official for whom we would not, I am afraid, be able to provide enough work to give him experience. May I also say—I do not know whether this applies to England or not—that experience shows that in these cases so much heat is developed, so much effort is made with witnesses—particularly the children—that I have the feeling that a welfare officer, however well-intentioned, would have great difficulty, in carrying out these inspections, in maintaining the detachment which is desirable in judicial cases. We have had no trouble of that kind.

4607. That is very interesting. As a Chancery judge, I had a great many cases to decide as to the custody and care of infants who had become wards of court, often by reason of previous divorce or separation proceedings. Before the appointment of the court welfare officer (he is a very recent innovation), if there was any dispute as to the suitability of a home for a child to go to, I used to get the Official Solicitor to visit the home. Here in Scotland you achieve the same result by asking a member of the Bar to pay a visit?—What I have said, Lord Morton, has reference to the Court of Session. I do not know how such matters are handled in the Sheriff Court because I only see Sheriff Court work on the occasional appeals that come to us. I have seen appeals, one in particular where the issue was made the subject of a full-dress proof, and eventually reached the Court of Session on appeal after all the evidence had been heard, by which time the facts were stale. I have little doubt that there is room for something to be done in the Sheriff Court, but what should be done I am not in a position to say. So far as the Court of Session is concerned, while I have no objection in principle to the welfare officer, I think that our reporter discharges in essence the function of the welfare officer rather better for our purpose than a full-time official.

4608. You were speaking of proof and remit and I would like to ask you that. Do you, when you have a contested case as to custody or access, have affidavit evidence or is it wholly oral?—If we can possibly manage it we have no evidence of any kind at all. We remit straight away to the reporter who goes and finds out the relevant facts, but we would not have affidavit evidence. We make practically no use of affidavits in Scotland at all, and in consistorial actions properly so-called, that is, divorce and that kind of case, we are forbidden by statute to use them.

4609. (Lord Keith): This is perhaps a question of policy, Lord President, and you may not be prepared to express any opinion on it, but perhaps I should explain what sort of situation we have been faced with in the evidence that we have heard and in memoranda that have been submitted to us. A strong view has been expressed that in all cases of divorce where there are children, even if custody is not asked for, then since somebody is obviously going to get the custody of the children after the divorce, a court welfare officer should make an enquiry in order to satisfy the court that the children's welfare is going to be looked after following the divorce. The other view is that if custody of children is asked for at all, whether it is contested or not, then there should be enquiry by the welfare officer to satisfy the court that it is in the interests of the children that the person who is seeking custody should have it. Now, of course, if that view were to be adopted as a matter of policy in divorce cases in the Court of Session, you might have quite enough work for the welfare officer to do.—It occurs to me that it would slow down the procedure tremendously, because there are children of the marriage in roughly two-thirds of the cases we hear. That is to say, if there are 3,000 divorce actions

per annum there would perhaps be 2,000 cases in which children were involved. That might add weeks to the disposal of each of 2,000 cases. I may be old-fashioned in these matters, but if the spouses are agreed as to who is to hold the custody, I do not altogether like the court, through a welfare officer, interfering with what they want to do. The sort of case I have in mind is where the child who is to be taken into custody is, for instance, aged six months. Do you need a welfare officer to tell you that the husband is quite right in saying that he does not want custody of that child?

4610. You understand that I am, of course, only indicating the views that have been put to us, but the Commission has to decide whether to accept or reject these proposals. On the assumption that the welfare of children had to be looked into in questions of custody arising from divorce cases, it would be clear that, whatever delays might be caused, you would probably need someone like a welfare officer to make the necessary investigations?—Yes.

4611. However undesirable you may consider the principle underlying the proposal to us?—Apart from the principle, I am rather afraid that the procedure would slow things down to the point of forcing us out of handling the work. The Court of Session might have to come back and say, "You will have to take this work to the Sheriff Court or somewhere else, for we cannot handle all these cases".

4612. The welfare officer would do practically all the work, and if the case were adjourned in order that custody of the children might be decided it would be the welfare officer himself who would do the work.—At present after the preliminary, provided the necessary times have expired, application is made for a proof, and the proof is fixed for six weeks hence. On that day the judge hears the evidence, divorce is pronounced and the parties go away free to re-marry if they like. If the suggested scheme were adopted there would then be an adjournment—for how long no one knows—while the question of custody or access is investigated. The case would come back, let us hope to the same judge, possibly a month or two later when he had forgotten all about it, and I am sure the administrative confusion would be very great. It would add considerably to the judicial burden and the clerical burden in these cases. I personally hold the view that divorces ought in principle to be left to the Court of Session. If, however, the court work associated with them is to be materially increased, then of course the Court of Session could not handle them and would get into confusion.

4613. The other point I wanted to make clear is that the question of results by the Court of Session to reporters takes place only in common law actions of custody. I cannot recall that it was ever done in the Outer House where custody was asked as part of the divorce proceedings.—No, and of course, where in a contested custody action the main action is defended, the judge who hears the evidence on the main issue of divorce thereby acquiesces himself necessarily with the greater part of the material relevant to the decision on custody.

4614. And he would hear the witnesses on the question of custody too?—At the same time.

4615. In the Divorce Court there is really never any question of a remit to a reporter?—No.

4616. And it is, I think, mainly in that type of case that it has been suggested to us that there should be a welfare officer. But that does not affect the question of principle that you have already indicated?—I should be slow to express concurrence with the view that issues which give rise to so much feeling as custody notoriously do should be taken out of the court and be put in the hands of anybody else, if that is the point. If he is merely advising the judge that is one thing, but if he is to be the effective judge as between the parties themselves I should be opposed to that. (Lord Keith): The court would always retain control. But I think it would perhaps be useful if Mr. Justice Pearce were to ask some questions on this by way of further elucidation. (Chairman): Perhaps Mr. Justice Pearce would say what is the position as between the welfare officer and the judge.

4617. (Mr. Justice Pearce): The judge refers the matter to the welfare officer, who goes and looks at the home

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[Continued

PAPER No. 59. MEMORANDUM SUBMITTED BY THE FACULTY OF PROCURATORS OF GREENOCK

suggested, and discusses the matter in a purely informal way with the parties and with any other witnesses he thinks fit, possibly with the child's schoolmaster. He then puts in a report (which is available to both the parties) of all that he has seen and done. The case then comes back before the judge and the welfare officer is usually present. If either of the parties thinks there is anything in the report that needs discussion or is unfair it can be taken up with the welfare officer. Finally, the judge makes up his mind on all the facts. The welfare officer's report has a very important place in the material before the court, because he is, in my experience, a completely unbiased person.—Is this procedure followed automatically in every case or only in cases where custody or access is a controversial issue? (Mr. Justice Pearce): Only where custody is contested. (Chairman): Even when custody is contested it is

invariably the case that the judge refers to the welfare officer?

4618. (Mr. Justice Pearce): It is not invariably the case. It depends rather on the individual judge. Some think that in almost every case where there is a contest they ought to have the view of the welfare officer to make sure that their own ideas are right, while others do not make a great deal of use of him.—I think I can say in a sentence what my conclusion would be; firstly, that an attempt to utilise the welfare officer or any other similar official in all cases would be unworkable; secondly, we have not enough contested cases to make a welfare officer in Scotland a worthy substitute for our assistant officers.

(Chairman): We are very much obliged to you for coming here today, and for your memoranda.

(The witness withdrew.)

PAPER No. 59

MEMORANDUM SUBMITTED BY THE FACULTY OF PROCURATORS OF GREENOCK

This memorandum is submitted to the Royal Commission on Marriage and Divorce by the Faculty of Procurators of Greenock.

The Faculty comprises some forty-five solicitors practising mainly in the Sheriff Court district of Greenock, being the lower ward of the County of Renfrew, including the burghs of Greenock, Port Glasgow and Gourock and involving a population of about 125,000.

The Faculty has submitted to the Council of the Law Society of Scotland certain proposals for inclusion in the evidence to be submitted to the Commission by the Council of the Law Society. It is understood that, with the exception of the recommendation made herein, the proposals made by the Faculty are being put forward by the Council of the Law Society.

The Faculty respectfully submits for the Commission's consideration the following additional proposal, and is willing, if desired, to supplement by oral evidence what is contained in this memorandum.

Powers of courts of inferior jurisdiction

That there should be extended to the Sheriff Courts a concurrent jurisdiction to deal with actions of divorce.

At present the jurisdiction in civil actions in Scotland is divided between (a) the Court of Session, which sits in Edinburgh and acts as a court of first instance (the Outer House) as well as an appeal court (the Inner House), and (b) the Sheriff Courts, which are district courts sitting in county towns and other important local centres throughout the country. There is reserved to the Court of Session exclusive jurisdiction in, *inter alia*, actions involving status, including actions of divorce, but there is a very wide class of actions in which the Court of Session and the Sheriff Courts have concurrent or mutual jurisdiction. For example, each of these courts has a jurisdiction of the first instance in actions of separation and aliment, adherence and aliment, adoption of children, and in actions for the payment of sums of money no matter how large. (In this respect the existing jurisdiction of the Sheriff Courts in Scotland is much more extensive than that of the county courts in England.) In other words, the pursuer in an action of separation or for payment of any sum of money however large, may elect as to whether the proceedings will be instituted in the Sheriff Court or in the Outer House of the Court of Session, the judgment in either case being subject to appeal to the Inner House of the Court of Session. Actions of divorce, however, as the law now stands, may be instituted only in the Outer House of the Court of Session, where they are decided by a single judge whose judgment is, of course, appealable to the Inner House. From the foregoing it will be appreciated that Sheriffs are frequently called upon to decide cases in which the issues of fact and law are much more complicated and difficult of decision than in many actions of divorce.

The criticism of the present system is in respect of the great amount of unnecessary inconvenience and legal and other expenses incurred by litigants in actions of divorce under the present system. (Incidentally, it is

submitted that the question of expense is a relevant consideration, whether it be borne by the litigant personally or by the public at large through the medium of the Legal Aid Fund.) At present a person resident outwith Edinburgh and Leith instructs in the first place a local solicitor, who in turn must instruct a solicitor in Edinburgh to institute or defend the proceedings there. Further, since only members of the Faculty of Advocates have the right of audience in the Court of Session, an advocate (counsel) must be instructed to conduct the hearing of the case in court. Thus, even in the simplest undefended action of divorce it is necessary for a pursuer so resident to employ (and pay) three different lawyers. In addition to the unnecessary legal expenses which are thereby incurred by such a litigant, there falls to be taken into consideration the substantial amount of inconvenience and incidental expense involved in journeys to (and often overnight sojourns in) Edinburgh, by parties, their witnesses, and sometimes their local solicitors. The foregoing criticism applies even more strongly to cases under the Legal Aid Scheme, where the preliminary inquiry is also conducted in Edinburgh.

It is submitted that, without detriment to the interests of justice but with great advantage to the public in the saving of inconvenience and expense, the present procedure could be altered so as to extend to the Sheriff Courts the same jurisdiction in relation to actions of divorce as they at present exercise, concurrently with the Court of Session, in relation to other matters, subject to the provision that the Sheriff before whom any such action is brought shall have the same power to remit the case to the Court of Session as is at present provided by Section 5 of the Sheriff Courts (Scotland) Act, in relation to other actions between husband and wife.

(Received 4th February, 1952.)

LETTER SUBMITTED ON BEHALF OF THE FACULTY OF PROCURATORS IN PAISLEY

2nd February, 1952.

Dear Sir,

Marriage and Divorce

I understand that the Faculty of Procurators of Greenock have lodged with you a memorandum of evidence on the above to be put before the Royal Commission. My Faculty have had an opportunity of going over this memorandum, and they desire to support the Greenock Faculty in all that they state in the memorandum, as the evidence there represents our views. It may be that a spokesman may be required to speak on behalf of the Greenock Faculty, and it will be understood that he has our authority to speak also as representing our Faculty.

I am,

Yours faithfully,

(Sgd.) J. JAMIESON,

Clerk.

The Secretary,

Royal Commission on Marriage and Divorce.

27 October, 1952]

MR. IAN BROWN, B.L.

EXAMINATION OF WITNESS

(MR. IAN BROWN, B.L., representing the Faculty of Procurators of Greenock and the Faculty of Procurators in Paisley; called and examined.)

4619. (Chairman): Mr. Brown, you are a Bachelor of Law and a solicitor practising at Greenock?—(Mr. Brown): Yes, Sir.

4620. We have had before us for some time a memorandum submitted by the Faculty of Procurators of Greenock, and a letter has been received from the Faculty of Procurators in Paisley expressing that body's support for the Greenock Faculty's memorandum. You are authorised, I understand, to speak as representing the Paisley Faculty also?—That is so.

4621. The memorandum states that the Faculty comprises some forty-five solicitors practising mainly in the Sheriff Court district of Greenock, being the lower ward of the County of Renfrew, including the burghs of Greenock, Port Glasgow and Gourock, and involving a population of about 125,000. Then the memorandum goes on to state that the Faculty has submitted to the Council of the Law Society of Scotland certain proposals for inclusion in the evidence to be submitted to the Commission by the Council of the Law Society, and it is understood that, with the exception of the recommendation which we are about to discuss, the proposals made by your Faculty are being put forward by the Council of the Law Society?—That is so.

4622. You put forward only one suggestion in this memorandum, namely, that there should be extended to the Sheriff Courts a concurrent jurisdiction with the Court of Session to deal with actions of divorce. Before I ask you any questions on your Faculty's memorandum, would you like to add anything to it?—No, there is nothing, Sir.

4623. I am sorry that you were not here to hear the evidence of the Lord President of the Court of Session, who takes a different view from that of the Faculty, but I will do my best to put to you some of the points that he makes and see how you deal with them. Have you read the memoranda of any of the bodies that disagree with the Faculties of Procurators of Greenock and Paisley?—I have seen those of the Society of Writers to the Signet and the Society of Solicitors in the Supreme Courts, but I have seen the memorandum of the Lord President only since I came into this meeting. It is quite evident that he differs from us and he has evidently seen our memorandum.

4624. I am sorry that you have not seen his memorandum before, but I hope to put that right as far as I can by putting to you what the Lord President says in his memorandum, and hearing what your answers are. Would you now turn to paragraph 8 of the Lord President's memorandum? You will see that the central point is that by restricting this jurisdiction in matters of status to the Court of Session there is uniformity in the administration of the law. Have you read that, Mr. Brown?—Yes, Sir.

4625. I am sorry that you have not had more time to ponder over it, but the point made is, first, that there are fifty-seven Sheriff Courts in Scotland, extending from Lerwick to Wigton and from Stornoway to Peterhead, and fifty Sheriffs Substitute and twelve Sheriffs Principal. None of these courts has ever handled an action affecting status, and some of them have not often handled an action for separation and aliment or for adherence and aliment. Then the Lord President goes on to say:—

"In undefended actions there is, of course, no appeal unless decree is refused, and there would therefore be no opportunity to the Court of Session in the vast majority of cases to exercise supervision directed to securing uniformity in the administration of the law by a large number of separate and unconnected courts."

What do you say about that, Mr. Brown?—There are two points I should like to make here, Sir. The first is on the question of status. The Lord President says that the Sheriff Courts do not have actions of status before them, but I think I am right in saying that adoption petitions involve questions of status. The second point is on the wider question of uniformity. You might say of any branch of the law that you want to have uniformity throughout Scotland, so why pick on the law

of divorce? The Sheriffs Substitute, who administer Sheriff Courts, are men of experience, men of high standing. Is there any reason why they should not take as uniform a view of divorce petitions as of any other petitions?

4626. That was dealt with by the Lord President by saying:—

"The jurisdiction in divorce and similar cases is notoriously one of great delicacy and specially so in undefended actions, and in the course of the 120 years during which they have exercised that jurisdiction the Court of Session judges have built up a corpus of decisions and practice rules with which the Bar and the Edinburgh solicitors are generally familiar. When points of special novelty or difficulty arise, the Lord Ordinary can 'report' the case to the Inner House, and so secure an authoritative decision which will usually enter the reports."

Now comes the sting in the tail of this paragraph:—

"If jurisdiction in divorce cases and the like were to be transferred to the Sheriff Court, it is certain that counsel would rarely be employed, at least in undefended actions; and it is to be feared that, with the best will in the world, a large number of Sheriffs, acting in isolation and with the assistance only of solicitors hitherto unfamiliar with the conduct of this class of litigation, could not achieve the due and uniform administration of the law in the fashion possible in the Court of Session."

You have to some extent answered that, but would you like to add anything further?—In the first place, on the delivery of the issues involved, we have also in the Sheriff Court actions of adherence and aliment and separation and aliment, which are very often on the same grounds as for divorce actions, the Sheriff Substitute has to adjudicate them. Secondly, on the question of uniformity I would say that the decisions of the Court of Session are reported in the Law Reports so that all Sheriffs Substitute have the opportunity of seeing the ratio of the decisions in the Court of Session. I cannot see that either of these considerations would be adversely affected by transference of jurisdiction to the Sheriff Courts.

4627. The other point which you make in your memorandum is on the question of expense. You refer to the great amount of unnecessary inconvenience and legal and other expenses incurred by litigants in actions of divorce under the present system, and you say further—and this, I am sure, would receive general agreement—that the question of expense is a relevant consideration whether it be borne by the litigant personally, or by the public at large through the medium of the Legal Aid Fund. Then you point out that at present a person resident outwith Edinburgh and Leith instructs in the first place a local solicitor, who in turn must instruct a solicitor in Edinburgh to institute or defend proceedings there. Then you point out that an advocate must be instructed to conduct the hearing of the case in court and you say:—

"Thus, even in the simplest undefended action of divorce it is necessary for a pursuer so resident to employ (and pay) three different lawyers."

You go on to point out the inconvenience and expense involved in journeys to, and often overnight sojourns in, Edinburgh, by parties, their witnesses, and sometimes their local solicitors, and you say:—

"The foregoing criticism applies even more strongly to cases under the Legal Aid Scheme, where the preliminary inquiry is also conducted in Edinburgh."

In that connection, would you turn to paragraph 4 and the following paragraphs of the Lord President's supplementary memorandum? May I first say this? I think it is only fair that, as the Lord President has seen your memorandum and has answered it in writing, if after giving evidence today you feel that you would like to supplement your evidence in writing, the Commission will be glad to receive a further memorandum from you, because we realise that it is rather difficult to deal with

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MR. IAN BROWN, B.L.

[Continued]

these matters on the spur of the moment. [See Paper No. 59A.] You have read these paragraphs, and you see what is said; would you let us have your comments in answer?—I think the first comment, Sir, with reference to paragraph 6, is that of the one hundred consecutive cases selected at random, only six are from Edinburgh. That shows that the problem I am speaking of is one for those outwith Edinburgh. It is people in the areas outwith Edinburgh who do have this inconvenience.

4628. What do you say as to paragraph 8, for example, where the Lord President says:—

"... it is thought that the results are typical of the ordinary run of cases, and they indicate that to dispense the work amongst some fifty odd courts from Lerwick to Stranraer would on balance create as much inconvenience and expense in convening and accommodating the witnesses as it would save, and in some instances more, and the difficulties would of course be gravely accentuated if, as may happen in any case, the action proves to be defended."

For your information, may I say that I put to the Lord President that there may be a number of cases of real hardship at present? For example, take a woman living in Inverness whose husband is alleged to have committed adultery in that area. Instead of going to the local Sheriff Court and employing the solicitor whom she knows to do the whole case, she has to go through the procedure of going to Edinburgh which you have outlined in your memorandum. Have you any comments to make on the paragraph in the Lord President's memorandum which I have just read?—I think that the conclusion arrived at by the Lord President on the question of expenses in such a case is an unwarranted one. My understanding of the question leads me to a contrary conclusion. I feel that there must be more hardship and inconvenience in the case of a pursuer and witnesses travelling from Lerwick to Edinburgh than there would be in attending the Sheriff Court at Lerwick.

4629. Then on the question of the judicial expenses of a typical undefended action, paragraph 9 of the Lord President's supplementary memorandum reads as follows:—

"There is no means of estimating what accounts could be taxed in Sheriff Courts if divorce actions were transferred to them, but it is difficult to believe that much, if any, saving could be effected except by the expedient of dispensing with the services of counsel. If, of course, counsel were employed outside Edinburgh, the cost would be materially increased."

What have you to say to that?—We have obtained a statement as to expenses in connection with an action of separation and aliment, which covers materially the same grounds as divorce. The figures were taken at the end of 1951, and the account amounts to £21 10s. 10d., including the shorthand writer's fees of £1 1s. 11d.

4630. Is that in the Sheriff Court at Greenock?—Yes, Sir.

4631. Of course the court did not have to try the issue of adultery?—This was an undefended case of separation on the ground of cruelty.

4632. Was there only one solicitor employed?—Yes, Sir.

4633. Is there anything else you would like to say about these paragraphs, Mr. Brown?—In my own office I have charged up three divorce accounts. Taking solely the local agent's fees, they amounted to £12, £15, and £16, respectively. That, of course, excluded the cost of drawing and serving the summonses, and attendance at court, so I think possibly a fair figure would be about £25 for an account of expenses for an undefended action for divorce in the Sheriff Court.

4634. There is one last question I want to put to you. I have every reason to have a great respect for anything that comes out of Renfrewshire, but can you explain why it is that out of the thirty-three legal societies enumerated in Schedule IV to the Solicitors (Scotland) Act, 1943, you are the only two who take this view, while the Lord President of the Court of Session, the Faculty of Advocates, the Law Society of Scotland—that is your profession—the Society of Writers to Her Majesty's Signet and the Society of Solicitors in the Supreme Courts all take the opposite view?—I think that is easily

answered. In the first place, I think that the fact that we are the only two societies who have put forward this recommendation shows how enlightened we are; someone has to start some time. The second point is that the Lord President is, of course, in Edinburgh—and similarly so are the Faculty of Advocates, the W.S. Society, and the S.S.C. Society, and thus they are seeing the question from one side only.

4635. But that does not apply to the Law Society of Scotland?—The Law Society of Scotland is in rather a different position in that it represents bodies from all over Scotland, including Edinburgh, and it could not be expected that the Law Society would support a motion or suggestion which might operate against some of its members.

4636. (Lord Keltie): Assuming your proposal were to be accepted, you recognize that the great bulk of divorce cases would continue to be undefended, as at present?—Yes.

4637. And in those undefended cases there would, of course, be no question of appeal?—No.

4638. And each of the fifty Sheriffs Substitute might quite well develop different views as to how divorce cases should be dealt with. Do you realize that that is a possibility?—I would be glad to dilate on that point when you have finished your question.

4639. I think that even at the moment you do find quite a number of conflicting decisions between Sheriffs on points other than divorce?—Yes.

4640. Does that not suggest to you that you might get diversity of practice in the administration of at any rate undefended divorce cases conducted all over Scotland by fifty Sheriffs Substitute?—I do not think that that necessarily follows, Sir. The grounds on which divorce can be granted are quite well established. The Sheriff would have the opportunity of seeing the pursuer and witnesses. I cannot see that it would necessarily follow that because you had fifty courts doing what is at present being done by one court, you would have any undue lack of uniformity. All of these decisions would be made within the framework of the divorce law.

4641. I notice that you say in your memorandum:—

"... issues of fact and law are much more complicated and difficult of decision than in many actions of divorce."

To some extent I might agree with that, perhaps not as a universal proposition but as a general proposition that might be so. On the other hand, these difficult and delicate questions, to which you refer, would fall to be decided in cases which were defended?—Yes.

4642. And if the other side were dissatisfied there would be an appeal to the Court of Session?—Yes.

4643. So that in these very difficult and delicate questions you would tend to get uniformity of decision and practice?—Yes. I am a little at a loss to understand what the difficult and delicate questions are in undefended actions of divorce.

4644. I do not want to instruct you, Mr. Brown, upon the law of divorce, but I think that there are certainly in quite a number of cases very difficult and delicate questions to decide in divorce—I agree with you.

4645. And you realize that divorce is a very important matter affecting the status of individuals?—Yes.

4646. And not only that, but decrees of divorce ought so far as possible to have international recognition?—Yes.

4647. Has it occurred to you that there might be difficulties in the question of international recognition of divorces that are granted not by the central judicature but by Sheriffs scattered all over the country?—The point I would make there, Sir, is this, that anyone can get married at a register office, and I cannot see that it should be any complete bar to breaking a marriage simply on the fact that divorce is granted in the Sheriff Court.

4648. What is your view as to which Sheriff is going to exercise jurisdiction in divorce cases if the Sheriffs are given jurisdiction? What Sheriff Court is to be selected?—That is a point I have not considered.

4649. But it is of some importance, is it not, from your point of view? Take it that you have a client in Greenock who wants to divorce her husband. The husband, I will assume, is not in Greenock, he may not be

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[Continued]

fact be in Scotland. If he is not in Scotland is there any court possible for divorce except the Court of Session?—I would say not.

4650. Supposing he lived in Stornoway, would the wife have to go up to Stornoway to get a decree?—Of course, I think it should be pointed out, Sir, that what we are asking for is concurrent jurisdiction.

4651. That means concurrent as between the Sheriff Court and the Court of Session, is not that so? You mean that in the case where the husband is in Stornoway and the wife in Greenock the wife would go to the Court of Session?—Yes.

4652. That might be an escape, but you agree that if the wife had to go to Stornoway there would be considerable expense?—It would be much more difficult than, say, going to Edinburgh.

4653. Are these not practical considerations to be considered in deciding whether the Sheriffs should have concurrent jurisdiction?—Yes.

4654. (Sheriff Walker): Your proposal is simply to transfer divorce jurisdiction to the Sheriff Court concurrently with the Court of Session?—What we are suggesting is that the pursuer in a divorce action should have the opportunity of taking action either in the Sheriff Court or in the Court of Session.

4655. At the pursuer's option?—Yes.

4656. Some of the Sheriffs Substitute have very wide territories to look after, with very few people in them?—Yes.

4657. And the local Bar consists of only one or two solicitors?—Yes.

4658. Take the case of a remote Sheriff Court. There might be only one divorce case in five years or an even longer period?—Yes.

4659. And you envisage a solitary divorce case being brought before a Sheriff Substitute, who perhaps has never tried a divorce case before, and being conducted by a solicitor who has perhaps never conducted one before? That might happen, might it not?—Yes.

4660. Are you quite satisfied, Mr. Brown, that in circumstances of that kind there would be disclosed to the court all the facts which ought to be disclosed, although they might be adverse to the prospects of success?—I think the answer to that, Sir, is that we must have confidence in our Sheriff Courts.

4661. But this is not a question of the responsibility of the court, it is rather that of the solicitor who is conducting an undefended divorce case on his own for the first time. If it were an action of divorce for desertion and the pursuer had been guilty of adultery, are you quite satisfied that this solitary solicitor might not by inadvertence fail to disclose that fact?—There is always the possibility, but one, I think, which is unlikely to arise.

4662. But the possibility becomes less, does it not, if you have to employ an experienced Edinburgh solicitor and also counsel?—When a local agent employs Edinburgh correspondents he sends through precommitments to the Edinburgh correspondents. You certainly have a double check, but I cannot see that it would make any great difference. I am assuming that the solitary agent is a man of standing and ability.

4663. Most of the divorce cases would be undefended, and in most of them, I suppose, a decree would be granted?—Yes.

4664. Take the case where the Sheriff Substitute refuses to grant a decree because he thinks the evidence is not good enough; the pursuer would then have an appeal to the Sheriff Principal. That is what you foresee?—Yes.

4665. And if the Sheriff Principal reverses the decision of the Sheriff Substitute and pronounces the decree of divorce there can be no further appeal?—Yes.

4666. And then you would have a marriage dissolved with the judge who heard the witnesses adverse to the decree and the other judge, who heard the appeal, granting the decree; two judges, one of one mind and the other of the other?—Yes, I agree.

4667. Would you regard that as a satisfactory situation from the point of view of the marriage?—I agree that the fact that an action of this kind is undefended does leave something out, it is only one side of the story. I

must confess I have not considered circumstances such as you mention, and I suppose it could happen that a pursuer could appeal to the Sheriff Principal on the ground that the Sheriff Substitute had given a misdirection. I think that again you have got to go on the standing of the Sheriff Principal. The Sheriff Principal will not lightly overturn a decision of his Substitute.

4668. But, Mr. Brown, as matters stand at present, if the Lord Ordinary refuses a decree in an undefended case then the pursuer can appeal. He appeals to a court consisting of at least three judges?—Yes.

4669. That is quite a different situation from your proposal?—It is, yes.

4670. (Mr. Young): Have you ever considered the possible effect your proposal might have on the Bar of Scotland? I do not mean by that simply the financial results. May I put it in another way? We draw most of our judges from the Bar in Scotland?—Yes.

4671. That is something which attracts persons of the best quality to the Bar?—Yes.

4672. If you lose that very fine body of people, would it not be a tragedy for the nation? From whom could we then draw our judges?—I cannot say. It is very important, but at the same time I do not see how it is going to affect the suggestion we have put to the Commission.

4673. If you took away all divorce from the Court of Session and reduced the amount of work at the Bar, might not that have a tendency to reduce the standards?—I think that you are probably right in saying that it would reduce the number of cases. But whether it would be justified—if the Commission are satisfied that our suggestion is right, then I feel that it would not be justifiable simply to keep an unnecessary number of people at the Bar in the prospect that later on they might become judges.

4674. May I go to another point? During the war it was suggested that we might alter the practice in Scotland in actions of aliment, either to obtain or to vary aliment, by adopting a procedure akin to the small debt procedure. Have you considered whether that is a good thing or not?—I am afraid I have not considered that.

4675. Have you in your experience found that there is considerable delay in the procedure followed by the Sheriff Courts in relation to aliment?—To my knowledge, no undue delay, at least not in our Sherrifdom.

4676. (Dr. Baird): Mr. Brown, when you speak of hardship do you think that anybody is deserted nowadays from getting a divorce because he or she has to make a journey to Edinburgh?—No, I would say that if a person wants a divorce then they are quite happy to come to Edinburgh. But at the same time one has to bear in mind the fact that it is not only the pursuer who has to come to Edinburgh. A pursuer must have two witnesses.

4677. But you do agree that divorce is a very important matter, it is not something to be taken lightly, and perhaps the degree of hardship is not very great when one considers the importance of the occasion?—I grant you that. On the other hand, there is the degree of inconvenience caused, and, of course, the question of expense.

4678. Would it meet your case if certain Sheriff Courts were designated to conduct divorce cases?—It would certainly help if certain Sheriff Courts were designated.

4679. Should any particular towns be designated for this purpose?—I would rather see jurisdiction in all Sheriff Courts, but if it came to that then there are the circuit towns, although that in itself would not totally remove the complaint.

4680. (Sir Frederick Burrows): Would you agree that the only reason for any such change as you suggest must be that it is in the interests of the litigants themselves?—Also of course there is the question of the Legal Aid Fund, which is met from public money.

4681. Yes, I am aware of that, but would it be in the interests of the litigants to transfer the jurisdiction to the Sheriff Court, other than on the score of expense?—That is a question for the litigants themselves. The suggestion here is that they would have the opportunity of saying, "I will go to the Sheriff Court" or, "I will go to the Court of Session". The option would rest with them.

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[Continued]

PAPER NO. 59A. OBSERVATIONS BY THE FACULTY OF PROCURATORS OF GREENOCK

4682. (Mr. Mac): Is the Sheriff Court the court of summary jurisdiction in Scotland?—Yes.

4683. There is nothing smaller?—Yes, we have the Justice of the Peace Court.

4684. I am sorry, I do not know the Scottish procedure. Can the magistrates grant judicial separation?—No.

4685. Do they deal with matters affecting relations between husband and wife at all?—No, for civil jurisdiction the inferior court in Scotland is the Sheriff Court.

4686. So in Scotland if husband and wife have matrimonial difficulties which they both think can be dealt with without raising the question of divorce they go to the Sheriff Court?—That is so, yes.

4687. Do you think it a good thing that there is a court which can decide questions between husband and wife without having jurisdiction in divorce? What I have in mind is the desirability of reconciliation. Let me make my point clear to you. Do you think it a good thing from the point of view of the public that there is a court capable of deciding problems in matrimonial cases which has not the jurisdiction of divorce?—No, I cannot say that I think it is.

(The witness withdrew.)

(Adjourned to Tuesday, 28th October, 1952, at 10.30 a.m.)

PAPER NO. 59A

OBSERVATIONS BY THE FACULTY OF PROCURATORS OF GREENOCK
ON THE EVIDENCE GIVEN BY THE LORD PRESIDENT OF THE
COURT OF SESSION

(See Questions 4627 and 4692 above.)

In so far as the Faculty's memorandum and oral evidence have not dealt with the objections of the Lord President of the Court of Session to our recommendation that there should be extended to Sheriff Courts a concurrent jurisdiction to deal with actions of divorce, the following comments are submitted, with respect, to rebut the views of the Lord President.

1. Knowledge of decision, the type of evidence required and general practice in the law relating to divorce is well known and/or is available by reference to the various text-books and legal decisions in the many periodicals which are the stock in trade of all solicitors with any court practice. The criticisms by the Lord President are almost a claim that no one outside of Edinburgh could competently take on work of this kind. That is not so, and the great bulk of work in the Sheriff Courts is generally deemed to be much more complicated and difficult than points arising in divorce cases.

2. While it is agreed that certain delicacy may be required in the case of defended actions of divorce, it is difficult to understand why this particular argument should be used or what particular significance it should be given when the Lord President himself admits that fully 98 per cent. of all divorce actions in the Court of Session are undefended and of these it is seen from statistics that about 1 per cent. are refused. It should be noted that the divorce figures for Scotland for the year 1951 showed that 1,957 actions had been dealt with, that 1,926 were undefended, that 1,927 were granted and that some 30 were refused. The figures do not reveal the number of undefended actions refused.

3. The grave objections mentioned by the Lord President so far as not already dealt with in a particular way might well be summed up in a general way by referring to the well-known reluctance of the law to countenance any change not only in procedure (which would fundamentally be the same in the Sheriff Court as in the Court of Session), but also to the jurisdiction of the court where such cases might be heard.

4. The principles of law governing divorce actions are, on the whole, well settled and there should be no lack of uniformity as between one Sheriff Court and another any more than there might be in any other aspects of

4688. May I make my point again to you? As a solicitor, when you are approached on matrimonial affairs do you consider it part of your duty to try reconciliation first of all?—Yes.

4689. Then if you can guide the parties to a court which can settle their dispute without breaking the marriage, is not that a good thing?—Yes.

4690. And if the marriage is still broken one goes to a higher court for divorce?—Yes. I should perhaps point out that under the Divorce Act of 1938 a decree given by the Sheriff Subordinate can be used as the basis for an action of divorce in the Court of Session.

4691. (Chairman): What do you mean by the basis for an action?—The pursuer can go to the Court of Session with a decree of separation and that will be accepted. In addition, the oath of solemnity requires to be sworn and the pursuer may be further examined.

4692. Thank you very much, Mr. Brown. Perhaps your Faculty would inform the Secretary as soon as possible whether or not they desire to submit anything further in writing.—Yes, thank you. [See Paper No. 59A.]

common or statutory law. Furthermore, the procedure for hearing divorce actions is less complicated than that applying to the multiplicity of types of actions at present dealt with in the Sheriff Court. It is emphasised, however, that our original memorandum did suggest that some power be granted to the Sheriff which he already has in matrimonial cases, namely, *ex proprio motu* to remit to the Court of Session.

5. While it is agreed that certain of the Sheriff Courts are busier than others, it is contended that the proposed additional concurrent jurisdiction would not cause overwork or congestion. It is widely known that undefended divorce cases are heard and disposed of in fifteen or twenty minutes.

6. It is agreed that there is at present no undue delay in having undefended divorce actions brought before the Court of Session. On the other hand, there is considerable delay in dealing with defended actions. According to information available, this delay has been as long as thirteen months.

7. It is incorrect to suggest that this proposal is not supported to any great extent by other local Faculties in Scotland. The following is an analysis of the result of an enquiry as to the attitude of other Faculties to whom this proposal was not previously submitted for comment:—

Of the 35 societies listed in the Second Schedule to the Solicitors (Scotland) Act, 1933, 3 societies (the W.S. Society, the S.S.C. Society, and the Scottish Law Agents' Society) are not local societies. Of the remaining 32 societies one (Caithness) does not appear to function. To the remaining 29 local societies there falls to be added 2 other local societies listed in the Scottish Law Directory (the Society of Solicitors of Clackmannanshire, and the Faculty of Procurators of the Stewartry of Kirkcubright). Of the resultant total of 31 local societies, 6 have not yet responded to the enquiry, 12 are against the proposal (some by a majority only), 11 (including Greenock and Paisley Faculties) are in favour, and 2 are divided in opinion. It is clear from the foregoing that there is indeed substantial agreement from many solicitors for the submission made by this Faculty.

(Received April, 1953.)

TWENTY-FIRST DAY

Tuesday, 28th October, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (*Chairman*)

Mrs. MARGARET ALLEN
 Dr. MAY BAKER, B.Sc., M.B., Ch.B.
 Mr. R. BELCH, M.A.
 Mrs. E. M. BRACE
 Lady BRAGO
 Mr. G. C. P. BROWN, M.A.
 Sir FREDERICK BURROWS, G.C.S.I., G.C.I.E.
 Mr. H. L. O. FURBER, C.B.E., M.A.
 Mrs. K. W. JONES-ROBERTS, O.B.E.
 The Honourable Lord KIRBY

Mr. F. G. LAWRENCE, Q.C.
 Mr. D. MACE
 Mr. H. H. MADDOCKS, M.C.
 The Honourable Mr. JUSTICE PEARCE
 The Viscountess PORTAL, M.B.E.
 Dr. VALEY ROBERTSON, C.B.E., LL.D.
 Mr. THOMAS YOUNG, O.B.E.
 Miss M. W. DUNNERY, C.B.E. (*Secretary*)
 Mr. A. T. F. OGLEBY (*Assistant Secretary*)
 Mr. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 60

MEMORANDUM SUBMITTED BY THE SCOTTISH MARRIAGE GUIDANCE COUNCIL

1. This memorandum is submitted to the Royal Commission on Marriage and Divorce by the Scottish Marriage Guidance Council.

2. The objects, principles and methods of working of the Scottish Marriage Guidance Council are similar to those of the National Marriage Guidance Council in England. The two bodies work in close association and the Scottish Council is represented on the National Marriage Guidance Council [see Question 4695]. The Scottish Council is recognised by, and is in receipt of, a grant from the Scottish Home Department in accordance with the recommendations of the Denning Committee.

3. The Scottish Marriage Guidance Council is in general sympathy with the memoranda submitted or to be submitted by the National Marriage Guidance Council. In view, however, of

(a) the differences between the two countries in religion, history, law, social conditions, etc.;

(b) the narrower view taken by the Scottish Council of the scope of the Commission's terms of reference; and

(c) the greater measure of agreement within the Scottish Council in regard to the law of divorce so far as it affects the work of marriage guidance;

the Scottish Council has decided to submit an independent memorandum.

4. The objects of the Scottish Marriage Guidance Council and its constituent Councils may be summarised as follows:—

(a) to enable those about to marry and those who are already married, to obtain, if they so desire, guidance upon the ideals and obligations of marriage and the art of married life. It seeks thereby to reduce preventable unhappiness in marriage with its serious consequences to the individuals concerned and through them to the children. The Council, in a word, seeks by education for marriage to build successful marriages;

(b) to provide for those who are in difficulties expert and sympathetic advice and a recognised reconciliation procedure before divorce proceedings are contemplated. The Council thus aims at preventing marriage breakdown and removing the desire for divorce.

5. It is not part of the ordinary work of the Council to uphold any particular views or policy in regard to divorce. In the Council's view, the decision whether or not an applicant for advice shall or shall not institute divorce proceedings is the responsibility of the applicant himself or herself and not that of the counsellor.

6. Nevertheless, the Council is strongly of opinion that the State should make greater effort than at present to ensure that divorce is regarded as a last resort and that reconciliation is seriously attempted before recourse is had to divorce. The Council does not favour compulsory

reconciliation procedure, which is understood to have proved unsatisfactory in France. It does consider, however, that the work of those organisations which aim at promoting reconciliation on a voluntary basis should be developed and strengthened. It suggests further that the court should be given power before disposing of cases of separation and divorce to make a remit to an individual or an approved organisation in accordance with a recognised reconciliation procedure.

7. Apart from the question of procedure, the state of the divorce laws powerfully affects the community's attitude towards marriage and the work undertaken by the marriage guidance movement. Successful marriages will not be promoted by legislation which is seriously out of harmony with the moral sense or accepted standards of social behaviour of the community. On the other hand, any relaxation of the divorce laws, bringing with it the widespread impression that "divorce is easier now" does, in the Council's view, make successful marriage more difficult. Whatever the merit of the particular measure, greater ease of divorce tends to produce a socially undesirable climate of opinion about marriage; it lessens the respect for marriage and the understanding of its true significance; it fosters insecurity within marriage and saps the resolution of those who are in difficulties. Consequently, the Council cannot be indifferent to changes in the law of divorce and considers itself entitled and bound to examine and comment on various proposed changes which are in the public mind.

8. The Council considers that, before specific proposals for change are considered in detail, two general principles should be laid down:—

(1) That it is undesirable to introduce at the present time any far-reaching extension of facilities for divorce. The legislation in 1937 and 1938 was necessary to bring the law into harmony with modern views, but the present need is to tidy up the existing law rather than drastically to change it. There should always be alternation between reform and consolidation and what is needed now is a period of consolidation. This is so not only because of the far-reaching reforms in the later 'thirties but because of the widespread unsettlement in private lives created by war conditions. In Scotland there is no considerable demand for substantial changes in the law, except in regard to property.

(2) It is desirable that, so far as possible, the law of husband and wife in Scotland and England should be assimilated. Much has been achieved in this respect by the passing of the Matrimonial Causes Act, 1937, and the Divorce (Scotland) Act, 1938. For historical reasons, however, there has been considerable difference of judicial interpretation in the two countries of grounds of divorce which superficially are similar or identical. It is recommended that so far as practicable these differences should be eliminated.

Specific changes may be considered under the following heads:—

1. WHETHER OR NOT THE PRINCIPLE OF DIVORCE BY CONSENT SHOULD BE INTRODUCED

9. Divorce by mutual consent is advocated on two main grounds:—

(i) That marriage is a legal relationship freely entered into between the parties and that so long as the rights of third parties are not infringed it is reasonable that they should be enabled to withdraw from that relationship. Expressed in non-legal terms, it is argued that since the social and economic emancipation of women it is no longer compatible with individual freedom and dignity that two spouses who are both desirous of bringing their marriage to an end should be legally precluded from doing so. The advocates of this view would normally accept that such freedom should be modified when there are children of the marriage.

(ii) That divorce by consent is, in fact, widespread today. The legal profession are well aware that a large proportion of undefended actions for divorce on the ground of adultery are collusive, i.e., that adultery, whether real or fictitious, is arranged in order to give the spouses the remedy they both wish. Such a state of affairs brings the law into contempt and is felt to be sordid, dishonest and degrading. Why, it is said, should two people who have made a mistake as to their compatibility be forced to such expedients to extricate themselves? Other contentions might be:—

(iii) That the greater freedom of divorce which would result would not in fact damage the institution of marriage. On the contrary, unsuccessful and unhappy marriages would be brought to an end and would thus cease to discredit the institution. Divorces would be more numerous but this would be compensated for by the better quality of the marriages which survived and on balance greater happiness in marriage would result.

(iv) Irregular unions and illegitimacy would be reduced.

(v) "Hotel bill divorce" under the present law is easy for the well-to-do, much more difficult for the poor; i.e., the present law discriminates against the poor.

In the view of the Council it is desirable that these arguments should be brought out into the open and fully considered as well as rejected by the Commission.

The view of marriage implicit in them is incompatible with that contained in the principles of the Scottish Marriage Guidance Council, which starts with the fundamental conception of marriage as from the point of view of the individuals, a partnership for life, and, from the point of view of the State, a relationship which is the basis of the family and the whole structure of society.

To introduce divorce by consent would weaken, not strengthen, the institution of marriage. Ordinary people would find its significance and responsibilities still harder to understand, and it would be undertaken still more lightly and with even lesser understanding by the young. Even where entered into seriously as a permanent union it would, on the admission even of some of the advocates of easier divorce (cf. Margaret Mead: *Male and Female*, Gallunee, 1950), be permeated not by greater happiness but by greater insecurity. The example of those countries where divorce is notably easier than in Great Britain, e.g., the United States, France, Sweden, suggests that it produces no gain to society in happiness or health. Apart from other considerations, it would lead to married couples postponing having children in order not to preclude the possibility of ready divorce.

II. DIVORCE FOR DESERTION

(a) The position of the deserting spouse whose partner refuses to raise an action of divorce

10. This is the situation dealt with in Mrs. White's Private Bill. It has been proposed that the deserting spouse should be given the right to raise an action of divorce at the end of x years of *de facto* separation regardless of who was responsible for its beginning. Certain conditions have been proposed, e.g., (i) that the pursuer shall have

implemented his obligation of maintenance; or (ii) that the pursuer shall have implemented all his marital obligations other than adherence; in particular he shall have abstained from committing adultery.

In favour of such a change it is argued:—

(i) If *de facto* separation has continued for, say, five or more years, then the marriage is for all practical purposes at an end. It is only realistic to admit this and to allow the legal position to be brought into line with the facts.

(ii) It would reduce irregular unions and illegitimacy.

(iii) It is by no means invariably the case that the spouse who is legally in desertion is morally speaking the one mainly responsible for the breakdown of the marriage. Desertion is the symptom rather than the cause of the failure of the marriage and it should not be treated as an offence.

Against this change it can be contended:—

(i) Desertion has for many centuries been recognised in Scotland as a matrimonial offence, and it is wrong in principle and contrary to justice that anyone should be able to profit by his own wrongdoing.

(ii) This legal rule proceeds from the fact that for either spouse to desert the other without reasonable cause is effectively to break up the marriage, often in a liberal sense. As long as the parties are cohabiting, so long, despite friction and difficulties, there is a much better chance of improving their relations than after they have been separated. Therefore, nothing should be done by Parliament to encourage separation.

(iii) Such a change would increase insecurity in marriage and lead to a further diminution in confidence in and respect for the permanence of marriage.

(iv) It would be an intolerable hardship to spouses who object to divorce for reasons of conscience.

(v) It would debar an innocent defender from pension rights, etc.

The Council is opposed to such a change.

(b) Willingness to adhere on the part of the deserted spouse throughout the three years' period

11. It has been suggested that it is unreasonable to insist, as the present law does, that the pursuer must throughout the triennium have remained willing to resume married life with the defender. It is argued that what matters is the responsibility for the separation at its inception. Therefore, it is said, it ought not to be held against the deserted spouse if regret changes to bitterness, and bitterness to acquiescence in the separation if not positive aversion from the defender's company. Short of this it is argued (as by Lord Keith in *Borland v. Borland*, 1947, S.C. 432 at p. 445) that there are circumstances in which as a result of the defender's conduct it would be *contra bonos mores* or against the conscience of mankind or unconscionable to insist on adherence by the deserted spouse and hence that unwillingness to adhere based on such conduct should not constitute a bar to divorce for desertion. In the case of *Borland* the conduct in question was the action of the deserting wife in taking proceedings for a divorce in the courts of Nevada after which as the husband admitted he was no longer prepared to adhere.

That case was probably an extreme one and certainly a hard one. Certainly, also, this requirement is responsible for a considerable amount of perjury. But, in the view of the Council, the law rightly regards it as of the essence of desertion that it should persist against the will of the deserted spouse. If this requirement is eroded the door will be opened wider to divorce by consent.

It is submitted that the present rule, though exacting and occasionally harsh, is sound and should be confirmed by the legislature.

III. DIVORCE FOR CRUELTY

12. In England, under the Matrimonial Causes Act, 1937, cruelty "since the celebration of the marriage" is a ground for divorce and it is unnecessary to establish that there was at the date of raising the action a risk of future danger to life or health. In Scotland, however,

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F.R.C.O.G., AND MRS. N. A. OATTS

there is some doubt as to the rule and in *Dunlop v. Dunlop*, 1950, S.C. 227 it was decided that such a requirement does still obtain in Scotland. In the case of *Cox v. Cox*, 1942, S.C. 352 it was held that the same applies to habitual drunkenness under the Licensing (Scotland) Act, 1933.

It is submitted that this rule whether applied to physical cruelty or to habitual drunkenness is a hardship to a conscientious and patient spouse who delays before raising an action and may be deprived of his or her remedy by an apparent reform on the part of the cruel spouse, a reform which may at best be very ephemeral and at worst fictitious. It is recommended that the English rule on this point be made applicable in Scotland.

IV. NULLITY OF MARRIAGE

13. It is recommended that subject to the conditions laid down in the Matrimonial Causes Act, 1937, marriages in Scotland should be declared voidable when:—

(a) The defender was at the time of the marriage pregnant by some person other than the pursuer.

(b) The defender was at the time of the marriage suffering from venereal disease in a communicable form.

(c) The marriage has not been consummated owing to the wilful refusal of the defender to consummate it. (It is recognised that this raises the question of the use of contraceptive practices but the Council has no recommendation to make on that subject.)

V. PROPERTY RIGHTS

14. In Scotland, for the purpose of determining property rights on divorce the technically "guilty" spouse is, subject to one important exception, treated as dead *vis-à-vis* the "innocent" spouse. The "innocent" spouse, that is, is entitled to any rights to which he or she would have succeeded on the death of the "guilty" spouse. The exception is that a husband who divorces his wife is not entitled to *fas* relief.

On the other hand, once the marriage is at an end no obligation of aliment remains.

It is submitted that this rule is anachronistic and unsatisfactory. It dates from a time when divorce was to a large extent confined to the property classes and is altogether inappropriate to the needs of salary and wage-earning litigants who have little or no capital. Further, it lacks reciprocity in the important respect above noted. Again, it is on ethical grounds open to criticism as excessively rigid in that the moral and legal responsibility for a matrimonial breakdown by no means always coincide.

It is submitted that the only wholly satisfactory solution is to confer upon the court the responsibility for regulating the property rights between the parties, including the right to award aliment, as in an action for separation, and/or compensation for loss of legal rights, in the form of either a capital sum or periodic payments; with the power, as at present in England, to vary settlements.

VI. ENFORCEMENT OF OBLIGATION OF MAINTENANCE

15. The Scottish Marriage Guidance Council recommends that if it is practicable a wife whose husband is failing to maintain her or the children should be entitled to bring an action for aliment in the Sheriff Court (and

its English equivalent) of the district in which she resides. At present jurisdiction is based upon the domicile or residence of the husband, which often makes the wife's remedy more difficult and slower and more expensive to obtain.

VII. FORUM FOR ACTIONS OF DIVORCE

16. It has been suggested that jurisdiction in actions of divorce should be extended to the Sheriff Court. The Council is opposed to such a change as being unnecessary and undesirable, unnecessary because there is for less competition in the Scottish Court of Session than in the English courts; and undesirable as involving a sacrifice of authority and uniformity.

VIII. LEGAL AID

17. For reasons of national economy and administrative convenience it was decided to introduce the Legal Aid Scheme in instalments. Consequently at present legal aid is available for litigation but not for advice. As by far the greatest number of assisted cases are matrimonial cases, the effect of the present position is socially undesirable and highly prejudicial to the working of the Marriage Guidance Councils; this in two main respects:—

(a) It puts pressure upon poor people in marriage difficulties to rush into actions of divorce without proper legal advice or mature reflection.

(b) It raises difficulties between the legal profession and the public; poor persons, despite the explanation they receive, find the present position very difficult to understand. They expect to get free legal advice and often unknowingly incur considerable legal expenses in the preliminary stages of an action for which, if they later decide to withdraw from it, they are not entitled to receive aid. This produces ill-will towards the solicitor concerned and puts him in a false position.

It is strongly recommended that the "advice" portion of the Act should be introduced at the earliest possible opportunity in respect of matrimonial causes. It is desirable that legal aid should cover advice upon appropriate reconciliation procedures if such is introduced. (Vide paragraph 6, *supra*.)

IX. NATIONAL HEALTH SERVICE

18. The Scottish Marriage Guidance Council considers it to be a vital part of preparation for marriage that every person intending to get married should have an opportunity of undergoing a medical examination (which is understood to be compulsory in France).

The Council also considers it desirable that married people and those about to marry should have the opportunity of obtaining, if they wish, skilled advice on contraception.

Both the above services are no doubt rendered by ordinary practitioners, particularly in places where specialised clinics do not exist. Doubt is, however, said to exist whether in terms of the National Health Service Act a doctor could be required to give these services. It is recommended that the Act be amended to provide for this.

The Council would welcome the establishment of a greater number of such specialised clinics.

(Received 15th January, 1952.)

EXAMINATION OF WITNESSES

(MR. JOHN WATSON, W.S., DR. MCKAY HART, M.B., Ch.B., F.R.F.P.S.(G.), F.R.C.O.G., and MRS. N. A. OATTS, representing the Scottish Marriage Guidance Council; called and examined.)

4693. (Chairman): We have here this morning Mr. John Watson, Writer to the Signet; Mrs. N. A. Oatts, and Dr. McKay Hart. To whom shall I address my questions?—(Mr. Watson): To me, if you please, my Lord.

4694. What posts do you respectively hold in the Scottish Marriage Guidance Council?—We are members of the Council, my Lord. The Chairman of the Council, Sheriff J. R. Philip, Q.C., is not giving evidence on behalf of the Council because as Procurator of the Church of Scotland he is to appear before the Commission on behalf of the Church, and it was considered desirable that the evidence on behalf of this Council should be given by

persons who were not appearing before you in any other capacity. Mrs. Oatts was the first Honorary Secretary of the Scottish Marriage Guidance Council. She served from its foundation until last year, when a paid, full-time secretary was appointed. Dr. McKay Hart is Chairman of the Glasgow Council.

4695. Before I ask any questions on your memorandum, is there anything that you wish to add to it, Mr. Watson?—Yes, Sir, there are two points. One is a very minor point of correction in paragraph 2 of our memorandum, in which it is stated that the Scottish Council is represented on the National Marriage Guidance Council in England. That statement was true when the memorandum was

Specific changes may be considered under the following heads:—

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(i) That marriage is a legal relationship freely entered into between the parties and that so long as the rights of third parties are not infringed it is reasonable that they should be enabled to withdraw from that relationship. Expressed in non-legal terms, it is argued that since the social and economic emancipation of women it is no longer compatible with individual freedom and dignity that two spouses who are both desirous of bringing their marriage to an end should be legally precluded from doing so. The advocates of this view would normally accept that such freedom should be modified when there are children of the marriage.

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(iii) That the greater freedom of divorce which would result would not in fact damage the institution of marriage. On the contrary, unsuccessful and unhappy marriages would be brought to an end and would thus cease to discredit the institution. Divorces would be more numerous but this would be compensated for by the better quality of the marriages which survived and so balance greater happiness to marriage would result.

(iv) Irregular unions and illegitimacy would be reduced.

(v) "Hotel bill divorce" under the present law is easy for the well-to-do, much more difficult for the poor; i.e., the present law discriminates against the poor.

In the view of the Council it is desirable that these arguments should be brought out into the open and fully considered as well as rejected by the Commission.

The view of marriage implicit in them is incompatible with that contained in the principles of the Scottish Marriage Guidance Council, which starts with the fundamental conception of marriage as from the point of view of the individuals, a partnership for life, and, from the point of view of the State, a relationship which is the basis of the family and the whole structure of society.

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implemented his obligation of maintenance; or (ii) that the pursuer shall have implemented all his marital obligations other than adherence; in particular he shall have abstained from committing adultery.

In favour of such a change it is argued:—

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The Council is opposed to such a change.

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there is some doubt as to the rule and in *Dunlop v. Dunlop*, 1950, S.C. 227 it was decided that such a requirement does still obtain in Scotland. In the case of *Cor v. Cox*, 1942, S.C. 352 it was held that the same applies to habitual drunkenness under the Licensing (Scotland) Act, 1933.

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15. The Scottish Marriage Guidance Council recommends that if it is provable a wife whose husband is failing to maintain her or the children should be entitled to bring an action for aliment in the Sheriff Court (and

its English equivalent) of the district in which she resides. At present jurisdiction is based upon the domicile or residence of the husband, which often makes the wife's remedy more difficult and slower and more expensive to obtain.

VII. FORUM FOR ACTIONS OF DIVORCE

16. It has been suggested that jurisdiction in actions of divorce should be extended to the Sheriff Court. The Council is opposed to such a change as being unnecessary and undesirable, unnecessary because there is far less congestion in the Scottish Court of Session than in the English courts; and undesirable as involving a sacrifice of authority and uniformity.

VIII. LEGAL AID

17. For reasons of national economy and administrative convenience it was decided to introduce the Legal Aid Scheme in Scotland. Consequently at present legal aid is available for litigation but not for advice. As by far the greatest number of assisted cases are matrimonial cases, the effect of the present position is socially undesirable and highly prejudicial to the working of the Marriage Guidance Councils; this in two main respects:—

(a) It puts pressure upon poor people in marriage difficulties to rush into actions of divorce without proper legal advice or mature reflection.

(b) It raises difficulties between the legal profession and the public; poor persons, despite the explanation they receive, find the present position very difficult to understand. They expect to get free legal advice and often unknowingly incur considerable legal expenses in the preliminary stages of an action for which, if they later decide to withdraw from it, they are not entitled to receive aid. This produces ill-feeling towards the solicitor concerned and puts him in a false position.

It is strongly recommended that the "advice" portion of the Act should be introduced at the earliest possible opportunity in respect of matrimonial cases. It is desirable that legal aid should cover advice upon appropriate reconciliation procedure if such is introduced. (Vide paragraph 5, *supra*.)

IX. NATIONAL HEALTH SERVICE

18. The Scottish Marriage Guidance Council considers it to be a vital part of preparation for marriage that every person intending to get married should have an opportunity of undergoing a medical examination (which is understood to be compulsory in France).

The Council also considers it desirable that married people and those about to marry should have the opportunity of obtaining, if they wish, skilled advice on contraception.

Both the above services are no doubt rendered by ordinary practitioners, particularly in places where specialised clinics do not exist. Doubt is, however, said to exist whether in terms of the National Health Service Act a doctor could be required to give these services. It is recommended that the Act be amended to provide for this.

The Council would welcome the establishment of a greater number of such specialised clinics.

(Received 15th January, 1952.)

EXAMINATION OF WITNESSES

(MR. JOHN WATSON, W.S., DR. MCKAY HART, M.B., CH.B., F.R.F.P.S.(G.), F.R.C.O.G., AND MRS. N. A. OATTS, representing the Scottish Marriage Guidance Council; called and examined.)

4693. (Chairman): We have here this morning Mr. John Watson, Writer to the Signet; Mrs. N. A. Oatts, and Dr. McKay Hart. To whom shall I address my questions?—(Mr. Watson): To me, if you please, my Lord.

4694. What posts do you respectively hold in the Scottish Marriage Guidance Council?—We are members of the Council, my Lord. The Chairman of the Council, Sheriff J. R. Philip, Q.C., is not giving evidence on behalf of the Council because as Procurator of the Church of Scotland he is to appear before the Commission on behalf of the Church, and it was considered desirable that the evidence on behalf of this Council should be given by

persons who were not appearing before you in any other capacity. Mrs. Oatts was the first Honorary Secretary of the Scottish Marriage Guidance Council. She served from its foundation until last year, when a paid, full-time secretary was appointed. Dr. McKay Hart is Chairman of the Glasgow Council.

4695. Before I ask any questions on your memorandum, is there anything that you wish to add to it, Mr. Watson?—Yes, Sir, there are two points. One is a very minor point of correction in paragraph 2 of our memorandum, in which it is stated that the Scottish Council is represented on the National Marriage Guidance Council in England. That statement was true when the memorandum was

composed but it is not now true because in the interval the National Marriage Guidance Council has undergone a change of constitution for purely internal reasons, and because of the requirements of their new constitution the Scottish Council is not actually represented on the National Marriage Guidance Council. What is said elsewhere, namely, that the two Councils work in friendly association, continues to be true.

4696. I suppose that it is also true that the objects, principles and methods of working of the Scottish Marriage Guidance Council are similar to those of the National Marriage Guidance Council in England?—Yes, Sir, that is true. The methods of working are almost identical, with the sole qualification that in Scotland the Marriage Guidance Councils work with a rather larger number of counsellors—that is to say, people giving advice—whereas in England the number tends to be smaller, and in many Councils in England is rather restricted to trained social workers who do this work as a full-time occupation. That is the tendency, though not the invariable rule, in England, whereas in Scotland our practice is to work very much more with voluntary counsellors who, though they may have some training, can devote only a very small part of their time to marriage guidance work. But that is perhaps an accident, said does not mark any essential difference between the working of the two Councils.

4697. You go on to say:—

"The Scottish Marriage Guidance Council is in general sympathy with the memoranda submitted or to be submitted by the National Marriage Guidance Council. In view, however, of

(a) the differences between the two countries in religion, history, law, social conditions, etc.;

(b) the narrower view taken by the Scottish Council of the scope of the Commission's terms of reference; and

(c) the greater measure of agreement within the Scottish Council in regard to the law of divorce so far as it affects the work of marriage guidance;

the Scottish Council has decided to submit an independent memorandum."

Am I right in thinking that "the narrower view taken by the Scottish Council of the scope of the Commission's terms of reference" may refer to this, that although the Commission is enjoined to have in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children, its terms of reference are, in fact, limited to consideration of changes in the law and its administration?—That is exactly the point, my Lord.

4698. Then you set out the objects of the Scottish Marriage Guidance Council and its constituent Councils, which may be summarised by saying that the Council seeks by education for marriage to build successful marriages and aims at preventing marriage breakdown and removing the desire for divorce by providing for those who are in difficult expert and sympathetic advice and a recognised reconciliation procedure before divorce proceedings are contemplated. Then, in the last of your five introductory paragraphs, you say:—

"It is not part of the ordinary work of the Council to uphold any particular views or policy in regard to divorce."

Nevertheless, in paragraph 6 you say:—

"... the Council is strongly of opinion that the State should make greater effort than at present to ensure that divorce is regarded as a last resort and that reconciliation is seriously attempted before recourse is had to divorce. The Council does not favour compulsory reconciliation procedures, which is understood to have proved unsatisfactory in France."

Would you care to enlarge upon that sentence? Is it the unsatisfactory results in France that influence you or are there other matters which come to your mind?—The Council was influenced both by general considerations, my Lord, and by what we, we understand, the result of at any rate one form of compulsory reconciliation procedure in France. This is a form of which one of the members of our Legal Committee had personal experience but that merely reinforced the strong conviction of the Council that no compulsory reconciliation procedure would be likely to be effective.

4699. Then you go on to say:—

"It does consider, however, that the work of those organisations which aim at promoting reconciliation on a voluntary basis should be developed and strengthened."

Of course, your organisation is pre-eminently one which aims at promoting reconciliation on a voluntary basis?—Yes, it is, my Lord, and perhaps I might have the opportunity of amplifying that sentence. What the Council had in mind in this paragraph was this. Firstly, and this is the point to which the memorandum recurs later, the question of advice under the Legal Aid Scheme. And secondly, the need for greater financial assistance to organisations such as ours. If I might document the question of finance for a moment, I would respectfully refer to the Second Report of the Law Society of Scotland on the Legal Aid Scheme, relating to the year ended 31st March, 1952. It is there stated on page 13 that, out of 4,421 certificates granted under the Legal Aid Scheme in Scotland during that year, 2,933 or eighty-five per cent. have related to actions between husband and wife. Of that figure of 2,933, 2,291 or fifty-two per cent. have related to husband and wife actions in the Court of Session. If one examines the annual cost of the Legal Aid Scheme in relation to these matrimonial causes one finds in Schedule I to the Report that the annual cost of the Legal Aid Scheme in the year was £78,528 or, to use round figures based on the annual grant-in-aid from the Scottish Home Department, £80,000. If one were to take fifty-two per cent, that is, the proportion related to matrimonial causes in the Court of Session in the figure of £78,528, one finds that the State spent through the Legal Aid Scheme on actions between husband and wife in the Court of Session approximately £41,000. By way of comparison, the Scottish Marriage Guidance Council is at present receiving not more than £750 of public money annually. The Council, of course, has no knowledge of any sums which may be paid to similar bodies, but to speak from our own experience, that is the extent of our support from public funds. That means that fifty-four times this sum is being spent on cheaper divorce. If I might refer again to the foreword to the Report of the Law Society, it is there stated that it is perhaps worthy of comment that several bodies of standing have brought to the notice of the Royal Commission on Marriage and Divorce the anomaly of providing facilities for cheaper divorce while denying the assistance of legal advice which may prevent it, and we, my Lord, would argue that the same argument could be used to urge that organisations such as ours, which are seeking to prevent rather than to facilitate divorce, should receive a greater share of public support.

4700. The £750 which you mentioned is the grant from the Scottish Home Department?—That is correct, my Lord.

4701. Then the last sentence of paragraph 6 contains a suggestion that:—

"... the court should be given power before disposing of cases of separation and divorce to make a remit to an individual or an approved organisation in accordance with a recognised reconciliation procedure." Have you any views as to what sort of individual or official, or what sort of organisation?—We discussed that question at some length, my Lord, but it was decided that it would be more proper to leave the suggestion in the somewhat vague form in which you find it.

4702. Then you come to another topic in paragraph 7, where you say:—

"Apart from the question of procedure, the state of the divorce laws powerfully affects the community's attitude towards marriage and the work undertaken by the marriage guidance movement."

Then you go on to say:—

"Successful marriages will not be promoted by legislation which is seriously out of harmony with the moral sense or accepted standards of social behaviour of the community. On the other hand, any relaxation of the divorce laws, bringing with it the widespread impression that 'divorce is easier now' does, in the Council's view, make successful marriage more difficult. Whatever the merit of the particular measure, greater ease of divorce tends to produce a socially undesirable climate of opinion about marriage; it lessens the

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[Continued]

respect for marriage and the understanding of its true significance; it fosters insecurity within marriage and saps the resolution of those who are in difficulties. Consequently, the Council cannot be indifferent to changes in the law of divorce and considers itself entitled and bound to examine and comment on various proposed changes which are in the public mind."

I want to ask you a question about the sentence—"greater ease of divorce tends to produce a socially undesirable climate of opinion about marriage". Is that put forward as a truism, or is it the result of observation on the part of the counsellors working in your organisation?—It is put forward as both, my Lord. It certainly stems from the direct experience of our counsellors. In examining the state of mind of our applicants for advice on what the law actually is, our counsellors frequently find that the view of the man in the street about divorce is very far from correct. They find that the impression in the minds of applicants for advice is that divorce is very much easier than it is, and it is the experience of our counsellors that this mistaken impression as to what the law now is undermines the stability of the marriages of these people and introduces in their minds a false impression of what marriage is all about.

4703. Passing to paragraph 8, you put forward a general principle:—

"That it is undesirable to introduce at the present time any far-reaching extension of facilities for divorce. The legislation in 1937 and 1938 was necessary to bring the law into harmony with modern views, but the present need is to tidy up the existing law rather than drastically to change it."

The reference there, no doubt, is to what we call the Herbert Act of 1937 in England, and the Divorce (Scotland) Act, 1938?—That is correct.

4704. Then you suggest:—

"There should always be alternation between reform and consolidation and what is needed now is a period of consolidation. This is so not only because of the far-reaching reforms in the later thirties but because of the widespread unsettlement in private lives created by war conditions. In Scotland there is no considerable demand for substantial changes in the law, except in regard to property."

In the course of your Council's work do you often hear comments or discussions upon the divorce laws?—Fairly frequently, my Lord.

4705. Then in paragraphs 9 and 10 you deal with two suggestions made by certain people. These two suggestions, putting it shortly, are, firstly, divorce by mutual consent, and secondly, the proposal, brought before the House of Commons in a Private Member's Bill by Mrs. White, that the spouse who desired a divorce after seven years' separation should have a right to have a divorce even if he or she were the guilty party. You have set out both the reasons put forward in support of these proposals and your own reasons for rejecting them entirely. Both sides of the argument are set out, and I have no questions on that. In paragraph 11 you discuss the present requirement as to willingness to adhere on the part of the deserted spouse throughout the three years' period. You then discuss the argument that it is hard upon the deserted spouse to insist upon his or her showing willingness to adhere throughout the three years, and you put forward this view:—

"... In the view of the Council the law rightly regards it as of the essence of desertion that it should persist against the will of the deserted spouse."

That is, throughout the three years?—That is correct, my Lord.

4706. It would like to ask you this: is it really right to insist on that in all cases? Would it not meet the case if willingness to adhere during a period of a year or eighteen months were proved, because after desertion for a year or eighteen months, or perhaps two years, is it not asking almost too much of human nature to suggest that the deserted spouse should still be willing to adhere?—My Council finds this point, my Lord, one of the most difficult of any of the points that we have considered. We did discuss the question of reducing the period during

which willingness to adhere should be obligatory, but we came to the conclusion that, while in a number of cases, particularly in such cases as *Borland*, hardship is certainly involved, nevertheless the requirement should be maintained for three years. That, after all, is a reduction from the earlier period of four years. We recognise that cases of extreme hardship do arise, but in so far as one limits or curtails the period in which one requires willingness to adhere, thereafter the way is opened to divorce by consent. Having considered the question of divorce by consent on its own merits and having rejected it, we felt that in the interests of consistency there was no other answer but to hold out for the full three years, as being what the law has hitherto regarded as a reasonable period, affording opportunity for reflection and reconciliation.

4707. (Lord Keith): Mr. Watson, I would like to know a little more about the Scottish Marriage Guidance Council. Can you tell me what the membership is?—The Council consists of members nominated by the two constituent Councils of which it is at present composed.

4708. Are there only two Marriage Guidance Councils in Scotland?—There are only two at present, one in Edinburgh and one in Glasgow.

4709. Is there any one which is the ruling body?—No, Sir.

4710. You really act in co-operation with one another?—Dr. Hart is the Chairman of the Glasgow Marriage Guidance Council and is well able to answer any questions regarding the equilibrium between Edinburgh and Glasgow. But the function of the Scottish Council is to act as a holding body, so to speak, not merely for these two Councils but for the other Councils which we hope will be started in other parts of Scotland. This is a new growth.

4711. When you speak of the Scottish Council, is that a body that holds the two together, or what is it? I am not quite clear.—It acts as a link between them, and furthermore the Scottish Council acts as a liaison body between these two constituent Councils, Edinburgh and Glasgow, and the National Council in England, and the Scottish Council has the third function of acting as the link between the Marriage Guidance Councils in Scotland and the Scottish Home Department.

4712. I take it that the Edinburgh Council and the Glasgow Council are the functioning Councils?—That is correct.

4713. Your Scottish Council, which holds the two together, consists of representatives from the two local Councils?—That is correct.

4714. You depend to some extent, I suppose, on public subscription?—Yes, Sir.

4715. And at the moment your field of work is confined to Edinburgh and Glasgow?—And the surrounding areas.

4716. Can you tell me, broadly speaking, what class of public you serve?—We draw upon a very wide social and economic cross-section of the community, but the majority of our applicants come from the poorer section of the community. That is, broadly speaking, true, but there are conspicuous exceptions to that.

4717. You are familiar with the work of legal dispensaries?—Yes.

4718. Would you say that the people who consult you are the same class of people as apply for advice at legal dispensaries or are they a rather superior class?—To a large extent the same class, but I would say there was a wider spread amongst our applicants than among the clients of the legal dispensaries. There is quite a big fringe of people in a higher social and economic position than normally go to legal dispensaries.

4719. In Edinburgh there is a body, which no doubt you know well, called the Davidson Clinic.—Yes, my Lord.

4720. Is it associated in any way with the Edinburgh Marriage Guidance Council?—No, my Lord. We know all about it and there is co-operation from time to time between my Council and the Davidson Clinic. One of

the practitioners at the Davidson Clinic is a member of the Edinburgh Council, but there is no official tie-up of any kind, and it must not be inferred that they accept our principles or that we accept theirs.

4721. I think I detected in your memorandum, Mr. Watson, a certain difference in outlook from that presented to us by the English body. In other words, you take a much more decided view on questions of principle in the matter of the extension of grounds of divorce than the English body, which on that matter remains entirely neutral?—Yes, my Lord, that is a fair comparison of the two memoranda.

4722. Is that due to some extent to the persons who operate your Marriage Guidance Councils in Scotland?—It is possible, my Lord, that the presence of representatives of the Faculty of Advocates and of the Society of Writers to Her Majesty's Signet on the Edinburgh Council, and perhaps their influence reflected in the Scottish Council, is responsible for a somewhat more legislative viewpoint in the Scottish Council than in the National Council in England.

4723. That I understand, but that would hardly explain the definite views that are expressed here on the question, say, of extension of grounds for divorce. I gather that the Council is against extension of divorce facilities?—Broadly speaking, yes.

4724. And it is natural enough to assume that that is due to the views of the persons who function on the Marriage Guidance Council?—Might I add, my Lord, that at any rate in Edinburgh, and I believe in Glasgow also, the summary of this memorandum was circulated not merely to members of the Councils, which are the policy-forming bodies, but also to the counsellors, the field workers, the people who are doing the job, so that the views in this memorandum reflect a much wider opinion than of the dozen or so men and women on these two constituent Councils?

4725. Is there any association between the Marriage Guidance Councils and any of the Churches in Scotland?—There are representatives of the Churches on the Edinburgh Marriage Guidance Council. Dr. Hart will speak for Glasgow. (Dr. Hart): There are in Glasgow, too, but it is not denominational in any sense. (Mr. Watson): And the same is true of the Edinburgh Council and the Scottish Council.

4726. And you have a fairly large representation of the Churches?—A substantial representation.

4727. Might I turn to some of the detailed observations in your memorandum? With reference to paragraph 6, where you deal with reconciliation, can you tell me in what circumstances you suggest that the court might make a remit to some individual or organisation to see if reconciliation could be carried out?—My Lord, I personally am in some little difficulty here, because though I am a solicitor by profession I am representing a lay body, and I do not think it would be desirable that I should put forward any views I might have as to the correct way of implementing the suggestion.

4728. First of all, you would need to give the court, I suppose, some statutory discretion to do this, and then you would simply leave the matter in the hands of the court?—Yes, my Lord.

4729. It occurs to me that if the judge says, "Now, here is a case where I think that an attempt should be made at reconciliation", one can see that the parties to the case may think, "Oh, here is the court exerting certain pressure on us", and that is getting near the idea of compulsory reconciliation?—Yes, my Lord. I do not think that my Council would have any serious objection to a certain degree of pressure being exerted from the court in that direction. Our difficulty would be, I think, not the fact that pressure is being exerted, but the doubt whether if the procedure were compulsory it could be successfully exerted. We feel that the essence of a discretion of this kind is that it should be effective. In France, in the example which came to our notice, so far from the procedure being effective it was a pure formality, a so-called reconciliation tribunal or session and neither of the parties even attended it personally. It was attended by agents which was, of course, *reductio ad absurdum* so

far as reconciliation is concerned. But if the matter be in the hands of the court exercising discretion, though there might be objections that the court was holding these persons together, then at least it could be said that everything possible was done to ensure that reconciliation was tried. If the official reconciliation agent were someone who was other than an official of the court, then my Council hopes that it might be possible to make the best of both worlds, have the official pressure, so to say, but the benefit of a free-acting agent or organisation.

4730. We have had quite a number of representations that compulsion is really quite unsatisfactory and that it is much too late to try reconciliation procedure after the divorce proceedings have been started. I suppose you can see that point of view, and I wonder if you have anything to say on that?—My Council would entirely agree, my Lord, about the lateness of this intervention by the time that matters have gone to court. One way to anticipate matters, of course, in our submission, is to introduce as soon as possible advice under the Legal Aid Scheme. That would help to impose a brake at an earlier stage, but as things are there is practically no brake between a hasty, ill-considered quarrel and proceedings in the Court of Session.

4731. The great bulk of divorce cases are undefended. I have difficulty, looking at the question from a purely personal point of view, in envisaging in what circumstances the court would say, "Here is a case where reconciliation might be attempted and might succeed". The court has really got no material to work on in an undefended case?—That is true, my Lord.

4732. And the procedure would probably apply only in the comparatively few cases which were defended. There the court would have both parties before it and would see possibly a chance of reconciliation; but in a defended case feelings are very often much too exacerbated to expect reconciliation?—There is force in that.

4733. And it does strike me, Mr. Watson, that, broadly speaking, the circumstances in which this power could be exercised would be so few as to make it doubtful whether it was worth introducing this by statutory legislation?—I think that my Council's reaction to that, my Lord, would be that even if it were successful in only a comparatively few cases it would be worth while. As legislation is likely to follow the conclusion of the Commission's deliberations, this proposal would not involve separate legislation.

4734. (Chairman): I understand that there are comparatively few contested divorce cases in the Court of Session. Are separation cases in the Sheriff Court more frequently contested? I assume that your Council would propose that this procedure should apply also in the Sheriff Court?—Yes, my Lord. I am afraid that I have not any statistics accessible as to the proportion of contested cases in the Sheriff Court.

4735. (Lord Keith): Mr. Watson, you refer in paragraph 8 to the far-reaching reforms in divorce legislation in the later thirties. I am not quite clear what the far-reaching reforms are that you have in mind. Were there any far-reaching reforms in 1938 in Scotland? There were reforms, but would you call them far-reaching?—My Lord, there is perhaps an element of imprecision in this sentence. I think that my Council was having regard to the legislation in both countries.

4736. I thought that might be so.—And that the sentence would be an apt description of what took place in England.

4737. It would be much more apt in England than in Scotland?—I am sure that my Council would entirely agree with that.

4738. Might I come to the question of divorce by mutual consent? You set out the grounds upon which this proposal has been put forward, with which we are very familiar, and at the end of paragraph 9 you sum up your view by saying:—

"To introduce divorce by consent would weaken, not strengthen, the institution of marriage."

and then you say:—

"Ordinary people would find its significance and responsibilities still harder to understand, and it would be undertaken still more lightly and with even lesser understanding by the young."

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[Continued]

Now these, of course, are two assertions, and we have had contrary assertions and opinions expressed. Do these two sentences represent more than an expression of opinion?—I would say that my Council regarded them as assertions based on the personal experience of our counsellors and members of the Council and on the researches of sociologists and so on. We fully recognise that these are expressions of opinion, and that other people might well differ from us in these two matters. I do not know whether it would be relevant if I were to draw attention to one particular passage in a work, quoted in our memorandum, which discusses this question from a very different standpoint to that of my Council, and as applied to the United States of America, where divorce is much easier than in this country. Would that be of help?

4739. Surely.—The work in question is by an American authoress named Margaret Mead who, I understand, is an ethnologist and sociologist. At page 355 *et seq.* she examines the social climate in regard to divorce in the United States. She says:—

"Young people are still encouraged to marry as if they could count on marriage's being for life, and at the same time they are absorbing a knowledge of the great frequency of divorce and the ethics that may later enjoin divorce upon them. There has been much inveighing from the pulpit and the bench which assumes that all those who get divorces are selfish, self-indulgent creatures. But as long as divorce was limited to the selfish and the self-indulgent, there were very few divorces, and it was safe to encourage young people to think of divorce as something that could happen to other people, but not to them. Divorce has now been so absorbed into our ethics that husbands or wives lie sleepless and torn, wondering, 'Ought I to get a divorce? Would she be happier with somebody else? Would he develop more with somebody else? Am I spoiling his life? Am I spoiling her life? Isn't it wrong to stay with someone out of mere loyalty? What will happen to the children if this goes on? Isn't it bad for the children to live in a home with this much friction?' Not only the possibility that any marriage except the marriage where both partners are deeply committed to some religious orthodoxy may end in divorce, but the phrasing of divorce as something that at least one of the partners in an imperfect marriage ought to get, is permeating the whole country, altering our expectations, making marriage many times more difficult."

That passage is taken from a book by an authoress who certainly holds no rigid point of view in favour of less divorce. Elsewhere she pleads for an extension of the grounds, but here, with great candour and force, she takes note of the significance of the attitude of mind towards divorce.

4740. I see that you quote from her here in a sentence which I must confess I do not understand. You say that marriage would be a permanent union "be permeated not by greater happiness but by greater insecurity". I cannot follow how that has application to divorce by mutual consent, because if both parties have to agree to a divorce I cannot see where the greater insecurity is?—I think that the answer is because divorce by consent gives rise to the social and moral conflict described in the passage I have just read. The fact that all that is required is the other party's agreement to divorce gives rise to this moral questioning, "Ought I to give a divorce?"

4741. You refer to the practice in the United States, France and Sweden. Have any members of your Council got any practical experience of the effects of easier divorce in any of these countries—I will leave out the United States for the moment?—It is limited to experience of Sweden, my Lord.

4742. There is similarly divorce by consent, of course, in other countries in Europe, such as Denmark and Norway, and, I think, Holland.—My Council was anxious not to include a catalogue outside the experience of any of our members.

4743. And you say that the example of France and Sweden suggests that it produces no gain to society in happiness or health. Is that a conclusion arrived at from actual experience in those countries by certain members of the Council?—Yes, my Lord.

4744. I should like to ask a question with regard to divorce after a period of separation, which might be, of course, divorce by the party who is in desertion. I did put a similar question to a witness whom we heard earlier which he thought was ingenious but I am putting it to you quite seriously. If parties, through matrimonial disputes or unhappiness, separate with the result that after a certain period of separation either of them can bring an action of divorce against the wish of the other party, do you not think that that might make for a certain stability in marriage, by making the parties to the marriage rather more careful in the way in which they behave to one another?—I must confess, my Lord, that I have strong sympathy with the opinion expressed by the previous witness.

4745. You think that it is ingenious?—I think it is extremely ingenious.

4746. You do not think there is anything in that, Mr. Watson? You see, this type of divorce involves a divorce against the wish of the other party. Now if that party, let me say, realises that if he or she does not do his or her best to make the marriage a success there may be a divorce brought against him or her...—I follow the argument, my Lord, but I would not have thought that it had a very wide application, and I would also have thought that it was far more than counterbalanced by the objections to this principle. For example, in the case of a spouse who is deserted, there may well be not very much he or she can do about it. Admittedly, that is open to argument, but to force a divorce against his or her wish seems to my Council—perhaps shocking would be an overstatement, but definitely a repugnant proposal.

4747. Now, let me come to some rather narrower questions which you deal with in your memorandum. Take first of all the question of the necessity to have a willingness to adhere during the three years. You are against the abolition of the principle of adherence?—In my Council's view, my Lord, the balance of advantage is against any change.

4748. I wonder if you know what the English position is on this matter? I am not an English lawyer myself, as you know, and there are others here who can perhaps express the matter better, but as I understand it, in England what is necessary is that there should first of all be a desertion, that is to say, a separation against the wish of the other spouse, but after that it is not necessary for the deserted spouse to express or to prove a desire for adherence—unless the deserting spouse changes his or her mind and expresses willingness to come back, in which case, of course, if the deserted spouse says, "No, I am not going to take you back", then there can be no divorce for desertion. Taking it that that is the English view on the question of desertion, you see that the English standpoint and the Scottish standpoint are different. You indicate elsewhere in your memorandum that you wish to assimilate the law of Scotland and the law of England?—Yes.

4749. I do not know whether you wish to assimilate the law of England to the law of Scotland, or the law of Scotland to the law of England?—In this particular case, my Lord, I feel reasonably certain my Council's view would be that England should join Scotland.

4750. Let me come to perhaps a rather more fundamental question. In Scotland, as you know, the desire for adherence need only last for three years and as soon as the three years is up the deserted spouse's attitude can change completely, and he or she can say, "I am not willing to have you back any more". Does it not strike you that there really is an element of fiction if not of futility in this point of view?—Would you amplify that question, my Lord?

4751. Can you imagine that a spouse can honestly say, "I have been willing to adhere to my deserting spouse for three years", and at the same time be in a position to say after three years have run out, "I am not willing to adhere to my deserting spouse"?—I think my Council's answer to that would be that during those three years the deserted spouse's sincerity can be put to the test, and at the end of the three years it has been fully tested.

4752. But still allowing the deserted spouse full opportunity to change his or her mind as soon as the three years run out?—Yes.

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4753. Does not the whole thing strike you as rather ridiculous?—No, my Lord. I appreciate that this requirement is widely held, by those who have experience, to give rise to frequent parody, and this memorandum recognises that, but the requirement does not seem to my Council to be just stupid.

4754. There is another difference between the law of England and the law of Scotland, namely, that the three years in England is three years immediately prior to the making of the action for divorce, whereas in Scotland it may be three years ten years ago, and therefore you look to be willing to adhere in respect of a period which has perhaps lapsed for over ten years. There, again, which law would you prefer?—My Council considered that point, but it felt that we as a lay body must not get drawn too deeply into legal matters which did not arise directly out of our experience in dealing with applicants for marriage guidance. You appreciate the difficulty with which we were confronted the whole time. There was a deep concern on the general principle of whether there should be divorce or otherwise, but at the same time we were concerned to see that so far as possible we restricted ourselves to matters arising out of our own experience in this field.

4755. On cruelty, with which you deal in paragraph 12, I am not sure, Mr. Watson, that perhaps you are not reading more into the English rule than the cases warrant. Your suggestion seems to be that in England once cruelty has happened divorce can be given without considering the question of whether there is any risk of recurrence, am I putting it rightly?—That was our understanding.

4756. Whereas in Scotland the view is that there must be an apprehension of danger to the wife or husband if he or she returns?—Yes.

4757. I do not want to go into all the legal questions because you are merely expressing the view of the Council on principle, but your view is that if cruelty has happened that should be sufficient?—That is correct.

4758. Without considering the question of what the position would be if the spouses were reunited?—Yes.

4759. I suppose you recognise, Mr. Watson, that in the great bulk of cruelty cases the court assumes that if cruelty has happened the risk continues, and that it really rests with the other party, the party who has been cruel, to show or to prove that all risk has now vanished?—Yes, we had that in mind.

4760. And unless that happens divorce will be granted. Taking it upon that view of the law, does it not seem to you that the principle for which you are contending is really against reconciliation and repentance? I am assuming that the court is satisfied that the cruel spouse has definitely changed and that there is going to be no chance of repetition. The spouse who has been cruel has got to prove that. If that is so, it does seem to me that in that case, which admittedly is a rare case, you are acting against your principles as a body supporting reconciliation by suggesting that the law should be that past cruelty, even if all risk has now disappeared, should be a ground for divorce?—My Council looked at it in this way, my Lord. Our chief concern was the position of the spouse who delays taking action. At the moment the state of the law seemed to us to encourage a spouse who had been the victim of cruelty to go for his or her remedy quickly, and that seemed to us, in admittedly not a very large number of cases, but in a certain number, to make for litigation and against reconciliation. It seemed to remove a delaying factor, to discourage the wronged spouse from taking time for reflection.

4761. Let me pass from that. Can you tell me why, in your recommendations in paragraph 13 for new grounds of nullity, you have excluded the ground of insanity, mental deficiency and inability to recurrent fits of insanity and epilepsy at the date of the marriage, which it is, as you know, in the English Act?—We think that it is so much a specific medical question.

4762. You excluded it because of difficulties on the matter of medical evidence?—Yes.

4763. So that you would not include that ground of nullity which is at present in the English Act?—I am sorry, my Lord, I did not make myself clear. My Council are not to be held as specifically excluding it, we merely do not advocate its inclusion.

4764. (Chairman): Is that because you think that it is a matter for the medical profession rather than for your Council?—Correct.

4765. (Lord Keith): Mr. Watson, you have put forward a recommendation on property rights with which we are very familiar, and I do not want to take you over it in detail. I believe that there is a certain difference of opinion, at any rate in the legal profession, on this matter?—There is a difference of opinion on certain points in connection with property rights, but from those memoranda from legal bodies which I have seen, I should have thought that the general lines of our recommendation had the approval of a number of legal bodies in Scotland.

4766. Am I right in thinking that your recommendation is confined to aliment and other allowances to the innocent party in a divorce?—Yes.

4767. (Chairman): Before we pass on, there are two matters I ought to mention. The first is that my attention has been directed to the fact, which I had noted previously, that paragraph 18 of your memorandum is apparently outside the Commission's terms of reference. You see, it deals with matters which must be done, it is suggested, before people get married—medical examination and skilled advice on contraception before marriage. We have to inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, and to consider whether any changes should be made in the law and its administration. We do not wish to take a narrow or legislative view of our terms of reference, but we cannot at the moment see how the matters mentioned in paragraph 18 fall within them.—I do not know whether this goes any distance towards answering the difficulty, but certain statements as regards the law of husband and wife do relate to what may have taken place before marriage; for example, the Sections in the Matrimonial Causes Act, 1937, on which Lord Keith was asking questions, deal with such matters as the pregnancy of the defendant by some person other than the pursuer, and venereal disease, and these are matters which arise before the marriage is contracted. Might that fact not be held to justify consideration of the medical state of the parties before the marriage is contracted?

4768. I am not sure. I suppose you might say that the law should be changed by making it a ground for an action of nullity if somebody had not been medically examined, but that is not the proposal you put forward.—No, indeed we do not put forward the proposition that medical examination should be compulsory. We are very far from advocating compulsory examination.

4769. I think I have your point. There is one point which arose out of Lord Keith's questions. Would you turn to paragraph 9, where you suggest that if there were divorce by consent marriage would be permeated not by greater happiness but by greater insecurity? May I say what I took to be the meaning of that and see whether you agree with it? Under the law as it stands any spouse can say, "Unless I commit a matrimonial offence or go insane, no one can compel me to have my marriage dissolved". If, however, you have divorce by mutual consent there may be a feeling of insecurity arising from the knowledge that if there is a quarrel there may be the risk that, although mutual consent is necessary, one party might say, "I want to be divorced, surely you will not be so unkind as to refuse it". Is that the sort of thing you had in mind?—That, my Lord, is so far accurate, but you are reading this atmosphere of insecurity into a particular marriage. But, as you no doubt appreciate, it is part of my Council's case that what matters is not merely the feeling within any one particular marriage but in the minds of a great many people who are about to marry or who have become married. It is a trend of fashion which is intangible and very hard to document, but which, we feel, is extremely important in its effect on what everybody thinks and therefore on what everybody is likely to do.

4770. (Mr. Justice Pearce): Paragraph 6 of your memorandum shows that you strongly feel the necessity for some break to be put on hasty divorces?—That is so, Sir.

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4771. Your suggested solution has many difficulties, has it not?—Lord Keith has suggested that it would be applicable to only a relatively small number of cases.

4772. I will not take you over the same ground again, but it is true that ninety-eight per cent. of divorce actions are undefended and therefore a judge cannot have any clear idea of whether referral for reconciliation would be useful and, in any event, whether the case is defended or undefended, it is very late in the day for reconciliation just at the time when the parties think that they are about to get their divorce?—I agree to both those points.

4773. You did say that advice under the Legal Aid Scheme might possibly help?—We are sure that it would help.

4774. I appreciate your dislike of anything that savours of compulsion, but of course, as long as reconciliation is left on a purely voluntary basis, only a fraction of the people who are asking for divorce will come for advice?—I do not quite follow that, Sir. At present, under the Legal Aid Scheme an individual who thinks his or her marriage is coming towards an end goes to a solicitor and asks in effect, "How can I be divorced?", and under legal aid the solicitor can in effect only receive fees for saying, "I will tell you how you can be divorced". If the same client goes to a solicitor saying, "Can you advise me what I ought to do about my marriage, what are my rights, what do you think I should do about it?", at the moment, as I understand the position, the solicitor cannot be paid for giving advice which leads his client away from the courts.

4775. Supposing that were altered and he could be paid for general advice, which might be advice for reconciliation, do you think that would really be satisfactory? The difficulty is this, is it not, that when a client comes to a solicitor wanting a divorce, it is difficult for the solicitor to counsel against it on general moral grounds, because he will lose the confidence of his client if he puts any pressure in that direction?—There is an element of truth in that contention, Sir, but I think that it rests on the false assumption that clients come to their solicitors only when they have decided to embark upon a divorce. It would, I would have thought, have been the experience of most solicitors that their more intelligent clients who get into matrimonial difficulties come to their solicitors long before that stage has been reached.

4776. Do you mean that in these legal aid cases, the parties will be discussing their position in general terms long before they have any idea of taking divorce proceedings?—Before they have formed a cut-and-dried decision to take proceedings. The situation I have described is the commonplace of a solicitor's practice in dealing with clients who pay his whole fee themselves, and I would have thought the same would apply in legally assisted consultations.

4777. What I am suggesting to you is that it is hard to put the burden on solicitors of trying to stop their clients' desire for divorce, and that it ought to be put on some independent body like your Council?—To that, Sir, I would make two answers. First, many solicitors, to my knowledge and the knowledge of my Council, do not hesitate to shoulder responsibility for advising against divorce if they consider that that is in the client's real interest. The second part of my answer is that I would anticipate a very close liaison between solicitors providing advice by arrangements under the Legal Aid Scheme, and Marriage Guidance Councils. There is already a close liaison between solicitors who are dealing with the court side of legal aid work and the constituent councils of the Scottish Marriage Guidance Council. I would expect that liaison to get even closer in future and that solicitors who were advising under the Legal Aid Scheme would not hesitate to pass back their clients to a body such as ours to pursue the sort of reconciliation which, as you say, it is not easy for a solicitor to do wholeheartedly.

4778. But he has got no sanction to enforce it. It is the people who are most hasty and unreasonable whom one most desires to have the benefit of such advice.—I would have thought that the solicitor did not need sanction. If he is sincere and eschews in his desire to guide his client into the course of reconciliation, he can without difficulty find plenty of ways of stalling divorce proceedings, to put it bluntly, and giving reconciliation a chance.

4779. Without losing his client's confidence?—I should have thought so.

4780. Do you not think that it would really be better if all persons, before they started divorce proceedings, had to discuss the case with some person like the marriage guidance counsellor, who would not put any pressure on them to be reconciled but would merely discuss their case with them?—I have already given my Council's reasons for dissenting from the principle of compulsory reconciliation procedures. We did appreciate the advantages of it, and from our purely material point of view, from the point of view of the advancement of our young organisation, it might have a great deal to commend it, but, on balance, looking at it from the point of view of the community as a whole, we are against it.

4781. I was not suggesting compulsory reconciliation proceedings, I was suggesting compulsory discussion of all the aspects of the case with a sensible person who might at once say, "Of course, you should get divorced at the earliest possible moment", if he thought that that was the only solution. You still do not think that that would be helpful?—My Council has not considered an arrangement of that kind, but I am certain that if such a scheme were introduced my Council would find no difficulty in operating it. It has no practical disadvantages.

4782. I want to ask one or two questions about the doctrine of adherence which you, I understand, wish to have imported into England. You would agree, from your experience of the work of your Council, that when, say, a woman is deserted by her husband, the tendency is to say, "Well, if he does not want me, I do not want him, and he was never much good anyhow"?—I do, Sir.

4783. And do you agree that that is a genuine feeling and helps her to maintain self-respect and to get through her troubles?—It might be.

4784. Whereas all the people who really know the wife know that she would have her husband back at once if he came and asked her?—I have known such cases.

4785. I am suggesting that that is really frequent?—Could you press on with the argument, Sir? I am not quite clear where this is leading.

4786. The point is this. When it comes to a wife, for example, making out her case for desertion, is she supposed to maintain what she believed at the time, namely, that she would not have her husband back, as she did not particularly want him and he was not much good as a husband anyhow? Or is she to say what her family believe to be true, namely, that of course she would have him back if he came and asked her?—These psychological subtleties, if I may say so, were not considered by my Council. We took our stand on the law in Scotland as it existed at the moment. We recognised its impotence on this particular point, and I am sure that had the point you have been making been put to our Council, we would have admitted that the psychological state of a deserted spouse does fluctuate and vary in something like the way you mention. But as we saw it the test is this: supposing the deserting spouse says "All right", is the deserted spouse on balance going to say "I never meant that", or to say "A good thing, I am delighted"?

4787. Have not all the difficulties I have been putting to you merely arisen from the fact that by the doctrine of adherence you are investigating a psychological reaction on hypothetical facts? In effect, the doctrine requires that you say to a woman who has been in love with her husband and cannot get him back and is very angry and unhappy, "Were you at all times ready to have him back"? If she told the truth, in many cases she would say, "I simply do not know", and the answer really is, is it not, that nobody does know until the husband asks her to have him back?—It is arguable that something like that takes place. I feel I am in the position now of exercising my own surmise on matters which my Council certainly never considered, but I feel their point of view, had this been mentioned, would have been that they would have been opposed to an excessively subtle analysis of a mental process, and they would have held to this comparatively simple test which may not be one hundred per cent. satisfactory because human affairs are not simple and clear cut. No deserted spouse probably ever felt for the whole three years, "I am one hundred

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per cent. willing to take my daughter back", but one has got to work, as Aristotle said, in general, in this as in all human affairs.

4768. But the necessity to take account of complicated mental states is introduced, is it not, by the doctrine of desertion? If you merely leave the deserted wife to her own mental reactions without worrying unduly about them and see whether, when the deserting husband asks her to come back to her, she will agree, and judge her by her actions, the whole thing becomes, does it not, perfectly simple?—Might I answer that by asking you to define your counter-proposal?

4769. My counter-proposal is this, that when a woman is deserted against her will by her husband, you do not worry about what she feels, her alternations of hope and anger, but you wait until the deserting husband asks her to have him back and then, if she refuses, you say, "Then you were not being deserted and that is the end of your case"; and, if she accepts, then that is obviously a reconciliation. Is not that quite a simple and workable method of dealing with desertion?—I think that is a difficult question to answer until it is translated into a legal proposition.

4790. (Chairman): Might I put what I understand the question to be? Mr. Justice Pearce is suggesting to you that the English system is less complicated, more simple and more workable than the Scottish system.—Possibly because of the novelty of it as presented by Mr. Justice Pearce, I could not, with respect, agree as to its simplicity.

4791. (Mr. Justice Pearce): I have only one further question. As I understood it, under Scots law, when a husband or a wife has been deserted for three years and then the other party wants to come back, the deserted party can refuse to have the deserter back and can subsequently obtain a divorce on the ground of desertion. What is the object of allowing a deserted spouse to insist on breaking up a marriage possibly years after the original desertion?—Could you re-state that question, Sir?

4792. The English situation is this: if at any time before the proceedings have actually started the deserted spouse is genuinely willing to come back to the deserted party, then the latter has no further cause for complaint because she—to take the case of a wife—has got her husband back if she wants him.—I think that the view on which my Council proceeded was that under the present Scottish system the deserted spouse has three years in which to mend his or her ways and that is quite enough.

4793. (Mr. Lawrence): Mr. Watson, I am not canvassing for one moment the merits of an import-export trade between North and South in this matter, but as an English lawyer I would like your help about the law of desertion in Scotland. Your memorandum cites one case, *Borland v. Borland*. Do I understand that case correctly in this way? Let us suppose that the desertor by the wife took place on Christmas Day, 1947—a purely hypothetical date. In 1948 she goes off to some State in the American Union, say, Nevada, and obtains a divorce against her husband on one of the grounds recognised by that State. For the purposes of the law of Scotland that would be an utterly worthless decree, would it not?—Yes, as I understand it.

4794. At the end of the triennium, that is to say, by Christmas Eve, 1950, the husband domiciled in Scotland is entitled to raise an action of divorce in the Court of Session in Edinburgh on the ground of desertion?—As I understand it, yes.

4795. And, when that suit comes on for hearing he has to satisfy the Court of Session not merely of the fact of desertion, but that throughout the whole of that triennium he has been willing to adhere to his wife, notwithstanding her conduct in going off to the United States and purporting to divorce him by an utterly worthless decree?—That is correct, Sir, and the hypothetical case which you have stated represents the facts in this case as I understand them.

4796. Very well, then, suppose that when the case comes on in the Court of Session in Scotland he says, "Yes, notwithstanding her conduct, I have been willing to adhere throughout the triennium ending on 24th December, 1950; on Christmas Day, 1950, I have totally changed my mind and I would not have her back at any price having regard to the way she behaved in Nevada". If he said

that, and his statement was accepted by the court, then he would be entitled to a decree?—That is my understanding.

4797. Suppose, on the other hand, that he said—what might I meet reasonable people appear to be the more likely—"After she had gone off to America and behaved like that I certainly could not consider having her back". If he had said that, as applying to his state of mind during the three years, that would have identified him to a decree? Decree would in fact have had to be refused?—That is the effect of the decision in *Borland*, as I understand it.

4798. Does it come to this, that if he had sworn something which few reasonable people would have believed, he would have obtained his decree?—Yes.

4799. And if he had told the truth as most reasonable people would see it, he would have failed to secure it?—That is correct.

4800. In those circumstances is it right to look upon a case of that sort as a case of hardship, or is it right to look upon it as a case which illustrates the need for reform?—I think, Sir, that is a matter of opinion. My Council, as we said in our memorandum, describes that as probably an extreme case—though I myself have in fact come across a very similar one and certainly a hard one—and the conclusion is a matter of opinion. That is our opinion.

4801. (Mrs. Jones-Roberts): Mr. Watson, you mentioned a figure of £750 which you received from the Scottish Home Department by way of grant. You will know that in the course of this year the grant for the English body has been cut. Has that occurred in your case as well? Does this £750 represent a smaller grant than you had before?—In the way you put it that question is not easy to answer exactly, because the figure of £750 is in fact a ceiling which has been in operation for, I think, two years. In fact, the exact amount of the grant is under negotiation at the moment between ourselves and the Scottish Home Department, and what the actual figure will be I cannot say, but it will not exceed £750. I should hazard that the figure we actually get in the current year will not be larger than the figure we got last year.

4802. Your position is that you could make good use of more?—That is our very strongly held opinion. We feel gravely handicapped for lack of financial support.

4803. Would you tell us what form the Council's educational activity—referred to in paragraph 4 (a)—takes?—I should explain that the Scottish Council works through the two constituent Councils, and we hope later on many others, and the educational work of the marriage guidance movement in Scotland is carried out principally by these constituent Councils. Partly it takes the form of sending out lectures to all kinds of organisations who want to receive information on subjects connected with preparation for marriage, speakers for Army courses and so on. These Councils also run short courses for those about to marry. Each course of discussions, lectures and so on, is attended by four or half-a-dozen couples.

4804. Do you consider that this work is best carried out by a voluntary agency, or do you think the State should take a larger part? It has been suggested to us that more should be done in the schools and in the universities.—My Council would, I think, take the view that the two forms of education are not mutually exclusive. More should be done in the schools, but that is not incompatible with a considerable extension of our educational activities on a voluntary basis.

4805. On the question of assimilation of the law of the two countries, would you like to particularise a little further? For instance, do you wish the three-year waiting period before divorce proceedings can be started, at present embodied in English law, to be introduced in Scotland?—I think that my Council would be in favour of that.

4806. Then, on the question of alimony after divorce, I think your views are quite clear that your law should be assimilated to the English law and that it should be possible to assure maintenance for a wife who has brought a petition for divorce. At present that is not the case in Scotland, I understand.—That is so, yes.

4807. I am interested to find that there is no provision in Scots law for maintenance for a wife after divorce. It occurred to me that that might deter people, more particularly those in the weekly wage earning group, from

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instituting proceedings. Would you agree that if you had a change in the direction you propose you might see a great many more petitions being launched?—That is possible; I think we would agree that that would be a possible consequence of that particular change, but on general grounds of justice we do feel quite strongly that that consequence, if it did occur, would have to be accepted.

4808. You refer to Mrs. White's Bill in paragraph 10 of your memorandum, and you say that one of the conditions laid down is that the pursuer should have abstained from having committed adultery.—The memorandum should not be held to imply that these proposals exist in Mrs. White's Bill. I think it is clear from the wording of the paragraph that certain conditions have been proposed but it is not suggested they have been incorporated in Mrs. White's Bill.

4809. Yes, because I think you would agree that one of the aims of that Bill was to regularise and legalise subsequent unions?—Yes, I would agree with that.

4810. The Bill evokes a new principle in that it looks to the breakdown of the marriage as the ground for divorce rather than to the commission of a marital offence. I take it from your memorandum that you cannot agree with that principle?—That is not correct. My Council were, I think, at pains not to commit themselves to any particular theoretical view, and therefore we would not wish to associate ourselves either with the view you put forward as being embodied in Mrs. White's Bill or indeed with any other theoretical view. It forms so part of our principles to tie ourselves to a particular view of that kind.

4811. (Mr. Macle): Mr. Watson, can you help me with regard to the work of your councilors? If they meet a case of desertion do they endeavour to bring about reconciliation?—Generally speaking, yes.

4812. That is the aim of your Council?—That is the normal aim of the Council.

4813. Do you find that because of the present law there is a reluctance on the part of couples who are apart to get together again and try to make a success of their marriage?—Yes, that is our experience, and I may say that that is a point which we discussed at considerable length when this memorandum was in its final stages. Our primary concern was that the law should in no way be such as to discourage reconciliation. The example you have given was in front of us.

4814. Have you referred to that in your memorandum?—We have not, and the reason for the omission was that we felt unable to make any constructive suggestion about it.

4815. Now will you direct your mind to adherence? Does the fact that under Scots law a spouse has the whole time to say, "I want him back", help reconciliation?—I think that it does, certainly—I would put it negatively, that it does not discourage reconciliation.

4816. But does it help your councilor in his endeavours to bring about a reconciliation?—It obviously does help the councilors in any instance where the assertion of willingness to adhere is sincere.

4817. Now we are starting the difficulties, are we not? Your councilor may gather, in the reconciliation process, that the pursuer is not genuine?—That is possible. I think I would like to borrow, if I may, from Mr. Justice Pearce and say that the experience of our councilors very often is that the state of mind of the pursuer is as nebulous, as vacillating, as he has described it.

4818. But in view of the desirability of reconciliation, do you not think that the requirement of willingness to adhere really is a disadvantage to your councilors because the parties cannot discuss the whole situation openly and freely with them?—I do not think that that position arises often. Our experience is that applicants for advice speak extremely freely. I cannot recollect any case which has been reported to me where a councilor had difficulty in obtaining a very frank statement of the applicant's attitude. Apart from other considerations, normally the applicants are so ignorant of the state of the law that it would never

occur to them to put up the barrier of reserve that you indicate; but, even apart from that, I would claim that our councilors do manage to elicit the confidence of the applicants to a high degree and get what the applicants believe to be the whole story.

4819. Would you agree with the contentions that have been put before this Royal Commission, namely, that if parties do come together genuinely to effect a reconciliation that should not break the three years of desertion?—When we considered that proposal considerable sympathy was expressed with it. We did not feel able to go so far as to embody it in the memorandum, but sympathy was expressed with it.

4820. One final point which follows from all that I have said. Assume that your Council were given some statutory rights as councilors for reconciliation purposes, would you agree that it would be essential with regard to reconciliation that you be given privilege?—We would think it highly desirable.

4821. You would not go so far as essential?—We discussed that point also, and the consensus of opinion was to put it no higher than highly desirable.

4822. (Mr. Macdocks): In paragraph 6 of your memorandum, you suggest that the court should be given power before disposing of cases of separation and divorce to make a remit to an individual or an approved organisation in accordance with a recognised reconciliation procedure. Have not your courts in Scotland got that power now?—May I repeat what I have said earlier, that the Scottish Marriage Guidance Council is a lay body and we rely on our legal advisers, and it may be that they have misled us on the point? Our understanding is that the courts have not such a power.

4823. In magistrates' courts in England it is a very frequent occurrence that before a separation order is made the case is adjourned, whether the parties like it or not, for them to be sent to see the probation officer. Is there nothing like that in Scotland?—Not so far as I am aware. (Lord Keith): I think that that is so. Of course the court might make a suggestion to the parties, but I do not think it could go any further.

4824. (Dr. Robertson): With regard to your proposal in paragraph 13 (b) that venereal disease should be recognised as a ground of nullity, has your Council evidence that there are fewer broken homes from this cause than there were, say, eight or ten years ago, owing to the more rapid treatment and frank attitude towards the problem? Perhaps Dr. Hart should answer that?—(Dr. Hart): I should say that the number is now very much fewer.

4825. Also that there are fewer children suffering, owing to ante-natal treatment?—I should think there are very few children suffering now.

4826. But you think that the number of such cases is still significant?—Such cases still do occur, but they are relatively few. I have had experience of such a case within the last two months.

4827. The number is definitely diminishing?—The number is definitely diminishing, it is very low.

4828. (Mr. Young): Mr. Watson, you propose in paragraph 15 of your memorandum to give the Sheriff Court in the area in which the wife resides jurisdiction in applications for aliment. How would you deal with the husband who wanted to vary the aliment? Would you make him go back to the original court, or would you give him a similar right to apply in the court of his residence? (Mr. Watson): I would have thought that he ought to be able to have a similar right.

4829. And if there is already a decree of aliment in another court and the wife wishes to get it increased, would you make her go back to the original court, or would you give her a right in the same way to raise the action where she happens to be at the time?—We would think it highly desirable that she should have the right of action in the area in which she is actually resident.

4830. May I deal with the question of cruelty which is discussed in paragraph 12 of your memorandum? Take the case, under Scots law, of a husband who has been cruel to a wife when he was perfectly sane and who then becomes insane and is incarcerated. In a case like that the wife of course could not get a divorce on the ground of cruelty?—That is so.

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4831. Take another case where a man has been cruel and has disappeared and cannot be found. Is not that another case where, according to the law of Scotland, the wife could not get a divorce on the ground of cruelty?—Quite correct.

4832. Take a third difficulty—I would like to have your views on it—is it not a very difficult thing in an action on the ground of cruelty for the court to accept a change of front on the part of the defender?—I think my Council's view would be that these changes of front would in many cases be likely to attract grave suspicion. We suspect that the changes of front are, as we say here, at best ephemeral, and at worst fictitious.

4833. On desertion you would agree that under the law as at present framed the risk of perjury is always present?—Generally speaking, yes. We have made it clear that we recognise that this particular requirement of the law is attended with perjury. That is our understanding, and it is open to criticism for that reason.

4834. If we adopted the English rule that objection would disappear?—That is true.

4835. I see that the function of your Council is to advise those about to marry and those who are already married. Can you give me any figures as to how many of each category consult you? Are there more of one than the other?—I can answer that with approximate statistics—without with detailed figures—quite easily. At the moment by far the larger side of our activity deals with advice after marriage. The proportion before marriage is still a minority, perhaps twenty-five per cent. of our work, but it is a minority portion to which we attach very great importance and which we hope to extend.

4836. Have you much professional experience in divorce work, Mr. Watson?—Not a very extensive professional experience. It is not one of my firm's specialities.

4837. Can you tell me this from your own experience? When people consult a solicitor as to their matrimonial difficulties and say they want a divorce, is not the attitude of most reputable solicitors that they investigate the whole domestic situation and in a sense act as reconciliation officers if they think there is any possibility of reconciliation?—I think, Sir, that I have already answered a very similar question to that with an emphatic affirmative. Yes, that is in my opinion what the majority of solicitors do attempt to do.

4838. In your own personal experience as a solicitor, when people come to consult you in their matrimonial difficulties, do you nearly always find that there have been attempts by members of the family and friends to effect reconciliation?—I would find it difficult to answer that question with a precise yes or no. I would say that friends and relatives almost always intervene in a matrimonial difficulty. But how far their interventions could be said to be categorically on the side of reconciliation is very difficult to say. Sometimes the well-meaning relative or friend acts as the honest broker and goes about the matter fairly directly, but more generally I should have thought the intervention is rather hesitant and *ad parit*. Attempts of some kind have usually been made, but not the kind of attempts that would have been made by a marriage guidance counsellor, because one of our counsellors, in contradistinction to a relative or friend, is completely detached. There is a personal element in that the counsellor is examining all the surrounding circumstances and getting to know the parties. But he has no emotional bias towards the parties, and thus we regard as absolutely fundamental about our work, namely, that our counsellors have the advantages which no friend or relative of the parties can possess.

4839. But I would be right in saying that your intentions are the same?—The intention certainly is the same as what you attribute to a friend or relation.

4840. (Mrs. Allen): May I pursue a point Mr. Young has been making a little further? You say a very small number come to the Council before marriage. Could you tell me the approximate number of people who come after marriage, not because there is any difficulty within the marriage, but because they just want to clear their minds on certain points?—The number of persons who come to clear up their minds is very small. In fact, so far I think it would be true to say that we have not yet arrived at the

technique of getting hold of the young married people who are in the doubtful category that you have spoken of. One suggestion which has been made recently is that we should extend our courses for engaged couples to newly married couples, and even that we should mix up the two. That is a question which we are investigating at the moment.

4841. That is one of the important points for your Council, because you are really established to prevent divorce and it is essential that the people should come to you early rather than late?—We most emphatically agree with what you say.

4842. May I ask if you have any suggestions as to how you could encourage people to come to your Council when they meet their first difficulties, and not when their difficulties are established and have become so deep-seated that legal action is the only solution?—I am inclined to think our answer would be simply this—by the Council's activities becoming known. That may sound rather intangible, but that is how any such organisation does spread and increase its influence, by achieving a reputation, by giving sound advice. That is a development which almost inevitably is slow, because there are for obvious reasons limits to the publicity which we can court or want to court. But the answer, in a sentence, is by gaining the confidence of the public. (Dr. Hart): Might I amplify a little what Mr. Watson has said? In Glasgow, recently we have definitely found that there are more couples—couples just recently married—coming to us to consult us in all matters. We have been quite struck by that. One other point I might make is that we are sending speakers out to youth fellowships and so on, and church organisations and allied associations, to speak to young married people, so that we are rather oversteering the ground to which Mrs. Allen has referred.

4843. In your memorandum you make very little reference to children, and children are, of course, very materially affected by marital breakdown. Do I take it that you are satisfied with the present machinery in regard to the custody and care of children, or have you any suggestions in that direction?—(Mr. Watson): Might I answer that question in two parts? First, my Council is not in the least unmindful of the importance of children in dealing with any marriage problem. In fact, the interests of the children bulk very largely indeed in the mind of any counsellor who is tackling any problem, but it was our view that we should restrict ourselves as far as possible to the question of husband and wife, because it is largely through deterioration in relations between husband and wife that the interests of the children suffer. We had further in mind that organisations concerned more directly than we are in the welfare of children would be taking up these questions with the Commission. On your second point, I think it would be true to say that we have not had brought to our attention any cases where the existing procedure in Scotland with regard to custody and access was not working well; generally speaking, it is working well.

4844. (Mr. Brown): How far is the lack of finance crippling the work of your Council?—One obvious way in which it is crippling our work is that we have a very rigid limit to the salary we can offer to a paid worker. At present the worker is in the singular, and the salary we are able to offer her is less than we think her ability justifies. As our work expands, if we were to take on an assistant, once again difficulties of finance would crop up at once. Secondly, at the moment our organising secretary is spending a very large proportion of her time on thinking out ways and means of raising money, instead of getting on with the job. May I add one further point? I have already referred to the courses for engaged couples. At the moment we are only able to offer a tiny lecture fee to those who are taking part in that. They are all busy people, and we are compelled to ask them that if they can see their way to waive such fees they should do so. In any event the amount of work done and the amount of time given to it is out of all proportion to the remuneration. If funds permitted we could multiply by three or four the number of such courses we run. These are a few obvious instances of our shortage of funds. At the moment both our constituent Councils have honorary secretaries who do the preliminary sifting work. They do that work gratuitously and that is, we feel, a gigantic

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and unfair burden and, without in the slightest degree disparaging the magnificent work they are doing, we feel that the time is bound to come very soon when the work will demand paid, full-time workers commanding salaries which at the moment we cannot look at.

4845. (Dr. Baird): Mr. Watson, in paragraph 9 of your memorandum, you say that one of the grounds on which divorce by mutual consent is advocated is that divorce by consent is, in fact, widespread today and that the legal profession are well aware that a large proportion of undefended actions for divorce on the ground of adultery are collusive, that is, that adultery, whether real or fictitious, is arranged in order to give the spouses the remedy they both wish. Have your Council considered this point? Do they agree that such a practice is prevalent?—From our own experience we believe it to be a fact, but it is something which it would be extremely difficult to prove. But we believe that it would be confirmed by the evidence of the vast majority of lawyers, whether solicitors or counsel, who deal with divorce matters.

4846. (Mr. Beale): May we go on from that point? In spite of that you are, I understand, against divorce by consent?—That is correct, Sir.

4847. The argument to which Dr. Baird has just referred is an argument in favour of divorce by consent?—It certainly is an argument in favour of divorce by consent because, as we ourselves argue in our memorandum, it is, generally speaking, desirable that the law should be brought into line with the facts. We feel that that is a strong consideration in favour of divorce by consent but, as we go on to say, it is outweighed by other considerations.

4848. It is only the adultery ground that produces collusive action?—That was what we had chiefly in mind. One can imagine that it happens in desertion also.

4849. The "hotel bill divorce"?—Chiefly, but it does also arise in desertion under the heading of fictitious willingness to adhere.

4850. Do you think it is better that people have got to go through that unpleasant procedure rather than being able to go to the judge and say, "We do not want to live together any more, may we have a divorce"?—Yes, on balance we do think so.

4851. Did it possibly occur to you that in addition to the other arguments against divorce by mutual consent there was the possibility that one spouse might virtually blackmail the other into coming and saying that he or she agreed to a divorce?—Yes, that certainly has been in our minds. I do not know entirely what you mean by blackmail, but divorce by consent might certainly lead one of the parties to exert certain forms of undesirable pressure on the other.

4852. The husband might say to the wife, who had decided that she wanted to remain with him for the sake of preserving a home for their children, "I will give you such a frightful time if you do not go with me to the judge and say that we want a divorce, that it will not be worth your while"?—We certainly do recognise that possibility.

4853. That is a danger?—And we would very gladly incorporate that as a further objection against divorce by consent.

(At this stage the Commission adjourned for a short period.)

4854. (Mr. Beale): Mr. Watson, in paragraph 18 you propose that facilities for pre-marital medical examination should be available under the National Health Service. I wondered why, in view of the fact that you had obviously not included in your memorandum a number of proposals that the National Marriage Guidance Council had included in theirs, presumably because you thought that the terms of reference excluded them, you thought it desirable to put in this particular recommendation about pre-marriage arrangements?—The answer which immediately comes into my mind, and I think it is the true answer, is that these matters do crop up quite often in our experience. This is not something which we believe as a matter of abstract principle, but it is something which does crop up quite often.

4855. Would it be fair to say that you felt it was very important that that should be dealt with at the same time as the other matters?—Yes, we do think that is urgent. We had in mind that amendment might be required to the National Health Service Act. The facilities that we hope for might not be arranged by means of amendment to the Matrimonial Causes Act, but the deliberations of this Commission would be a weighty occasion for amendment of the National Health Service Act on those lines and it seemed to us opportune to put it forward at this stage.

4856. I wonder if I might turn to something which has been puzzling me, as an Englishman, very considerably. In 1950 the number of divorces granted in Scotland was, I think, in the neighbourhood of 3,000, but when we come to actions before the Sheriff Court, which I understand is the only inferior court in Scotland that can deal with separation and aliment, there is a remarkably small number of actions. The Civil Judicial Statistics for Scotland for 1950 show that Sheriff Court actions relating to marriage in 1949 were 249 and in 1950 were 235, and actions of affiliation and aliment, similarly for the two years, 230 and 186. In England there would be a very much higher proportion of actions for separation and maintenance, and so on. I wondered if there were any explanation of the difference between the two countries?—I am afraid I have not quite followed your question. It relates to the respective proportions in the Court of Session and the Sheriff Court?

4857. Yes, one being divorce actions and the other being actions for maintenance and separation, which do not entail a final termination of the marriage—I speak subject to correction, but I think I am right in saying that there is in Scotland a concurrent jurisdiction for actions of separation in the Court of Session. I do not know how far that would go to account for it. (Lord Keith): I think, Mr. Watson, that the statistics show that there are only about two or three actions for separation in the Court of Session in a year, so you can ignore the Court of Session as regards separation.

4858. (Mr. Beale): It is very surprising to me, as an Englishman, to see what a low proportion of actions there are in the Sheriff Court compared with those of the Court of Session, a very small proportion of actions for maintenance, marriage subsisting, as against the number of actions for divorce.—That means that separation and aliment actions are something like one-tenth of the total number of divorce actions?

4859. Something like that.—What would be the corresponding ratio in England?

4860. Speaking from memory I think about half, probably not more, but I know it is a very much higher proportion, and I wondered if there were any explanation that you could help us with?—It is a very striking contrast, but I am afraid I have not any contribution to make there.

4861. It looks as if people when they are unhappy with their marriage in Scotland either put up with it or else got a divorce?—They go the whole way, it looks like that.

4862. I wondered if that had any bearing upon your work?—I certainly think it is a striking phenomenon that we ought to consider, but at the moment I have no ready-made explanation for it.

4863. One further question about the use of the probation service. Would you feel that the probation service would be a good alternative, not an exclusive alternative, to what you can provide in the way of help in effecting reconciliation?—Could you amplify what you have in mind there?

4864. As I think Mr. Maddocks said, in England cases are frequently adjourned for parties to see the probation officer to see if he can effect a reconciliation. I gather that there is no such arrangement in Scotland. Supposing there were an arrangement by which cases could be adjourned, or prior to the case coming forward people could be referred to some reconciliation agency, would you feel that the probation service would be a good service to use in addition to the Marriage Guidance Council?—My immediate reaction is that the probation officer is too closely associated with the whole machinery of justice. The name has associations which I would have thought would render it rather undesirable to entrust probation officers with this rather different commitment. A further

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point that occurs to me is the question of training. I do not know what type of training the average probation officer does in fact undergo. But it is becoming increasingly an article of policy with us that our counsellors should undergo a fairly comprehensive course of training, not merely in the technique of marriage counselling, which is, we feel, quite a specialised skill over and above the ordinary commonsense and sympathy and so on, which are required, but also he or she has to provide himself or herself with the fundamental background of information that any counsellor working at a commonsense level must have if he or she is to avoid making very stupid mistakes. Whether or not the probation officer is inevitably equipped with that sort of training I do not know, but if this work were entrusted to the probation officer it would be necessary to ensure that the probation officers have the sort of training which we think is indispensable for our counsellors. Some of our counsellors start off with a fairly liberal basic equipment of either professional experience or training as a social worker. In so far as they have not got that, we urge them, and it is becoming practically obligatory, to acquire that by means of the courses of training that we supply. So that any system of reference to a probation officer would have to take into account those factors.

4865. One of my reasons for asking that was because I have noted that you only have machinery available at the moment in two cities, and it seemed to me that you would have to spread enormously if you were going to be the only service that could be offered?—There are two answers to that. First, as things are, the results would be principally from the Court of Session in Edinburgh. Secondly, our movement is speeding. Centres are on the point of being formed in Aberdeen and Dundee, and in Ayr and Dumfries there is also movement on the way. That is the sort of development which we hope and believe is going to materialise pretty quickly. But I think the direct answer to your question is that, as the results will be from the Court of Session, we could make a start right away.

4866. Yes, but presumably a great many people do not live in Edinburgh or Glasgow?—Quite, though you appreciate, Sir, that the biggest population belt is along the Edinburgh-Glasgow axis, so that between Edinburgh and Glasgow we can cover a great deal of the population of the country, and if we had centres in Aberdeen and Dundee then, one way and another, we would cover quite a large proportion of the population of Scotland.

4867. (Lady Bragg): Mr. Watson, would you tell me exactly how this memorandum has been compiled? For instance, did you send a questionnaire to all your counsellors or is this memorandum really the opinion of the legal experts who are on your Council?—Perhaps I may explain how the document was put together. A committee was formed and held a preliminary discussion. After that a draft summary was prepared and a number of copies were circulated to each of the constituent Councils. I do not know exactly what Glasgow did, but Dr. Hart will be glad to answer that. So far as Edinburgh is concerned, copies of this abstract were circulated to all members of the Council and to all counsellors, who had an opportunity of offering comments either at a meeting or in writing. This abstract was then discussed at a meeting of the Edinburgh Council and quite substantial amendments and additions were sent to the drafting committee. Glasgow did the same, and then a draft of the final memorandum was prepared and discussed at a full meeting of the Scottish Council. As to how far it is a lawyers' production and how far it has the active sympathy of the lay members of the Council, I think Mrs. Gatts should speak. (Mrs. Gatts): I think that it has more or less the complete sympathy and agreement of all people who are working in this movement. It was circulated very widely and everyone was in full agreement with what we were putting forward.

4868. (Chairman): And, in fact, members generally did make suggestions, many of which were adopted?—Yes, that is so, and the original committee was not formed solely of legal people but also of lay and medical people.

4869. Do you wish to add anything as to Glasgow, Dr. Hart?—(Dr. Hart): No, I do not think so. I would endorse what the two previous speakers have said.

4870. (Lord Keith): Might I ask how many counsellors there are in Edinburgh?—(Mr. Watson): About twenty-five.

4871. And that is the body that considered the memorandum?—That, plus the members of the Council, somewhere about twenty-three members of the Edinburgh Council, which is the policy-making body, as opposed to the counsellors who do the field work. There is a slight overlap between the two, because some of the members of the Council, like myself, also do counselling work.

4872. What is the overlap? Can you tell me how many of the counsellors would be on the Council?—Only two or three at the very outside.

4873. (Lady Bragg): Then I should like to ask a question about finance. Do the people who seek marriage guidance pay, as they sometimes do in England, or is yours a completely free service?—It is a completely voluntary service in that not merely do the counsellors do their job for nothing, but that no applicant is obliged to pay anything at all. Applicants are invited to contribute towards the administrative expenses. As you can appreciate, that can mean something like a virtually compulsory levy, or it can mean a very voluntary donation. We have considered this very anxiously because it has a very material bearing on our body. I do not say that we could not pay our way if we were to extort fairly liberal voluntary contributions; we could by that means increase our income sensibly. But the Council's policy has been against that; it is a completely voluntary service and the income from applicants is extremely limited. We do invite applicants to contribute, but that is not frightfully easy to do, because until the Secretary or the counsellor has investigated the case fully, we do not know what the applicant's means are, and frequently they are very slender. Now suppose that the counsellor, at the end of a number, maybe from two to twelve, of consultations, invites the applicant to pay, realising that the applicant is of some substance. Then we feel that awkwardness arises in introducing the monetary element into a highly confidential and intimate relationship. The business men on the board, so to say, would be in favour of rather stepping up the pressure on applicants, but the other members are against it. The result is that donations are in the very strictest sense voluntary and our income from that source is very limited indeed.

4874. And lastly, do you feel that in time, if allowed to, you could, for reconciliation purposes, cover the whole of Scotland as the sole reconciliation agency?—Subject to the position of the members of the Roman Catholic Church, yes.

4875. Is that allowing for something that you gave some stress to, namely, the fact that you find solicitors are the first line of reconciliation?—That is so some extent true, but I am not making allowance for that. I do believe that we could, apart from the Roman Catholic Church, cover the whole of Scotland. In fact we do already cover a large area from Glasgow.

4876. (Sir Frederick Burrows): In paragraph 4, you say:—

"The objects of the Scottish Marriage Guidance Council and its constituent Councils may be summarised as follows:—

(a) to enable those about to marry and those who are already married, to obtain, if they so desire, guidance upon the ideals and obligations of marriage and the art of married life."

I fully understand the ideals and obligations, but would you please tell me how you explain the "art" of married life?—A great many people far better equipped than members of this Council have written many books on this subject, but what we are trying to get at in using that phrase is that in our view a happy marriage involves a special technique of its own. It is a relationship which can only be made to work by the acquisition of what at its lowest I would describe as a technique of adjustment and give and take and many other things like that. But to call it a technique suggests that it is a trick which can be learned out of a book, and what we have in mind is that it partakes of the nature of art, it is something more subtle and indefinable and not like playing scales at the piano.

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[Continued]

4877. Will you tell me how your counsellors acquire the technique to instruct people with marriages pending, or the newly married, in the art of marriage?—First of all, they ought to have acquired that art, if they are to get it across successfully, and I would have thought the chief answer to that was by having done it themselves. I myself would concede that somebody whose marriage had foundered, might from that experience be able to give the sort of advice that our counsellors are able to give as a result of their own successful experience in marriage. That is the equipment which we think our counsellors should if possible start from, but how are they to get that across? The answer is that they must be teachers either born or made, and teachers should, I imagine, start with some gift for teaching, but should also study the technique of teaching, and that is where our courses of instruction for counsellors come in. We do believe not merely that married life is an art but that counselling is also an art

or technique, and that it can only be acquired by either experience or instruction or both.

4878. (Mr. Flacker): We have been urged by some of the witnesses whom we have heard in London to introduce in England the Scottish practice of arrestment of wages in cases where it is difficult for a woman to get the maintenance that she ought to have for herself and her children. It has been said that arrestment is undesirable in principle and, secondly, that here in Scotland it causes hardship. On the other hand, other people have told us that the system works perfectly well. I wonder whether the experience you have derived in your Marriage Guidance Councils would help us on that point?—I do not think that my Council has sufficient experience of the procedure to be able to offer an opinion on its operation.

Chairman: Thank you very much for coming here to help us and for your memorandum.

(The witness withdrew.)

PAPER No. 61

MEMORANDUM SUBMITTED BY THE CITY OF GLASGOW SOCIETY OF SOCIAL SERVICE

This memorandum contains the opinion of the Society on the law of Scotland pertaining to divorce and has been based on the experience of the honorary law agents who operate the Society's free legal dispensaries.

1. Principles which form the basis of our opinions

(a) The marriage of a man and woman is not just a sacred union, but also a bi-partite contract, breach of which by one party should allow the other to rescind. The law should recognise more than at present the contractual element of marriage: it should be made more flexible so that consensual causes can be decided in the light of the particular circumstances more often than by virtue of statute or precedent. This would tend to make a divorce easier to obtain in some instances.

(b) The perjury and insincerity of evidence prevalent in so many divorce actions is a matter for grave consideration. In many cases a person seeking divorce would not succeed if he or she did not lead certain requisite formalities of evidence. We consider that these formalities should be modified and in some cases eliminated so that the law does not invite so many to perjure themselves in divorce actions.

(c) Every person who marries should appreciate what so doing the gravity and permanence of the obligations which he or she has voluntarily agreed to undertake. Since many husbands do not appreciate this, legislation should be introduced which would impress on them the seriousness of dishonouring the contract of marriage. This might tend to lessen the number of divorces.

(d) We do not think an attempt should be made to reduce the number of divorces in the country per annum at the expense of the welfare and happiness of aggrieved husbands and wives. Laws are made primarily for the benefit of those whom they govern and it is difficult to see where the benefit lies if a husband or wife, obviously permanently detached from his or her spouse, is unable to obtain a divorce because of the rigid and in some respects unreasonable requirements of our law at present.

If a more Christian attitude were adopted by the courts there would be much less suffering and the resulting reduced number of children reared in unhappy homes among dissatisfied families might have the effect of considerably reducing the amount of divorce actions in succeeding generations.

II. The various grounds of action which we consider should be revised

(a) Desertion

The requisite period of three years appears to be as satisfactory as any.

We consider it unreasonable, however, that a deserted spouse should be required to show his or her willingness to adhere during the whole of that period. This requisite

on the part of a deserted spouse is of course a safeguard against collusion and, in principle, desirable, but would a normal person who has been deserted without just cause be willing to return to the deserter after a period of two years or so and expect to resume cohabitation as if no breach had ever occurred or without fear of being again deserted? We do not think so.

It is our opinion that a period of eighteen months to two years after desertion is a reasonable period during which a deserted spouse should be required to prove willingness to adhere and that such period would be an adequate safeguard against collusion. It might be advisable that the requisite period could be varied in accordance with the circumstances of desertion, for instance, where it could be shown that the guilty spouse deserted with a member of the opposite sex but adultery could not be proved. The circumstances of desertion without just cause are various and there is no reason why the period of willingness to adhere should not vary accordingly.

It is the proving of willingness to adhere during the tritium that is responsible for perjury and insincere evidence and the consequent abuse of the law. In the Society's free legal dispensaries we have often been consulted by a deserted spouse, usually a wife who, having been deserted for a period of less than three years, wishes to seek a divorce. We know that many solicitors in such circumstances would thereupon advise their client to write to the other party and express willingness to adhere and the desire for the return of the deserter. In those circumstances such a letter could only be written with a mind to establishing grounds for divorce. A deserted spouse who would honestly condone desertion by the other, immediately on his or her return, should have no thoughts of divorce.

If the period of willingness to adhere were reduced it would not eliminate perjured evidence entirely but it would reduce it so substantially that insincerity in the witness box would be more easily detected by its being the exception rather than the rule.

(b) Cruelty

We consider it an evil that an innocent spouse must endure the cruelty of the other until the health of the former has been seriously affected before divorce on those grounds is available. The court should have power to divorce the parties if it becomes eventual detriment to health as a result of the marriage continuing.

The law makes no allowance in this respect for the variations in the constitutions of men and women, especially the latter. Some women can withstand the conduct of their husbands which would seriously affect the health of other women. Similar conduct therefore by the guilty party would give grounds for divorce in one case but not necessarily in the other.

In all divorce actions on the grounds of cruelty we think the fact that whether physical cruelty has been sufficient to justify divorce should be left to the discretion of the court and that medical evidence should be supplementary and not a *sine qua non* of such proceedings.

III. *Where in our opinion a divorce which would not at present be available is desirable*

Divorces should be granted where one party has shown by his or her conduct a total disregard for the obligations undertaken on marriage in general and for the welfare of the other party in particular. We suggest the following grounds for divorce should be introduced.

(a) *Perpetual drunkenness*

At present the degree of drunkenness must verge on insanity before grounds for divorce are available. This degree should be lessened and made much more reasonable.

(b) *Cruelty to children of the marriage*

Under this heading could be included, for example, a husband's disregard for his family in not allowing his wife a sufficient and reasonable proportion of his wages for the sustenance and maintenance of his family.

(c) *Persistent malicious slander of one spouse by the other*

We have had one or two cases where this was taking place, but in each case the health of the aggrieved spouse was not affected and no remedial action could be taken.

There are no doubt many sets of circumstances similar to the above three but, generally speaking, we consider that the principle stated in paragraph I (a) should be followed.

IV. *The principle of impressing on a husband from the start the gravity of his matrimonial responsibilities and thus, we trust, reducing the number of divorces could be effected by increasing the financial obligations of a husband from whom his wife has obtained a divorce.*

Although a wife is at present entitled to her legal rights in her divorced husband's estate, such rights in the majority of cases are worthless. We suggest that a wife on obtaining a divorce should be granted decree of alimony for herself and that such alimony should continue for life. This alimony ought to be able to be reviewed:—

(i) by the husband, (a) when his income decreases, but not when he incurs fresh obligations, e.g., by re-marriage and (b) on the re-marriage of the wife; (ii) by the wife when the income of her divorced husband increases.

It might also be deemed desirable that an innocent husband, incapable of supporting himself, should be allowed alimony from a guilty wife who has private means.

V. *If the law of divorce is altered the law pertaining to separation should be altered accordingly.*

(Received 26th December, 1951.)

EXAMINATION OF WITNESSES

(MR. JOHN KELSO, B.L. and MR. WILLIAM MUIR, representing the City of Glasgow Society of Social Service, called and examined.)

4875. (Chairman): Mr. Kelso, you are representing the City of Glasgow Society of Social Service. You are a Bachelor of Law and Honorary Law Agent of the Society's Western Free Legal Dispensary. I understand that you are accompanied by Mr. William Muir, who is Assistant Secretary of the Society.—(Mr. Kelso): That is so, my Lord Chairman.

4880. If you have an annual report I think the Commission would be glad to have it.—I think Mr. Muir can help on that point, my Lord. (Mr. Muir): I have three copies available at present, but I can quite easily furnish the Commission with sufficient to go round.

4881. If you can head them in at the conclusion of the hearing it will save us from asking questions about your activities. How many free legal dispensaries have you?—(Mr. Kelso): There are two operating in Glasgow.

4882. And any operating elsewhere?—No.

4883. You start in your memorandum with "Principles which form the basis of our opinions". I have only one question on that section of your memorandum. Would you turn to sub-paragraph (c), where you say:—

"Every person who marries should appreciate when so doing the gravity and permanence of the obligations which he or she has voluntarily agreed to undertake. Since many husbands do not appreciate this, legislation should be introduced which would impress on them the seriousness of dishonouring the contract of marriage. This might tend to lessen the number of divorces."

I think that the legislation which you suggest is embodied in paragraph IV, that is, where you recommend increasing the financial obligations of a husband from whom his wife has obtained a divorce?—That is what I had in mind, Sir.

4884. I will pass to your concrete suggestions in paragraph II. As to desertion, you are dealing there with the question of adherence during the whole of the period. That was very fully discussed this morning. Were you here this morning?—I heard part of the evidence, my Lord.

4885. Did you hear the discussion about adherence?—Yes, I heard quite a bit of it.

4886. I gather your opinion is contrary to the opinion of the Scottish Marriage Guidance Council, that you think

that the present requirement of adherence throughout the three years is too strict?—I do.

4887. In paragraph II (a), you say that it might be advisable that the requisite period of desertion "could be varied in accordance with the circumstances of desertion, for instance, where it could be shown that the guilty spouse deserted with a member of the opposite sex but adultery could not be proved". I follow the reason for that suggestion, but would it not introduce an element of uncertainty? It would leave the matter very much to the views of the individual judge?—I think that the point is underlined throughout the memorandum, that perhaps not sufficient is left to the discretion of the court at present.

4888. You mean that the judge might say in some circumstances, "I am satisfied you were willing to adhere for a year, and in the circumstances of the case that is sufficient", whereas in another case he might say, "I think you have not proved adherence for more than a year, and that I consider insufficient in the circumstances of this case". Is that what you have in mind?—It might well be that the judge might not require the pursuer in the action to prove willingness to adhere at all, as in the example which I have given.

4889. You would give a wide range of discretion to the judge?—I would in this case, yes.

4890. Now coming to paragraph II (b), in which you deal with cruelty, you say:—

"We consider it an evil that an innocent spouse must endure the cruelty of the other until the health of the former has been seriously affected before divorce on those grounds is available. The court should have power to divorce the parties if it foresees eventual detriment to health as a result of the marriage continuing."

Would it meet your view if the test were if there is an actual injury to health, or if the court is satisfied that there are reasonable grounds to apprehend an injury to health?—Yes, it would, my Lord. I think the whole object.... (Chairman): My impression is that in England and in Scotland that is the law.

4891. (Lord Kelvin): Let me give you an illustration, Mr. Kelso, and I think you will appreciate it at once. If a husband threatened to cut his wife's throat with a

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[Continued]

knife, without actually doing so, and she left him and brought an action of divorce on the ground of cruelty, do you think that any court would refuse the divorce?—assuming the court finds that it was a really serious threat?—No, my Lord. I was bearing in mind such an instance as you have just given, but any criticism of the grounds for cruelty is that there might well be cruelty over a period but not sufficiently serious to affect the wife's health.

4892. I see, you are limiting yourself to a certain type of cruel conduct?—Yes, perhaps physical cruelty.

4893. (Chairman): You think that the test that it must involve either injury to health or reasonable apprehension of injury to health is too severe?—Yes, I think it is, my Lord.

4894. You refer to the fact that some women are, to put it shortly, tougher than others and can stand conduct on the part of a husband which would affect the health of a woman of a less robust constitution. I think your suggestion is, it is not, that the test should be—what has been the result on that particular woman, or what is apprehended to be the result?—That is so.

4895. Under paragraph III (a), where you deal with perpetual drunkenness, you say:—

"At present the degree of drunkenness must verge on insanity before grounds for divorce are available. This degree should be lessened and made much more reasonable."

As you are aware, no doubt, drunkenness is not mentioned in the grounds available for divorce in the Divorce (Scotland) Act, 1938, but I am told that it comes under Section 1 (1) (c) of the Act because drunkenness was one of the vices which, according to the law and practice existing at the passing of the Act, could lead to the granting of a decree of separation *a mens et thoro*, that is to say, drunkenness of a certain degree. What you had in mind is that the degree required is too high?—Yes.

4896. Can you give any suggestion as to how that could be embodied in a statute? You say the degree should be lessened and made much more reasonable. Unless you adopt as the test drunkenness which amounts to cruelty, what alternative test do you suggest?—As I have already said, the Society's view is, generally speaking, that much more should be left to the discretion of the court. I think that this is another example where the court should be allowed to exercise more discretion. Is not the law as it stands at the moment that in order that divorce or separation may be obtained the guilty spouse must be guilty of drunkenness to such an extent that he or she cannot look after his or her own affairs?

4897. I will not pursue that with you, I will leave it to others who are more familiar with the law of Scotland. The next heading is "Cruelty to children of the marriage", under which you include a husband's disregard for his family in not allowing his wife a sufficient and reasonable proportion of his wages for the sustenance and maintenance of his family. If you made it a ground of divorce that the husband was not allowing his wife a sufficient and reasonable proportion of his wages, might that not encourage rather hasty resort to the court? Do you think that that would really be a good thing to introduce as a ground for divorce?—I do. I think that the effect on the children of the marriage should be borne in mind with a view, as I have said elsewhere in the memorandum, to perhaps reducing the number of divorces in successive generations.

4898. But a man is surely under legal obligation to make provision for his wife and family already. You want to introduce in addition the sanction that he can be divorced if he does not?—That is so, my Lord. I think that many children suffer as the result of the husband not providing sufficient money each week to maintain the children.

4899. Then at the end of paragraph III you say:—

"There are no doubt many sets of circumstances similar to the above three but, generally speaking, we consider that the principle stated in paragraph I (a) should be followed."

The principle stated in paragraph I (a), putting it shortly, is that the law should be made more flexible so that consistorial causes can be decided in the light of particular circumstances more often than by virtue of statute or precedent. Does not that simply amount to this: that

people will go before a judge not knowing what are the fixed grounds for divorce, but will say, "The circumstances of this case are such that you ought to grant a divorce"? The criticism I would suggest on that, first, that it is important that the law should be certain, so that people can get advice, before they go to the court at all, as to whether they have a chance of success; and secondly, that individual judges might differ widely in their views as to what were sufficient grounds in the particular case. You would get a great deal of confusion and perhaps an endorser by the parties to have their case heard before one judge rather than another. How would you deal with those two objections?—It is rather difficult to put into words or to draft a statute which would embrace what underlies this proposal. I think that our whole difficulty can be summed up in one phrase—incompatibility of the spouses. It might well be that the judges would differ as to the degree of incompatibility necessary to constitute grounds for divorce. But, generally speaking, I think that as long as judges were in some way directed only to grant a divorce if the parties were so incompatible that there was no chance at all of the marriage succeeding, then a divorce should be granted on that ground.

4900. That follows the lines of certain suggestions, made to us in the evidence we have received in England, that incompatibility should be a ground for divorce. I have one other question on the very last paragraph:—

"If the law of divorce is altered the law pertaining to separation should be altered accordingly."

I take that to mean that the grounds for separation should be the same as the grounds for divorce. Is that right?—No, I mean only in so far as the law of separation is at present the same as the law of divorce in respect of proof of cruelty.

4901. I see, there should be a corresponding alteration in the law of separation?—Yes.

4902. (Lady Bagg): I would like to ask a question on paragraph I (d). When you say, "If a more Christian attitude were adopted by the courts", do you mean that there should be a more tolerant or elastic attitude, or what am I to understand by that?—What is meant by that is that the law at present is much too rigid and, in many cases, where two spouses are clearly incompatible, the court cannot grant a divorce to the innocent spouse because of the rigid terms of the law. As a result of that there is, I can well imagine, much hardship in very many circumstances.

4903. You mean then "less rigid"?—I think that the law should be less rigid.

4904. (Mrs. Bruce): Paragraph III (b), in which you deal with cruelty to children, starts off by saying:—

"Under this heading could be included, for example, a husband's disregard for his family..."

Do you consider that physical cruelty to children should also be a ground?—Yes, most definitely.

4905. In your memorandum you give only one instance of cruelty—Yes, it is put very briefly indeed. The heading "Cruelty to children of the marriage" is meant to be taken...

4906. . . . in its broadest sense?—Quite, and one example, by way of elucidation, is given.

4907. (Mr. Beloe): Mr. Kelso, you suggest that cruelty to children of the marriage should be a ground of divorce. Why do you not make this merely a ground for separation?—There might well be a choice of separation or divorce.

4908. What value would come from divorce as opposed to separation?—One value I can think of is that it gives the wife and mother an opportunity to set up another home with another man, and perhaps give the children a much better chance. Financially speaking, a step-father to the children might be able better to maintain them than the mother could if she were left to her own resources.

4909. But you are at the same time suggesting, are you not, that the father shall be made to pay for the children?—I am. But in many cases the amount which the father could pay—say, in the case of a divorced father earning £5 or £6 a week—would not be as much as would look after satisfactorily his wife, who has divorced him, and the children of the marriage.

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[Continued]

4910. I was suggesting separation and not divorce in such cases?—I thought you were referring to my suggestion about alimony in paragraph IV.

4911. Of course that would apply on divorce. But you agree that a husband who is separated from his wife should pay for his wife and children, do you not?—That is the present law, as I understand it.

4912. He would probably be likely to pay more if separated than if divorced, might he not, because if he were divorced he might marry again and have less to spend?—That rather leads us back to the obligations of a divorced husband, which I have mentioned in paragraph IV. And on divorce it is rather difficult to reconcile the competing claims of the various parties.

4913. It is, but I have got your point. You feel that a step-father is an advantage when there is no father at home?—I do indeed. Of course, there is no assurance in either separation or divorce. Suppose a husband were ordered to alimony his wife or children after divorce had been granted against him. There is no assurance that that husband will continue to alimony his wife and children; he might well go abroad and contact might be lost with him altogether.

4914. Yes, but the majority would not go abroad, would they?—I think that a good number in circumstances such as those might very well disappear and not be traced again.

4915. They do now, do they, if separated from their wives?—Yes, I have had experience of that.

4916. (Dr. Robertson): Might I ask, would you include in your definition of custody to children persistent and frequent periods of desertion—perhaps comparatively short periods, but persistent intermittent desertion? Have you considered that at all?—That was not considered when the memorandum was prepared.

4917. But you have knowledge of such cases, have you?—I think that they might rather come within the ground of desertion rather than custody.

4918. You would not include it in this definition?—I do not think it would be included in that.

4919. May I ask if in your legal dispensaries you have had experience of this problem? Some witnesses have reported to us that a considerable number of deserted wives are getting relief from the National Assistance Board?—We have had experience of that, yes.

4920. To a considerable extent? Or does the Assistance Board deal chiefly with such cases on its own?—I would not necessarily know of every case in which I have been consulted in which assistance was being obtained from the Assistance Board.

4921. (Mr. Moss): Excuse my ignorance, but is a law agent equivalent to a solicitor?—Yes.

4922. And you have been giving your service entirely free of a department that gives legal advice on all subjects?—That is so, yes.

4923. What is the proportion of matrimonial cases in the work that you do?—I think we could answer that from the annual report. It is very high. It is probably around sixty per cent. of the total number of consultations.

4924. I suppose that the Rest Restriction Act comes fairly high?—Yes, but husband and wife problems are by far the greater.

4925. I ask you that because I want to know this: is your work finished when you have answered their legal problem?—I think perhaps I should speak only as regards husband and wife. Now that the Legal Aid Act is in force, once we have advised our clients whether they have or have not grounds for divorce, separation or whatever they want advice about, we usually refer them to the Legal Aid Secretary.

4926. For the purposes of getting a divorce?—To refer them in turn to a solicitor.

4927. For the purposes of getting a divorce?—Whatever they wish.

4928. Do you do nothing further in these cases?—We do not take cases as far as the courts of course, but we do give advice. We can only tell the client who comes to see us whether he or she has grounds for a divorce. We usually listen to the whole history and then advise them as we think best.

4929. Say the advice that you have to give them is that they come under one of these categories where you are asking for the law to be enlarged. In other words, they have not got a good case for divorce at the moment but they might have in the future; or there will always be a border-line case. What do you do?—If it were a border-line case I would certainly refer a client to the Legal Aid Secretary.

4930. I have asked those questions in that way for this purpose. I have been waiting for you to say whether you refer them to the Marriage Guidance Council, probation officers, or another department of your Society, for the purposes of reconciliation?—No, we do not.

4931. (Chairman): Do you simply tell your clients whether they have or have not a right to a divorce under the existing law, or do you ever say to them something like this, "Well, we think you have a right to a divorce, but is it really a good idea to go on with it"? Do you ever say that sort of thing?—I think perhaps I have.

4932. "Would you not just discuss it again with your husband or your wife?"—would you not say that sort of thing to your clients?—There are one or two instances where I have certainly sent a client back to try again. There have been some clients who have come to me for advice having been married for a matter of a week or three weeks at the most and who want to institute proceedings for divorce. Naturally I do not listen very seriously to it.

4933. It would be a very good social service, would it not, if you could be the cause of reconciling two people who are on the verge of a divorce?—Really my work in this Society is purely to give free legal advice. I did not set myself up as an adviser on marriages.

4934. I quite follow you. May I just ask this? Are all the persons who work in the legal dispensary who give advice members of the solicitors' profession, or do they include advocates?—They are all solicitors.

4935. (Lord Kelvin): On the question of desertion and adherence, with which you deal in paragraph II (a) of your memorandum, would it not be better just to do away altogether with this requirement of adherence rather than to retain it for eighteen months or a couple of years as you suggest?—If it were abolished, my Lord, would there not then be the possibility of a husband and wife voluntarily separating and subsequently seeking divorce?

4936. No, you see the period must start with genuine desertion. There must be a desertion to begin with against the will of the other spouse. You have given a very good illustration of the spouse who goes off with a member of the opposite sex. Let me assume that that has been done without the consent of the other spouse. That would be a plain case of desertion, would it not?—Yes, it would.

4937. You suggest in that case that there would really be no period during which the deserted spouse should be required to testify to a desire to adhere?—Yes, my Lord.

4938. For the very obvious reason that it would really be in many cases contrary to human nature for a wife to say, "I was willing to have my husband back although he went off with another woman". Of course I am not ignoring the fact that there are some wives who might be prepared to say, "I would like my husband back even in those circumstances", but there are other cases of women who certainly would take quite a different view. I am just wondering whether you are wholeheartedly set down to this eighteen months or two-year period which you suggest might be retained as a sort of residuum of the period of adherence at present required?—No, we do not suggest that a new period of willingness to adhere should be adopted of eighteen months or two years. We say in our memorandum that in a case where a wife is deserted by her husband and her husband goes off with another woman, then the wife should not be expected to be willing to adhere to her husband.

4939. But then, leaving aside that exceptional case and similar cases, you state in paragraph II (a):—

"It is our opinion that a period of eighteen months to two years after desertion is a reasonable period during which a deserted spouse should be required to prove willingness to adhere . . ."

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[Continued]

You are retaining in the normal case, shall I say, a period during which willingness to adhere must be spoken to on oath?—Quite, my Lord, but I think that there are probably the two cases, one where a husband merely deserts without the wife knowing that he has gone off with another woman, and the other where a wife actually knows that he has gone off with another woman.

4940. You are rather leaving it to the court to decide whether a given case is one in which no expression of willingness to adhere is required at all, or whether it is a case in which an expression of willingness for some limited period is required?—It is merely a division of desertion into two kinds. It does not seem to me to be any more complicated than that.

4941. The simplest way of all would be to abolish the adherence requisite, provided you start off with a clear initial desertion?—That would be one solution but, as I have said, I think that there should be borne in mind the question of collusion in divorce, and the possibility of spouses merely separating by agreement.

4942. (Mr. Flecker): In paragraph IV you suggest that a wife on obtaining a divorce should be granted decree of alimony for herself and that such alimony should continue for life. Let us take the case of a marriage where there are no children at all, where the wife is perfectly capable of earning her own living. Would you still, merely for the sake of bringing home to husbands their responsibilities, insist on quite so rigid a regulation as that?—It might have a double effect. It might discourage men already married from committing matrimonial offences, and it might also help to instil into the minds of men who are about to marry the obligations which they are undertaking.

4943. You do not think that this is a little bit behind the times, that the position which women have now come to occupy in society warrants a rather different

treatment from this, a more equitable treatment?—I also say in the memorandum that if the husband is unable to look after himself and the wife has private means, then she ought to support him if he has obtained a decree of divorce.

4944. I was rather thinking more of the case of the weekly wage earner?—In considering the question of alimony the court would take into account the wife's ability to earn.

4945. I see, that would be taken into account. My difficulty was that your memorandum did not make that clear.—Alimony is something which is left to the discretion of the court at present, and I would not interfere with that. The court must fix the amount of alimony. It is not something which can be fixed by statute.

4946. I think we have had evidence that there are many men in England who prefer to go to prison rather than pay maintenance which they think is improperly demanded of them. The result is that the wife gets nothing in the end.—If the alternative is prison for the man, that is fair enough. He is still being penalised.

(Chairman): We are very grateful to your Society for its memorandum and to you for coming here to help us. May I say from a personal point of view that what I said to you earlier was not intended to be any sort of criticism of the way in which you do your work? From the public point of view to give your advice on these matters for nothing is a very valuable social service. I do not think I should have made any suggestion as to what you should do or might have done in addition to it, and I entirely withdraw such a suggestion if it appears to have been made. (Mr. Mace): May I add my personal endorsement to what you have said? I do not desire to criticise in any way whatever.

(The witnesses withdrew.)

(Adjourned to Wednesday, 29th October, 1952, at 10.30 a.m.)

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ON
MARRIAGE AND DIVORCE

TWENTY-SECOND DAY

Wednesday, 29th October, 1952

WITNESSES

THE VERY REVEREND J. HUTCHISON COCKBURN, D.D.
SHERIFF J. R. PHILIP, Q.C.
THE REVEREND PROFESSOR W. S. TINDAL, O.B.E., D.D.
MRS. G. S. DUNCAN

} representing the Church of Scotland.

MISS M. B. SMITH
MISS A. STUART-COOPER

} representing the Scottish Division of
the National Federation of Business
and Professional Women's Clubs of
Great Britain and Northern Ireland.

MISS I. C. BUCHAN
COLONEL A. SPROT, D.S.O.

} representing the Scottish Branch of
the Soldiers', Sailors' and Airmen's
Families Association.



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TWENTY-SECOND DAY

Wednesday, 29th October, 1952

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PAPER No. 62

EXTRACT FROM A LETTER FROM THE VERY REV. DR. J. HUTCHISON COCKBURN, CONVENER OF THE SPECIAL COMMITTEE ON MARRIAGE AND DIVORCE

I send to you under separate cover:—

(1) thirty copies of the Report of the Special *Ad Hoc* Committee on the Royal Commission on Marriage and Divorce;

(2) thirty copies of a previous Report* of another Committee which, appointed to consider the question of the re-marriage of divorced persons, produced a useful and informative report on the Church of Scotland's doctrinal position.

The Committee on Re-marriage etc. (under (2) above) had expected to report fully to the General Assembly just ended on the doctrinal issues, and to ask approval of its findings, which would have determined the Church's attitude to the re-marriage of divorced persons.

But the Committee on Re-marriage etc. (henceforth called the Special Committee, the Committee whose findings I now send being henceforth called the *ad hoc* Committee) found itself unable to report definite findings to the Assembly of 1952. This was due to the emergence within their deliberations of views on the Christian doctrine of marriage, which, if accepted, would have altered the Church of Scotland's doctrinal position with regard to marriage. The scholastic authority behind this proposed altered view, and the depth of the theological position propounded, was such that the doctrine which was urged could not be lightly dismissed.

The Special Committee therefore asked the Assembly, 1952, to add to their number additional members of recognised theological competence, in order that at a future

Assembly a report would be presented which would carry the weight necessary to enable the Assembly to come to a decision on the issues.

The question of the re-marriage of divorced persons, it will be seen, has forced the Church to reconsider its doctrine of marriage, and for the moment the Church of Scotland is in the process of finding out whether, in the light of its understanding of Scripture, some change should be made in its doctrinal position.

This means that the *ad hoc* Committee, in giving evidence before the Royal Commission, must take cognisance of this continuing discussion in the Church. While it can say what the Church has believed in the doctrine of marriage up to the Assembly of 1952, it has no means of knowing what the Church may declare its doctrine to be, within the next few years.

It will be noted that the doctrinal position stated in Section 1 of the *ad hoc* Committee's Report is purely factual and has been accepted by the Assembly (1952) as "a general statement of the doctrinal position of the Church of Scotland in regard to marriage and divorce" (Section 2 of Deliverance).

The other statements were approved, with one exception, according to the Deliverance at the end of the Report. The exception is Section 3 (a) (i) which, as you will see, was amended to make clear the Assembly's view that marriage guidance should not be "a national welfare service publicly financed", but a voluntary service supported by Government grants.

* This Report is not reproduced.

(Dated June, 1952.)

married persons during the war and in the post-war years has been attributable to external circumstances—e.g., enforced separations, economic difficulties, the housing shortage, which not merely induced disharmony, but also subject the parties to severe physical and emotional strains. Limited statistics obtained by the Church and Nation Committee in 1959, for example, revealed a certain ratio in the causes of matrimonial unhappiness, the percentages in Edinburgh and Glasgow showing a certain correspondence:—

	Edinburgh	Glasgow
	per cent.	per cent.
Disharmony	74	80
Pre-marriage advice acquired ...	12	12
Other circumstances (e.g., housing)	14	8

3. The need of advice and help is widely known to ministers of the Church, who are often approached by members on their own initiative, and the Church can, and does, undertake much work of advice and conciliation where opportunities can be made to offer themselves. The Church has in view the publication of a brochure on marriage. Further, many ministers give systematic instruction to persons about to marry, and opportunities are also taken of instructing youth organisations. Ministers are frequently able to give intimate help to married persons in the course of their pastoral duties. But these measures are not, in themselves, adequate. Some Church members are shy of approaching their minister in such problems. Persons outside the Church are untouched by its pastoral help. There are many problems—medical, psychological, legal, economic—as in which a minister may not be qualified to give advice.

4. The Church has welcomed, and given active support to, the Scottish Marriage Guidance movement. While the Marriage Guidance movement began in England in 1938, it was not until October, 1946, that the first Scottish Council was established in Edinburgh. A second Council, in Glasgow, was inaugurated in December, 1947. More recently, in 1949, a Scottish National Council was set up, to co-ordinate the other local Councils. The Church and Nation Committee has reported regularly to the General Assembly on the progress of the movement, and the Church of Scotland is, along with other Churches and public bodies, officially represented on the Councils.

5. The Church suggests the following practical changes in the law:—

(a) *Marriage welfare.* The Church is convinced that the earlier help can be given in marriage difficulties the more likely it is to succeed. Therefore, in order that marriage guidance may be strengthened and become an efficient nation-wide service, legislation should be passed (i) to convert the secretarial and administrative organisation of marriage guidance into a national welfare service publicly financed; and (ii) to secure that those experts who give medical, psychological, legal, and other professional advice in the course of such service are remunerated from public funds. On the other hand, the members of Councils, and the lay counsellors, who advise applicants in the first instance, should continue to give their services voluntarily, though the composition of the Councils might well be determined by a scheme having legislative authority. The Church further submits that this service should not be in any way connected with the law courts. It should rather be modelled on the lines of a National Health Service, and simply be available to those in the community who desire to use it. While, since the Denning Report, the Scottish National Council has received a limited grant from public funds, this is not sufficient. The financial anxieties of the Councils, which depend partly on voluntary support, hamper them greatly in the discharge of their proper function and in the extension of their work.

(b) *Judicial conciliation.* Power should be given to the Court of Session and Sheriff Courts, in the exercise of their discretion, to refer matrimonial cases to (i) a welfare officer (of the type indicated in the Denning Report), or (ii) an experienced person drawn from a special panel, for the purposes of endeavouring to effect conciliation between the spouses and to safeguard the interests of any children of the marriage under the age of sixteen, and, if need be, of reporting back to the court. Power should also be given to treat such references and reports as confidential. Procedure of this type exists in the Channel Islands. Article 9 of the Law

relating to Divorce and to other Matrimonial Causes for Guernsey ratified by Order in Council on 3rd July, 1939, is in these terms:—

"Provision for Reconciliation in Proceedings for Divorce or Separation.

(1) Where any person

(i) has petitioned the Court for Matrimonial Causes for a decree of divorce or judicial separation; or

(ii) has applied to the Ordinary Court, or to the Court for Matrimonial Causes, for the granting of a judicial separation by consent; or

(iii) has applied to the magistrate for a separation order;

then, unless the court seized of the case or the magistrate, as the case may be, is satisfied that an attempt has been made to reconcile the parties or that such an attempt is impracticable or undesirable, such court or the magistrate, as the case may be, for the purpose of affording an opportunity of reconciliation between the parties, may adjourn the case and may, with the consent of the parties, nominate one or more persons to act as mediators between the parties with a view to their reconciliation.

(2) The Court for Matrimonial Causes shall prepare and maintain a list of persons of repute willing to serve as members of a Panel of Mediators and in that capacity to be called upon by the court or magistrate from time to time to endeavour to reconcile married persons as provided for in paragraph (1) of this Article.

(3) Any petitioner for divorce or petitioner or applicant for judicial separation or applicant for a separation order, who, in a case in which the court or magistrate is of opinion that an attempt should be made to reconcile the parties, refuses to go before a mediator shall, unless the court or magistrate, after considering the circumstances of such refusal, otherwise directs, be disentitled to proceed with the said petition or application.

(4) Where an application is made to the magistrate for a separation order and the magistrate is of opinion that an attempt should be made to reconcile the husband and wife before the application is finally adjudicated upon, he may, if he thinks fit, make a separation order to take effect during such interval as he directs for the purpose of the making of endeavours to effect such reconciliation."

Article 14 of the Matrimonial Causes Rules for Guernsey, 1945, provided:—

"Application for Appointment of Mediators.

(1) Where any person has presented a petition to the Court for Matrimonial Causes for a decree of Divorce or judicial separation such person or the respondent to the petition may, at any time before the suit is listed for trial, make application to the court for the appointment of one or more mediators to act between the parties.

(2) The court on making such appointment give such directions as to the listing of the suit for trial as it sees fit."

(c) *Legal aid.* At present legal aid is available only for litigation and not for advice. By far the greatest number of assisted cases are matrimonial. Without the provision of legal aid for advice a poor person, it is believed, will tend to proceed straight to the remedy of divorce without considering sufficiently other possible courses. Legal aid should therefore be made available not merely for litigation, but also for advice.

SECTION III. GROUNDS OF DIVORCE, OF SEPARATION, AND OF NULLITY

1. New grounds of divorce

The Church is not aware of any general public demand in Scotland for further new grounds of divorce. In particular there has been no general public demand in Scotland either for (a) divorce by mutual consent, or, it is thought, for (b) divorce after voluntary or judicial separation for a term of years. Divorce after a period of voluntary separation would really be a mere variant of a divorce by mutual consent, the "remedy" being delayed instead of immediate. Divorce after judicial separation

* See Q. 462.

is already available to the spouse holding the decree of separation—*Divorce (Scotland) Act, 1938, Section 4; Wilson v. Wilson, 1939, S.C. 102*. But if the spouse whose conduct had led to the judicial separation was permitted, after a period, to use that *adverse* judgment as a step to obtaining divorce, the offending spouse would be deriving rights from his or her own wrong. Such new forms of divorce would, it is submitted, strike at the very institution of marriage itself both as resting on Christian teaching and as understood in the common law of the land, whilst, at all events in its basic principles, still depends on Christian teaching. Thus, *Watson on Husband and Wife* defines marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others, entered into in some form recognised by the *lex loci* as sufficient". While sympathising deeply with hard cases the Church submits that any remedies for particular cases which tended to strike at the institution of marriage itself would be productive of infinitely greater harm than good; and, indeed, the ultimate consequences for society could not fully be predicted.

Moreover, the Church submits that, in view of the very recent extension of the grounds of divorce in 1937 and 1938, it would be specially impossible to make further extension at the present time, and that now is the time rather to cure defects in the existing grounds of divorce than to add further grounds. Further, existing social conditions are, to a considerable extent, affected by unsettlement due to two major wars, and were the law to be radically altered at the present time, undue weight might be given to factors merely of a temporary nature.

2. Existing grounds of divorce

The Church submits that, if the existing grounds of divorce are to remain, the following changes should be made:—

(a) *Divorce for cruelty.* At present, under Scots law, divorce for cruelty is only granted if the court at the date of the proof is satisfied that the pursuer cannot with safety resume cohabitation—*Dunlop v. Dunlop, 1950, S.C. 227*. The same rule applies where the particular form of cruelty is habitual drunkenness, under the Licensing (Scotland) Act, 1933—*Cox v. Cox, 1952, S.C. 352*. It is submitted that the rule, whether applied to cruelty or to habitual drunkenness, bears hardly on the pursuer who may be deprived of a remedy merely because he or she has been exceptionally patient, and waited a long time before suing, or because the defender shows apparent (though in the result only temporary) improvement. Moreover, the rule bears most heavily on the victim of mental cruelty, and is unrealistic in cases of habitual drunkenness. It is submitted that if the pursuer has established such cruelty as would, at the date of its occurrence or at the subsequent separation of the spouses, have justified divorce, it should not be necessary for the court, at the date of the proof, also to be satisfied that the person cannot with safety resume cohabitation.

(b) *Divorce for insanity.* It may be difficult to find any justification, in accordance with Christian teaching, for divorce on this ground. In this type of divorce, differing from all the others at present existing, there has been no conceivable matrimonial offence, and no vow broken. All that has happened is that one spouse has suffered the greatest of all misfortunes—the loss of reason. The loss of one spouse's reason, in some cases, may well result from the cruelty of the other; yet the latter will have the right to divorce the one he or she has ill-treated. The loss of reason, in other cases, may well be precipitated by fear that increased mental instability will draw with it also the penalty of divorce. It is doubtful, moreover, if insanity for the five years' period at present in force is sufficient, according to the latest medical opinion, to preclude all hope of recovery.

It is right, however, to state that in 1937-38 the General Assembly of the Church of Scotland gave general approval to the grounds of divorce in the *Divorce (Scotland) Bill*, including this ground.

If this form of divorce is to remain, then it is submitted that it should be available whether the issue defender has been certified or not, provided always that his or her insanity throughout the statutory period is established to the satisfaction of the court.

(c) *Divorce for desertion.* The Church submits that malicious denial of sexual intercourse persisted in for 1862

three years should constitute desertion within the meaning of the *Divorce (Scotland) Act, 1938*, and that the rule in *Good v. Good, 1927, S.C. 177*, should, in effect, be restored and *Leavis v. Leavis, 1930, S.C. (H.L.) 1*, over-ruled.

3. Existing grounds of separation

The Church submits that cruelty to justify separation should be determined on the same proposed new basis as cruelty to justify divorce.

4. New grounds of nullity

The Church submits that the new grounds of nullity of marriage introduced for English law by Section 7 of the *Matrimonial Causes Act, 1937*, should, subject to the conditions laid down therein, be applied to Scotland—namely, that a marriage shall be voidable on the grounds:—

(a) that the marriage has not been consummated owing to the wilful refusal of the defender to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective, or subject to recurrent fits of insanity or epilepsy; or

(c) that the defender was at the time of the marriage suffering from venereal disease in a communicable form; or

(d) that the defender was at the time of the marriage pregnant by some person other than the pursuer.

5. Existing property rights

Under the existing law of Scotland, for the purpose of determining property rights in the case of divorce on all grounds other than insanity, the "guilty" spouse is, in general, treated as dead *vis-à-vis* the "innocent" spouse. On the one hand, the guilty spouse forfeits all rights to which he or she would have been entitled by virtue of the marriage. On the other hand, the "innocent" spouse is entitled to rights to which he or she would have succeeded on the death of the "guilty" spouse. There is one exception, however: that a husband who divorces his wife is not entitled to *jur relict*—*Eddington v. Robertson (1892) 22 S. 430*. Further, on the dissolution of the marriage, any obligation of aliment comes to an end. These rules, it is submitted, are now out of date. They involve too rigid a differentiation between "guilt" and "innocence". They make no allowance for the fact that the great majority of the community are without capital, either heritable or moveable, and are dependent on income only from salary or wages. The slight discrimination still subsisting between husband and wife dates from a time when, in law, the husband was treated as the "dominant person". It is submitted that, now, the law should be so altered as to confer on the court power to award aliment on the dissolution of a marriage, and also to regulate property rights and vary settlements.

6. Obsolete legislation

The Church submits that the Scots Act, 1902, C. 11 (imposing certain disabilities on a divorced wife who contracted marriage with her paramour), and 1600, C. 20 (declaring null any marriage contracted by a divorced spouse with a paramour named in the decree of divorce), no longer serve any useful purpose and should now be repealed.

7. Jurisdiction of the courts

The Church submits that the jurisdiction of the Scottish courts in matrimonial causes should remain as at present. In particular, it considers that divorce should be reserved for the Court of Session, on the grounds that this ensures the greatest uniformity in the administration of the law, and that the volume of work has not proved too great for that court, by itself, to undertake.

SECTION IV. THE FORBIDDEN DEGREES IN MARRIAGE

The official position of the Church of Scotland with regard to the above rests upon Chapter 24, paragraph 4, of the Westminster Confession of Faith, which reads as follows:—

"Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the word; nor can such incestuous marriages ever be made lawful by any law of man, or consent of parties, so as these persons may live together as man and wife. The man

may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer in blood than of her own."

The scriptural passage referred to is Leviticus xviii. 6-18, and for many years this was the basis of the forbidden degrees in civil law also, as is shown by an Act of the Scots Parliament, 1567, Chapter 15.

In more recent years, however, Parliament has passed Acts which make the following unions legal:—

(1) In 1907 marriage between a man and his deceased wife's sister was permitted.

The Church of Scotland dealt with this matter in 1910, but only to the extent of passing a Declaratory Act, which set forth "that marriage between a man and the sister of his deceased wife shall not be visited by any ecclesiastical censure or disability either upon the minister proclaiming the banns for the marriage or celebrating it, or upon the parties contracting it." The Church thus left ministers entirely free to celebrate or to refuse to celebrate such marriages, and also relieved persons who entered on them from any disability to cohabit or loss of Church privileges.

The United Free Church of Scotland had, in 1908, passed an Act to the same effect.

(2) In 1921 Parliament decided to regard as legal the analogous case of the marriage of a woman with her deceased husband's brother.

Neither Church made any pronouncement at this stage, but it may be assumed that the liberty given by their respective Declaratory Acts mentioned above would be held to cover this relationship.

(3) In 1931 Parliament made an addition to the Acts of 1907 and 1921 with effect that:—

"No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, or between a man and his deceased brother's widow, or between a man and any of the following persons—that is to say:—

1. his deceased wife's brother's daughter,
2. his deceased wife's sister's daughter,
3. his father's deceased brother's widow,
4. his mother's deceased brother's widow,
5. his deceased wife's father's sister,
6. his deceased wife's mother's sister,
7. his brother's deceased son's widow,
8. his sister's deceased son's widow,

within the realm or without shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity."

This enactment, therefore, is retrospective in its force.

It should be noted, in view of the question asked by the Royal Commission, that the 1907 and 1921 Acts state that divorce is not equivalent to the death of a spouse. Therefore a man may not marry the sister of his divorced wife while the latter is still living, nor may a woman marry the brother of her divorced husband so long as the latter survives. The Royal Commission may wish to hear what the Church has to say on this particular point.

It might well be emphasised that the Church should resist any suggestion that marriage with a divorced spouse's sister or brother should be permitted. For example, a man might wish to marry his deceased wife's sister for worthy reasons. On the other hand, a desire to marry his wife's sister, were it legal to do so, after being divorced from his wife, might lead him to procure a divorce for this purpose. Relaxation of the law in this respect, therefore, might constitute a further threat to the preservation of marriage and the unity of the family circle.

A table of kinship of affinity is appended. It should be understood that this table relates merely to what has been declared by civil law, and that the Church has only declared that no censure or disability shall be incurred by persons contracting marriages specified by us in the table, these being the relationships no longer reckoned by the civil law as "forbidden degrees". The year stated in brackets is that of the Act of Parliament which made such marriages lawful.

A man may not marry his:—

1. Grandmother.
2. Grandfather's widow.
3. Deceased wife's grandmother.
4. Father's sister.
5. Mother's sister.
- * 6. Father's brother's widow (1931).
- * 7. Mother's brother's widow (1931).
- * 8. Deceased wife's father's sister (1931).
- * 9. Deceased wife's mother's sister (1931).
10. Mother.
11. Father's widow.
12. Deceased wife's mother.
13. Daughter.
14. Deceased wife's daughter.
15. Son's widow.
16. Sister.
- * 17. Deceased wife's sister (1907).
- * 18. Brother's widow (1931).
19. Son's daughter.
20. Daughter's daughter.
21. Son's son's widow.
22. Daughter's son's widow.
23. Deceased wife's son's daughter.
24. Deceased wife's daughter's daughter.
25. Brother's daughter.
26. Sister's daughter.
- * 27. Brother's son's widow (1931).
- * 28. Sister's son's widow (1931).
- * 29. Deceased wife's brother's daughter (1931).
- * 30. Deceased wife's sister's daughter (1931).

PART II

Extract Deliverance of the General Assembly of the Church of Scotland on the foregoing Report

At Edinburgh, the twenty-sixth day of May, One thousand nine hundred and fifty-two years.—

Which day the General Assembly of the Church of Scotland being met and duly constituted,—inter alia,

The General Assembly called for the Report of Special Ad Hoc Committee on Marriage and Divorce, which was given in by the Very Rev. Dr. J. Hutchinson Cockburn, Co-convener.

It was moved and seconded—

1. The General Assembly receive the Report and thank the Committee, especially the Co-convener.

2. The General Assembly accept Section I of the Report as a sufficient statement of the doctrinal position of the Church of Scotland in regard to marriage and divorce.

3. The General Assembly, being anxious that all possible steps be taken by Church and State, each in its own sphere, for the safeguarding of marriage, approve of the practical changes in the law proposed in Section II of the Report, viz:—

(a) that legislation be passed—

(i) to convert the secretarial and administrative organisation of marriage guidance into a national welfare service publicly financed; and

(ii) to secure that those experts who give medical, psychological, legal, and other professional advice in the course of such service are remunerated from public funds, but that, in other respects, marriage guidance should remain a voluntary service, and that this service should not in any way be connected with the Law Courts.

(b) that power be given to the Court of Session and Sheriff Courts, in the exercise of their discretion, to refer matrimonial cases to:—

(i) a Welfare Officer (of the type indicated in the Denning Report), or

(ii) an experienced person drawn from a special panel,

for the purposes of endeavouring to effect reconciliation between the spouses and to safeguard the interests of any children of the marriage under the age of sixteen, and, if need be, of reporting back to the Court, such

PAPER No. 63. MEMORANDUM SUBMITTED ON BEHALF OF THE CHURCH OF SCOTLAND
20 October, 1952] THE VERY REV. J. HUTCHISON COCKBURN, D.D., SHERIFF J. R. PHILIP, Q.C.,
THE REV. PROFESSOR W. S. TINDAL, O.B.E., D.D., AND MRS. G. S. DUNCAN

references and reports to be treated as confidential unless the Court directs otherwise:

(c) that legal aid be made available not only, as at present, for litigation, but also for advice.

4. The General Assembly are opposed to any extension of the grounds of divorce, and in particular to an extension to (a) divorce by mutual consent, and (b) divorce after voluntary or judicial separation for a term of years, being persuaded that such new forms of divorce would harm the institution of marriage itself.

5. The General Assembly are of opinion that, under existing grounds of divorce:—

(a) Divorce for Cruelty (including habitual drunkenness) should be granted by the Court if the pursuer has established such cruelty on the part of the defender as would, at the date of its occurrence or at the subsequent separation of the spouses, have justified a divorce, without the Court requiring to be satisfied that, at the date of proof, the pursuer cannot with safety resume cohabitation.

(b) Divorce for Insanity, while approved by the General Assemblies of 1937 and 1938, differs from all other types of divorce in that no vow has been broken, and should therefore be open to reconsideration in the light of experience, especially in the case of significant medical advance in the cure of the insane; but, if this type of divorce remains, it should be available whether the insane spouse has been certified or not, providing always that his or her insanity throughout the statutory period is established to the satisfaction of the Court.

(c) Divorce for Desertion should be granted for malicious denial of sexual intercourse persisted in for three years, as constituting desertion within the meaning of the Divorce (Scotland) Act, 1928.

6. The General Assembly are of opinion that cruelty to justify separation should be determined on the same proposed basis (5 (a) of this Deliverance) as cruelty to justify divorce.

7. The General Assembly resolve to submit to the Royal Commission their view that the new grounds of nullity of marriage introduced for English law by sec. 7 of the Matrimonial Causes Act, 1937, should, subject to the conditions laid down therein, be applied to Scotland.

8. The General Assembly, considering that the rules governing property rights in cases of divorce on all grounds other than insanity are out of date, resolve to suggest to the Royal Commission that the law should be so altered as to confer on the Court a discretionary power to award

alimony on the dissolution of a marriage, and also to regulate property rights and vary settlements.

9. The General Assembly submit that the Scots Acts, 1592, c. 11, and 1603, c. 20, should now be repealed as no longer serving any useful purpose.

10. The General Assembly are agreed that the jurisdiction of the Scottish Courts in matrimonial causes should remain as at present, and in particular that divorce should be reserved for the Court of Session.

11. The General Assembly, having considered the Table of Forbidden Degrees in Marriage, as amended by Act of Parliament in 1907, 1921 and 1931, oppose any change in the Forbidden Degrees in Marriage as at present existing.

12. The General Assembly authorize the *Ad Hoc* Committee to send four of their members to represent the views of the General Assembly to the Royal Commission on Marriage and Divorce, if invited to do so, and to offer to the Commission the above and other appropriate findings of the General Assembly.

13. The General Assembly instruct the Committee to report diligence to next General Assembly.

It was moved, seconded, and agreed as an amendment to Section 2—

For "sufficient" read—general.

It was moved and seconded as an amendment—

That Section 3 (a) (i) read—That legislation be passed to enable sufficient grants from public funds to be made for the secretarial and administrative organisation of marriage guidance.

On a vote being taken "For" or "Against" this amendment, it was carried "For", and the General Assembly resolved accordingly.

It was moved, seconded, and agreed—

That as an addendum to Section 12 read—and also make known to the Royal Commission that there is a body of lay and ministerial opinion which believes that the Church should not recognise divorce at all or at most recognise it only on grounds of infidelity.

The Deliverance, as amended, was then agreed to.

Extracted from the Records of the General Assembly of the Church of Scotland by

THOS. CALDWELL,

CL. Ecol. Sec.

(Dated May, 1952.)

EXAMINATION OF WITNESSES

(THE VERY REV. J. HUTCHISON COCKBURN, D.D., SHERIFF J. R. PHILIP, Q.C., THE REV. PROFESSOR W. S. TINDAL, O.B.E., D.D., AND MRS. G. S. DUNCAN, representing the Church of Scotland; called and examined.)

4947. (Chairman): We have before us as representing the Church of Scotland the Very Rev. Dr. J. Hutchison Cockburn, who is Convener of the Special *Ad Hoc* Committee which prepared the memorandum, Senior Minister of Dushane Cathedral and an ex-Moderator of the General Assembly; Sheriff J. R. Philip, Procurator to the General Assembly; the Rev. Professor W. S. Tindal; and Mrs. George Duncan. I presume, Dr. Hutchison Cockburn, that I should address my questions to you!—(Dr. Hutchison Cockburn): Yes, Sir.

4948. You sent with your memorandum a covering letter referring to two reports, one the Report of the Special *Ad Hoc* Committee sent the Royal Commission on Marriage and Divorce, and another Report dealing with the question of the re-marriage of divorced persons. I am sure you appreciate, Dr. Hutchison Cockburn, that this Commission cannot say anything about the re-marriage of divorced persons, that being entirely a matter for the Church?—Quite true, but that Report was sent to you in order that you might realise that we are not entitled to say that that is the last word on the findings of the Church of Scotland on the re-marriage of divorced persons. That may have been backward-looking upon the whole doctrine of the Church.

4949. I appreciate that—It is only for that reason that it was sent.

4950. It is made very clear in your letter and we need not go into the other matter; it is outwith our terms of reference, and indeed it would never be referred to a Commission of laymen and laywomen—Yes.

4951. Would you like to add anything before I ask you a few questions on the Report of the Special *Ad Hoc* Committee?—Yes, Sir. If you would be kind enough to look at the Deliverance of the General Assembly at the end of the Report of the Special *Ad Hoc* Committee, you will see that the General Assembly made three changes. The first is in paragraph 2 of the Deliverance. In the first line it says, "... as a sufficient statement of the doctrinal position of the Church ...". The General Assembly substituted for "sufficient" the word "general". Then there is the change in respect of paragraph 3 (a) (i) of the Deliverance. The third change is in paragraph 12 of the Deliverance. The following words are to be added: "and also make known to the Royal Commission that there is a body of lay and ministerial opinion which believes that the Church should not recognise divorce at all or at most recognise it only on grounds of infidelity".

29 October, 1953] THE VERY REV. J. HUTCHISON COCKBURN, D.D., SHERIFF J. R. PHILIP, Q.C.,
THE REV. PROFESSOR W. S. TINDAL, O.B.E., D.D., AND MRS. G. S. DUNCAN

[Continued]

4952. Yes, we have noted these changes.—In regard to the last change, it should be said that the first point made was that the Convener make known to the Royal Commission that there was "a considerable body of opinion" of that view. I refused to accept that. I said we had no means of finding out whether it was considerable or not, but I would accept the words, "a body". I think if you address a question on that subject to Professor Tindal, he may be able to assist.

4953. I should be interested to know how far Professor Tindal could illuminate that subject. It may be very difficult to ascertain how considerable a body is, I appreciate that, and if you would rather not say anything more than is contained in the addendum we should be quite content!—(Professor Tindal.) I think I need only say this, my Lord, that the doctrine of the Church has been admitted now for a number of years. To begin with no opinion was expressed contrary to what was being set forth in our documents, but last year opposition did begin to arise that had some substance in it. A group of people were taking a more conservative view, shall I say, and it was because of that, that I think our Convener accepted the statement that there was a body of opinion. We cannot say any more than that, but it was opposition that we felt had to be recognised.

4954. I gather, however, that, subject to the existence of this body of opinion, the Church of Scotland recognises that divorce as an institution exists and is recognised by the law, and is of the view that this group is going too far in holding the opinions which you have just mentioned?—Yes.

4955. In the first part of your Report you summarise the history of the constitution of the Special Ad Hoc Committee, and I have no questions on that. It is very helpful to know all these facts. Similarly I have no questions on Section I—which deals with the doctrinal position of the Church of Scotland. Coming to Section II, which deals with conciliation procedure and advice, I think I ought to say that the scope of our terms of reference has been generally rather misunderstood, and I cannot accept the view stated in the beginning of Section II. We recognise that in so far as conciliation procedure is concerned, that is clearly within our terms of reference. At least that is my personal view, and I think it is the view of the Commission. Conciliation procedure comes in where you are considering the administration of the law regarding divorce and other matrimonial matters. But we do feel that any matters such as pre-marital training are without our terms of reference. I think I might just go through the terms of reference to make that clear because there has been considerable misunderstanding about it. The terms of reference are:—

"To inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, . . ."

—and here are the words that we must note carefully—

" . . . and to consider whether any changes should be made in the law or its administration, . . ."

That refers plainly to the law of England and the law of Scotland concerning divorce and other matrimonial causes—

" . . . including the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death), . . ."

Then follow the words

" . . . having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children . . ."

To our mind these words do not add a fresh term of reference. They merely enjoin us to have in mind, in considering the matters which are referred to us, those two very important matters. Then it goes on:—

" . . . and to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity."

We cannot find in these terms of reference any general injunction upon us to lay down rules and guidance generally as to the promotion of healthy and happy married

life before marriage and before there is any question of divorce at all. Moreover, we feel that if that very wide and important matter were to be considered, it is probable that the Commission set up to consider it might be somewhat differently constituted from this Commission. It may be, I cannot say, that as we have had a considerable body of evidence on pre-marital training for marriage we may feel able to refer to it in our Report, but it is not for us to make any specific recommendations in regard to it.

In paragraph 5 (a) of Section II, you suggest certain practical changes in the law. We have read with great interest what has preceded that, and we are most interested to know what steps are taken in the direction of preparing young people for marriage, but I have no questions on it. Turning to paragraph 5 (a), I come to the passage where a change was made by the General Assembly. The original second sentence read:—

"Therefore, in order that marriage guidance may be strengthened and become an efficient nation-wide service, legislation should be passed (i) to convert the secretarial and administrative organisation of marriage guidance into a national welfare service publicly financed; . . ."

Contrasting that with the form to which it was finally amended one appreciates that the difference is this, that in its original form the Report suggested that marriage guidance should be a national welfare service run, I presume, by the State, whereas in the amendment it is suggested that grants from public funds should be made for the purpose of marriage guidance. I would be interested to know what were the reasons which led to the amendment? What, in the view of the Church of Scotland, are the arguments for and against a national welfare service?—(Dr. Hutchison Cockburn.) The change was made by the General Assembly and we had to accept what the General Assembly said. The argument was that to put such a service into the hands of the State made it rather rigid and detached, that if a voluntary body were dealing with this matter they would take a wider and perhaps more humane view and be able to apply a higher series of laws than perhaps a State institution would feel inclined to do. There was no great debate in the General Assembly in the matter. The two cases were put just as you have put them, and there was no use in arguing for a case that we could not stand by with any great conviction. But perhaps the Procurator has something to add? (Sheriff Philip.) The only point that I should like to add is this, that I think in Committee we considered that at all events the secretarial and administrative organisation of this service should be publicly financed, rather on the lines of the Army and R.A.F. welfare services. The reason for that view was that it was felt that if a voluntary organisation is embarrassed unduly with the merely secretarial and administrative side it is rather likely to be unable to discharge work for which it primarily exists. I think that both Professor Tindal and myself, who are directly connected with the marriage guidance movement in Scotland, felt that that movement was seriously embarrassed just by the search for funds from undertaking the work for which it was primarily founded.

4956. We had very striking evidence yesterday from the Scottish Marriage Guidance Council as to the amount that is given for marriage guidance as compared with the amount which is expended by the State in making divorce easier for those who cannot afford it.—My Lord, might I add a point on that? I think that the figure of £750 was mentioned as a grant for each year?

4957. No, as a ceiling—A ceiling?

4958. A maximum.—The actual grant for last year was, I think I am correct in saying, £475, and so far for this year, £105.

4959. For the whole of Scotland?—Yes.

4960. Coming to paragraph 5 (b), the suggestion is made that:—

"Power should be given to the Court of Session and Sheriff Courts, in the exercise of their discretion, to refer matrimonial cases to (i) a welfare officer (of the type indicated in the Dearing Report), or (ii) an experienced person drawn from a special panel, for the purposes of endeavouring to effect conciliation between

29 October, 1952] THE VERY REV. J. HUTCHISON COCKBURN, D.D., SHERIFF J. R. PHILIP, Q.C.,
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the spouses said to safeguard the interests of any children of the marriage under the age of sixteen, and, if need be, of reporting back to the court."

Had you any view as to which of those two suggestions was the more suitable for Scotland? I will tell you why I ask the question. The Lord President took the view that, as far as reporting about custody of children was concerned, the existing system in the Court of Session was working well, but we did not go into the question with him of reconciliation, so I would be glad to know which of these two suggestions you think is the better, or the more suited to Scotland?—(Dr. Hutchison Cockburn): For my own part, I think that the second is the better, but the Committee was quite divided in the matter. Perhaps the Procurator has another view? (Sheriff Philip): May I deal with the Court of Session and the Sheriff Court separately? First, as regards the Court of Session, unquestionably the system of report which is used in custody petitions is, I would judge, very satisfactory, but there are at least four different types of case where custody has to be considered. There is not merely the custody petition in the Inner House, there are also the defended and the undefended divorce cases in the Outer House, and there is, in addition, the case which the Lord President referred to, of appeals coming to the Court of Session from the Sheriff Court, where the evidence with regard to custody may be stale. I would suggest that it may be that the present report procedure is adequate and works very well in relation to Inner House custody petitions, but in the case of the other three, and particularly appeals from the Sheriff Court and undefended divorce cases, I question it and I would suggest to the Commission that it is inadequate. One knows only too well that in undefended divorces the spouse is very often more concerned to get the divorce than to take full charge of the future of the children, and quite often divorces are granted undefended, and no arrangement is made by the court with regard to the custody of the children. Therefore, it seems to me that even in the case of the Court of Session there is room for a welfare officer. So far as the Sheriff Court is concerned, there is, of course, no means of report such as obtains in the Court of Session, and there is perhaps less adequate consideration of questions of custody, and I would say that *a fortiori* in the Sheriff Court there is need for the welfare officer.

4951. (Lord Keith): Mr. Philip, I would just like to make clear what the Lord President's main objection to a welfare officer in the Court of Session was, as I understood his evidence. It was that there would not be enough work in the Court of Session to justify the employment of a welfare officer. The number of custody questions arising in the Outer House in divorce cases was not sufficient really to employ a welfare officer. I do not know whether you would like to express any views about that?—I think that the number of questions *de jure* arising in court may not be sufficient, but after all, the great bulk of cases are undefended cases. And in my opinion, in undefended cases the parties are not vitally concerned to regulate custody, they are much more concerned to get the divorce.

4952. (Chairman): In paragraph 5 (b) of Section II, in the middle of the quotation from the Guardianship statute, I presume that rather an important word has been missed out. It says:—

"... such court or the magistrate, as the case may be, for the purpose of affording an opportunity of reconciliation between the parties, adjourn the case . . ."

I think the word "shall" or "may" must have been missed out before the words, "adjourn the case". It seems to me rather important, because if it is "shall adjourn the case", it is imperative and the court would be bound to adjourn the case, but if it is "may" it is a discretion. Perhaps that could be looked into. I dare say we could get the Guardianship Order in Council. You do not happen to have it?—I have not got it here. [Note:—The correct wording is: "... such court . . . may adjourn the case . . ."]

4953. May we pass to Section III, which deals with grounds of divorce, of separation, and of nullity? We have, of course, had a very large number of suggestions for change, but as far as I am concerned I have only one question on paragraph 1 of that section. There you set

out your reasons for thinking that there should be no new grounds for divorce by mutual consent or for divorce after voluntary or judicial separation for a term of years. It has been suggested in the course of the evidence which we have heard in England that divorce might be made easier in the case of couples who have no children. It has never been precisely formulated how much easier it should be made or what the difference should be in the conditions to be laid down, but I would like to know what your views would be upon that. Are you prepared to express any view upon that? It does not appear in your memorandum as one of the possible suggestions.—(Dr. Hutchison Cockburn): I can understand why nobody is suggesting the degree of liberty that should be allowed, because such a proposal interferes with the whole doctrine of marriage. The Church would be against drawing any distinction between people who have children and people who have no children, in the question of divorce. Am I not right? (Professor Tindal): I agree. (Sheriff Philip): Yes.

4954. I pass on to the end of paragraph 2 where you do submit one suggestion for the extension of the present grounds of divorce. It is under heading (c) which deals with divorce for desertion:—

"The Church submits that malicious denial of sexual intercourse persisted in for three years should constitute desertion within the meaning of the Divorce (Scotland) Act, 1938, and that the rule in *Good v. Good*, 1927, S.C. 177, should, in effect, be reversed and *Leenie v. Leenie*, 1950, S.C. (H.L.) 1, over-ruled."

I think that the Commission would be interested to hear why that was put forward?—The reason is twofold. In the first place, there would seem to be at least three main reasons for marriage. I think that these are recognised in the Book of Common Prayer and, in our own Church of Scotland, in its subordinate standard, the Westminster Confession. Malicious refusal of sexual intercourse does interfere with one of these three main bases. One is not concerned as to whether it is the main basis, but it is one of the three. In the second place, the English Matrimonial Causes Act contains as a ground of nullity, which we now seek to adopt, that the marriage has not been consummated owing to the wilful refusal of the defender to consummate the marriage. It does seem to us to be logical that if wilful refusal *ab initio* results in nullity, then supervening wilful refusal should result in desertion. The view which, I think, has so far been taken by the House of Lords turns very largely upon the extreme difficulty of proof in such a case. I think that the House of Lords in the case of *Leenie* went so far as to say that the difficulty almost amounted to an impossibility. But if wilful refusal can be proved, then in the one case we consider that it should result in desertion, and in the other case, where it commences at the very start of marriage, in nullity.

4955. I quite follow the reasoning, but may I put what can be said against it? In the case of nullity on the ground of non-consummation the parties have never lived together as man and wife. But in this case of malicious denial of sexual intercourse persisted in for three years, it may be that they have lived together as man and wife for ten years, and had children. Thus while your proposal may be right, the situation is not entirely analogous to that of non-consummation as a ground of nullity?—In each case there is a removal of one of the prime bases of marriage. Of course, in the second case, in the desertion case, it is removed in the course of a valid marriage, but it does seem that, if that refusal is wilful or malicious, without sufficient cause, then it should constitute desertion.

4956. I quite follow the argument, but I thought it as well to mention what, I think, has been said against it. Would you turn now to Section IV, which deals with the forbidden degrees in marriage? Towards the end of the section you say:—

"It might well be emphasised that the Church should resist any suggestion that marriage with a divorced spouse's sister or brother should be permitted. For example, a man might wish to marry his deceased wife's sister for worthy reasons. On the other hand, a desire to marry his wife's sister, were it legal to do so, after being divorced from his wife, might lead him to procure a divorce for this purpose. Relaxation of the law

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in this respect, therefore, might constitute a further threat to the preservation of marriage and the unity of the family circle."

The arguments to the contrary in that case might, I think, be summarised like this. In any ordinary marriage the lady who knows the children best and takes most interest in them is probably the wife's sister, and if the wife unfortunately commits adultery and the husband has to divorce her, what more natural than that the wife's sister should take charge of the children? She is somebody that they know, and that they may have an affection for. What is more natural and right, it is asked, than that the husband should marry the lady whom the children know, and who, presumably, is fond of them and will look after them? I would be glad to hear what you have to say about that?—(Dr. Hutchison Cockburn.) The whole question, my Lord, turns on the relationship that exists between a man and his sister-in-law. Such a relationship, within the family circle, is very much more friendly than any relationship that exists outside that circle, generally, and therefore an element is introduced which might be taken advantage of in order to procure a divorce so that the man might marry the other party, and that would seem to us to bring a confusing element into the whole situation. No argument such as what was to happen after the divorce to the children should be allowed to weigh with it. Perhaps the Sheriff has more experience on this. (Sheriff Philip.) The argument that I would put forward is exactly the one which Dr. Hutchison Cockburn has already mentioned. I do not think I can usefully add to that.

4967. (Mr. Lawrence): Dr. Hutchison Cockburn, there is one small matter on which I would like any assistance you may be able to give me, or perhaps the Sheriff, and that is on the matter of paragraph 2 (c) in Section III of your Report—divorce for desertion based upon denial of intercourse during marriage. Would you be good enough to tell me exactly what you mean by the word "malicious"? It has certain connotations in the minds of lawyers and I wanted to be clear whether you meant anything more than deliberate or willful?—(Sheriff Philip.) Deliberate and without probable cause.

4968. You do not intend it to mean that the denial must be inspired by some oblique or improper motive?—I think if that arose for consideration that might lead to cruelty rather than desertion.

4969. I may take it that the word "malicious" is the equivalent really of the word "wilful" that appears in the English statute in the Section that provides the ground for adultery?—I think that probably is so, but I am not in any better position to answer that question perhaps than you, Sir, are. I do not know English law.

4970. As it was your suggestion I ventured to ask what was the meaning of the word, which appeared to have been somewhat deliberately chosen?—Malicious is a word which is regularly used in this connection in Scots law, and I think that in relation to divorce for desertion it means no more than just "wilful and without probable cause".

4971. (Lord Keith): It is a word derived from the old Scots law on desertion—I think so, yes.

4972. (Mr. Mace): Following that same topic, has your Committee considered the question of limiting the age of the parties?—I do not think that has been considered by the Committee. It certainly did occur to myself, but it seems to me that it would be to introduce a very difficult distinction. I presume that what you have in view, Sir, is the distinction between, say, a wife who was of child-bearing age and a wife who was past that age?

4973. Yes—I think the answer to that would be sufficiently met by the use of the word malicious. There might very well be sufficient probable cause for refusing intercourse in the latter case.

4974. And you appreciate that that is a problem for consideration on your clause generally?—Definitely.

4975. Section II, paragraph 5 (b), of your Report reads:—

"... an experienced person drawn from a special panel, for the purposes of endeavouring to effect conciliation between the spouses and to safeguard the interests of any children of the marriage..."

The word "and" troubles me. Do you appreciate that the reconciliation officer, if there is to be one, plays a very different part from an officer who is investigating and reporting on the question of the custody of the children? Would you suggest two separate officers, or would your view be that the same officer should deal with both types of case?—My answer to that question would be that the officer who is required for reconciliation must be very much more experienced, and the question whether the two duties could be combined by the one officer would depend upon whether the officer was sufficiently experienced. If one takes, for example, the Sheriff Court at the present day, the only officer of that kind who exists is the probation officer, and I am quite clear from personal experience that some probation officers in Scotland who are only part-time probation officers would not have anything like the necessary experience for reconciliation work.

4976. That leads me to this: would you make differentiation between the two officers, or the same officer when he is doing the two different jobs, in respect of privilege?—I would say that the functions in each case are essentially different and each requires a different training, but you might in a very experienced man or woman find sufficient qualifications for both.

4977. I do not think you quite appreciated my question. When an officer is dealing with reconciliation, would it be your view that he should have absolute freedom from disclosure to the court of what goes on between him and the parties? On the other hand, it might be essential that the report to the court of the officer who deals with the children should include the attitude of the parent to his or her negotiation? What are your views?—That increases the need for the two duties to be kept separate.

4978. I would like to have your view on it from contact with it in your work?—My own personal view would be that the ideal system would be to have the two officers entirely separate. The officer who is concerned with the welfare of the children is engaged essentially in fact-finding. The officer who is concerned with reconciliation is engaged in a species of missionary function.

4979. What are the views of the Church, from the practical point of view, as to when reconciliation should be tried? The easy answer is, "as soon as possible". But have you views as to whether it is still worth while attempting it after divorce proceedings have started?—Unquestionably, the earlier attempts at reconciliation can be begun the better, and I would agree that in many cases after proceedings have been started reconciliation may not be possible. But there is one fact which I think is very significant, and perhaps the Commission would like to have it. In the operation of the Army and Air Force Legal Advice Scheme it was apparently found that twenty-five per cent. of all applications for divorce by members of the Forces were capable of being dealt with by reconciliation at that stage. I take that fact from the Denning Report (paragraph 18), and it therefore seems to me that it may not be impossible even at the stage of divorce proceedings for conciliation to have fruitful results. It also seems to me that the proposal which the Church makes with regard to financial aid for legal advice has an important bearing on this question, because if advice can be given before proceedings are decided upon, it may very well be that reconciliation will be the result, and the proceedings will not go forward, whereas if the aided persons can only receive aid when going into court that encourages them to rush straight into court. (Professor Tindal.) May I say something about that? I think that there are various stages at which reconciliation is possible. I think that parish ministers do quite a lot on their own ground. I think that solicitors very often try to see if there is not a possibility of reconciliation. But if these fail and the matter goes a further stage, I would like to see the door to reconciliation still left open, and suitable reconciliation machinery available at all stages.

4980. (Mr. Meddock): May I refer again to that same paragraph, and also to the answers which you gave to the questions put by Lord Keith? Is it your suggestion that the court should enquire into the welfare and the custody of the children in every case that comes before it, whether defended or undefended, and whether custody is asked for or not?—(Sheriff Philip.) I would think that the ideal would certainly be that it should. So far as my experience

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as counsel goes, it seems to me that quite often custody questions arise at a later stage in a more difficult form, because in undefended cases no enquiry has been made at the time of divorce.

4981. That would necessitate setting up a whole new machinery as compared with what is, certainly in England, in existence today. If the court gets a case before it where custody is not asked for, it assumes that the parties have made their own arrangements. If custody is asked for by one, and not contested by the other, it assumes that that party does not wish to have the children.—Might I suggest that the procedure which exists in that respect rather belongs to the days before the standard of the best interests of the child was the ruling standard? It rather belongs to the days when the law had simply to determine which parent had the right of possession. It seems to me that the moment you get into the region of determining the best interests of the child, then there is a public interest involved, not simply the interests of the two parties, and certainly, so far as my experience goes, there are quite a number of cases where parents in that particular situation do not always have the best interests of the children in view.

4982. Would you look at the question from the point of view of the judge or magistrate? The wife says that she wants the custody and the husband says he does not want the custody. Supposing you were to refer the case to an independent person who reported that the wife was quite an unsuitable person to have custody. What then would you do?—Without examining the position of the husband?

4983. Yes. If one followed your suggestion, I gather that the judge or magistrate would refer the case to an officer to report as to whether or not the wife was a proper person to have the custody of the child. That officer reports that the wife is not a proper person to have the custody of the child and the husband says, "I do not want to have the custody of the child". What are you, as judge or magistrate, going to do then?—I quite appreciate that that is a case where the best interests of the child are not going to be looked after by either parent. In effect, both parents are refusing to look after the child.

4984. Are you then going to say that the custody of the child must be taken away from the mother, who wants it, merely because the officer does not think she is a proper person to have it, and put the custody of that child in the hands of the local authority?—I think that that would be a very extreme step to take. I certainly hope that it would not require to be taken often.

4985. To whom, in my illustration, are you going to give the custody of the child?—In that particular situation I think that the court would simply be led to the conclusion that the best custodian in the circumstances, but still a very unsatisfactory one, would be the mother.

4986. (Dr. Robinson): One further question regarding the proposed welfare officer. Some of you are connected with marriage guidance work; have you formed any view regarding the suitability of children's officers for this work, if given special training. I think that you indicated, Sheriff Philip, that part-time probation officers would not be suitable, and possibly, not even the trained full-time probation officers, but what about the children's officers?—That has not been considered. The only point which has been considered on that matter is whether there are any classes of persons who are specially suitable for this kind of work, and we did think, rightly or wrongly, that one class suitable for it would be the Class A deaconsess of the Church of Scotland, who is a highly trained person. (Professor Tindal): We want to stress that there should be a panel of such people, because I am convinced that nobody should have too much of this kind of work to do, and each case may take a very long time. If this work is to be voluntary, I am quite clear that there has to be a fairly varied panel of the right kind of people, and that they should not be asked to do more than one or two cases in quite a space of time.

4987. Do the witnesses feel that children's officers might perhaps co-operate, as they often know, at a very early stage, of the risk of a break-up of a home?—(Sheriff Philip): Yes, certainly.

4988. (Mr. Young): I am not clear as to whether you want recourse to reconciliation procedure to be compulsory or voluntary?—I think that it would have to be done by persuasion, or at least persuasion by the court. Generally when the stage of divorce proceedings is reached, it seems to me that unless some degree of persuasion is put on the parties by the court they might not even consider reconciliation, because by that stage they have taken a definite decision.

4989. I want to face the problem. Are you going to make recourse to reconciliation procedure compulsory, or are you going to leave it on a voluntary basis?—I would suggest that it should be left to the discretion of the court in each case. There may be some cases where it should be compulsory, others where it should be discretionary.

4990. Assume you leave it as a discretionary power, and that the judge exercises his discretion and remits to an officer, whoever he may be, as reconciliation officer. Do you want to follow the Gurnsey procedure, which so far as I can see, means that if the parties will not go before the reconciliation officer they are refused a divorce altogether?—(Dr. Hutchinson Cockburn): No, Sir, not if the judge or magistrate "otherwise directs". He has that power, if the party refuses to go before the mediator. That is in paragraph 3 of Article 9 of the Gurnsey statute.

4991. That is just what I am saying. If the judge has decided that it is a case where there ought to be an attempt at reconciliation and the petitioner refuses to go before a mediator, then it is quite clear that he or she is "disentitled to proceed with the petition".—Unless the court or magistrate, having considered the circumstances of such refusal, otherwise directs. Thus it is left to the judge or the magistrate to take the wisest course in all the circumstances.

4992. Does not the practical effect of that mean that it is a compulsory reconciliation procedure?—(Sheriff Philip): Does it not rather mean that if the refusal were malicious it might become compulsory, but if the refusal were on good grounds, a probable cause, it would not be compulsory?

4993. I take it that you would like to adopt the same principle as is in this Gurnsey statute?—Might I say this with regard to the Gurnsey statute? We gave it as an example. We have endeavoured to find out from Gurnsey how it is working. I was in communication with the Bailiff himself but I cannot give evidence as to how this is working. All that we have submitted is that here is a specimen of such machinery.

4994. We have had a lot of evidence, Sheriff Philip, that the compulsory reconciliation procedure in France is useless. It is merely carried out automatically, and that is what I am afraid of here. Would the danger not be that people would go to the court and say, "We do not want to be reconciled"?—I do not want to express a view about matters on which I have only limited knowledge, but so far as my knowledge of French reconciliation procedure goes, it is a formality, to say the least of it.

4995. Is there not always a danger of this developing if recourse to reconciliation machinery is compulsory?—There is always that danger, but that is one of the things that has to be avoided.

4996. I would like to ask about the procedure in Scotland on remit. Am I right in saying that there are two cases where there is a remit, not only the Inner House custody petition but also, of course, the adoption petition?—Yes.

4997. In these cases there is a remit to an outside party to enquire and report to the court, and that procedure also obtains in the Sheriff Court, does it not, so far as adoption is concerned?—Yes.

4998. The main distinction, as I see it, between the proposals for the setting up of a system whereby an officer is paid by the State and reports, and the present system of remitting in certain cases to independent people, is that under the latter system the reporter is paid by the parties.—I think that the main distinction is that the court reporter is merely finding facts. He is really conducting a kind of private proof. He is not concerned with reconciliation at all.

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4999. I want to bring out this very big distinction, as I see it, that under the present system of *commit* it is the individual parties who pay for the reporter's fee, whereas under your proposal it would be the court—I am very glad that that point has been raised. It is a point I meant to mention. It does seem to me that the report procedure is really available only in cases where the expense of what is virtually a proof can be met, and the reporter's fee is always a considerable item in itself, whereas if it could be done through a welfare officer, at any rate in suitable cases, so much the better.

5000. (Dr. Baird): Dr. Hutchison Cockburn, we have had a good deal of evidence suggesting that the present law is very much out of touch with modern trends. In Section III, which deals with new grounds for divorce, you make your case against extension of grounds of divorce. We have had a good deal of evidence to the effect that in fact when a marriage has completely broken down, people will go to any length to obtain a divorce, and that the present situation leads them to commit perjury, leads them to arrange divorces through solicitors, and so on, and altogether is very unsatisfactory. Do you consider, from your experience, that there is much of that?—(Dr. Hutchison Cockburn): Our experience is that there is no great demand for new grounds of divorce, and that it is impossible to try to legislate to keep people in the way of telling the truth when they are in difficulties. There are certain cases where divorce is allowable in the view of the Church of Scotland, although if the body of opinion which I have already mentioned and which claims to have found the truth, carries its view in the General Assembly, then the Church's official view may be changed. We think that it would be ineffectual to make any further extension of grounds at this time, when the Divorce Act of 1938 has not yet had a proper trial. Part of that trial took place during a time of war when things were unsettled, and we had not yet come to a settled period. We simply take the point that we have not found any general public demand for extension of grounds for divorce.

5001. You do not think that there are many cases of arranged divorces where people do, in fact, commit perjury?—I think that you will always get arranged divorces, and I know there are a great many of those.

5002. You do think there are?—I know there are, but you are not going to sort them out by trying to stop up every gap that can be found.

5003. You think that the present system is the lesser of two evils?—(Sheriff Philip): My view on that is one may live those evils that we have to others that we know not of.

5004. (Mr. Baloe): May I turn to the question of the enquiries about children in divorce cases, because it has exercised a number of witnesses? May I put this possible solution to you to see what you think of it? When a child is brought before a juvenile court—I believe that the position is the same in Scotland as in England—there has to be a report on the child submitted to the bench by the children's officer, who has to get information from the school as well as certain other information. Do you think that a report of that kind, automatically supplied in respect of every child whose parents were suing for separation or divorce, would enable the court to determine whether it wanted any more information, or whether it wanted to refer the matter to somebody for further enquiry?—I think that that would be of value. It would certainly slow up proceedings. I can only speak from experience in relation to the reports made by a probation officer under similar circumstances. That usually involves a little delay in dealing with the case, until the probation officer has found the facts, because he has not always got them at the time when the evidence is led. But so far as my experience goes, it is extraordinarily helpful in dealing with the case and I do not see why that analogy should not be used in relation, say, to uncontested cases of custody. There is this complication, however, that, of course, the probation officer and the children's officer are dealing with cases in the particular locality, whereas a welfare officer of the Supreme Court might have to go to the ends of the jurisdiction to investigate the case of the children, and that would make a practical difficulty in carrying out that suggestion.

5005. There is another question I would like to ask, and it relates to a recommendation on cruelty that has been made by the Law Society of Scotland. I wonder if I might read to you their recommendation in order to find out what the attitude of the Church might be towards it. The Law Society states:—

"The standard demanded is that the cruelty must be of such a nature as to imperil the life or the health, physical or mental, of the complaining spouse. There are found in practice many instances of conduct on the part of a husband towards his wife and children which (e.g., because of the robust physique and mentality of the wife) does not satisfy the present requirements, but which nevertheless renders married life intolerable for the wife. (It should be noted also that the conduct, however reprehensible, of a husband and father towards his children does not constitute a ground of divorce (or separation) unless the wife can show that her health is thereby imperilled.) It is suggested that there are good grounds for asserting that one spouse should be entitled to divorce (or separation) where the other has been guilty of a course of conduct wilfully persisted in towards the pursuing spouse or towards the children of the marriage of such a nature as in the opinion of the courts shows on the part of the defender an unrepentable indifference to, or disregard of, the normal obligations of marriage, and renders the married life of the spouses intolerable to the pursuing spouse."

First, would you agree that there might well be a case for separation, where the husband, shall we say, is cruel to the children, but would you feel that there was the same case for divorce?—(Dr. Hutchison Cockburn): Personally I would not, but this is a case in which the Church has not declared its mind, and therefore my view may be controverted by my colleagues who are with me. The whole question seems to me to turn on the meaning of the word "intolerable", but it would seem to me impossible to say that the present definition of cruelty must remain for all time. We must face facts, and cruelty is of such varied forms that I would not be against the spreading of the definition of cruelty to cover intolerable conduct which made married life impossible. But that is an individual view. (Mrs. Duncan): In Committee there was a general feeling that cruelty presented a stronger case for divorce in many cases than adultery, and that the present laws with regard to cruelty were not compatible with the conditions of the present day. I think that many in the Committee would agree with the recommendation of the Law Society of Scotland, but we have not put that down on paper.

5006. (Chairman): You are, of course, here as representing the views of the Church of Scotland, and it is perhaps a little difficult to ask you for individual views on matters on which the Church of Scotland has expressed an opinion, but, of course, if you are willing to answer as individuals, your views will be very interesting.—(Professor Tindal): I would have thought that the view which was coming to be held more and more was that almost any home was better than no home, that children have an extraordinary power of putting up with quarrelling and trouble at home, and that to disrupt the home is something to be done only in most extreme cases. On the other hand, I do agree that certain forms of cruelty could be called intolerable, and that possibly divorce should be granted in such cases.

5007. (Mr. Baloe): Including, and this is the point on which I was anxious to get your view, cruelty to the children, as distinct from cruelty, if you can distinguish the two, to the spouse?—(Dr. Hutchison Cockburn): That would hardly seem a question for divorce, it might be one for separation.

5008. That was the point I wanted to get your views on—I would incline to separation in such a case. But we are speaking as individuals.

5009. (Lady Bragg): Dr. Hutchison Cockburn, would you turn to paragraph 1 in Section III of your memorandum? Do you feel that the present rate of divorce is due mainly to temporary social conditions, for example, as the result of war separation, or of bad housing conditions, and if these conditions improve would you expect that marriages would be more stable, and that therefore it would at present be a mistake to make any change in the

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existing law? Or do you feel that there is any more fundamental cause for unhappy marriages, perhaps less strong religious convictions, or the change in the economic status of women, matters that perhaps would be rather more difficult to change?—Certainly there are many more fundamental reasons concerned in this. I was a parish minister for many years, and I knew many very happy marriages in very bad economic and housing conditions. These housing conditions, however bad, and economic stresses do not of themselves break down marriage. They are in some cases a contributing factor where there are other, more important elements missing, and these are very often the lack of a religious outlook on life and the lack of a sense of value of vocation. Sometimes the trouble is due to bad temper that cannot be controlled, and things like that.

5010. (Mr. Flecker): Might I ask you, Sir, to carry back your mind to the answer you gave to my Lord Chairman on the subject of marriage with a divorced wife's sister? What I should like to ask is this: does your objection to that stem from the theoretical, or if I may use that expression, view of what happens, or from definite experience of cases where you consider a divorce would have been sought if such a marriage had been possible. Is your view based on theoretical considerations or is there some practical backing for your view?—It cannot be practical because the situation cannot arise at the moment.

5011. I understand that fully, but we may have evidence relevant to it. On the one hand, a very strong case is made for this reform—particularly during the war, for instance, when the wife went off and the husband on his return found her sister already looking after the children, and there was the obvious difficulty of his living in the house with the sister, and so on. On the other hand, we are asked to accept such evidence as you gave that this might cause difficulties at home. You do see any problem?—I see the problem, but you have got to take your knowledge of human nature under existing conditions, and draw your conclusion. Our conclusions are that such a reform would introduce an element of confusion into the whole marriage relationship.

5012. You really feel that that might occur?—Yes, that is our view, and it was not questioned either in Committee or in the General Assembly.

5013. There is one other question I should like to ask, arising from paragraph 2 of Section 1. There you state that in 1937 the Church of Scotland took the view:—

"... that the facts requiring to be established import that the union between the parties has already been destroyed."

May I take it that that is, broadly speaking, the view on which the Church of Scotland bases its general attitude to divorce?—Not the general attitude on the question, but the attitude of the Church in the matters raised by the Act on which this resolution was based.

5014. Then it would not be fair to quote this as the Church's general attitude? We have received recommendations that incompatibility should be a ground of divorce. But quite apart from the legal difficulty of proving any such ground, it would be the view of the Church of Scotland that the principle quoted in that paragraph should only be employed so far as the law already lays down certain definite grounds for divorce?—You are referring to the 1938 Act?

5015. Yes.—And this quotation has specific reference to the provisions of that Act. Am I not right, Mr. Procurator? (Sheriff Philip): I think that it would be misleading to read that out of its context.

5016. (Lord Keith): Dr. Hutchison Cockburn, might I ask a question or two upon Section II, the section on conciliation? There are certain figures in the second paragraph of this section that I did not fully understand. You say that limited statistics revealed a certain ratio in the causes of matrimonial unhappiness, and then you show figures of percentages in Edinburgh and Glasgow. The one I could not follow was "Pre-marriage advice enquirers"?—(Dr. Hutchison Cockburn): Professor Tindal will deal with that. (Professor Tindal): These statistics really came from the Marriage Guidance Councils of Glasgow and Edinburgh. When they were instituted they set out to deal with enquirers about marriage, people

who were about to be married who had certain things they wanted to ask about. We were there in order to help people who were finding difficulties. We were there to try and provide a certain amount of education for people who were engaged, and we announced these purposes to the public. We then found that we had a number of people coming to make enquiries of us. Each person that comes has a case-sheet, and we have made an analysis of the case-sheets as to the purposes for which people do come. That gives the reasons why people came to the Marriage Guidance Council, seventy-four per cent. in Edinburgh because of existing disharmony, twelve per cent. were those who were thinking of marriage and wanted some advice, to be put in touch with a doctor or minister.

5017. What I do not understand is how people that come for advice on marriage form a category which falls into the causes of matrimonial unhappiness. Your figures come out to 100 per cent. Take Edinburgh, seventy-four per cent. for disharmony. Disharmony I understand. Pre-marriage advice enquirers twelve per cent. Other circumstances, housing and so on, fourteen per cent. I can understand such circumstances causing matrimonial unhappiness, but I do not understand the pre-marriage advice enquirers.—(Chairman): As I understand your answer, and I am very glad Lord Keith asked the question, these figures merely show the reasons that led people to come to the Marriage Guidance Council for assistance, and of the people who came to the Edinburgh Marriage Guidance Council for assistance seventy-four per cent. came because there was this disharmony in their married life, twelve per cent. came because they were contemplating marriage and wanted some assistance in regard to that, and fourteen per cent. came because they were in some other difficulty. But, as Lord Keith says, these figures, taken together, do not set out the ratio in the causes of matrimonial unhappiness.—(Dr. Hutchison Cockburn): This difficulty was pointed out in the Committee, and we changed the wording to "Pre-marriage advice enquirers" at the last moment, but I feel we have not made the whole matter clear enough. (Chairman): I do not think that it was very happy, if I may say so, to say that this "revealed a certain ratio in the causes of matrimonial unhappiness". These figures reveal a certain ratio in the reasons that led people to go to the Marriage Guidance Council.

5018. (Mrs. Allen): I wonder if you could tell me, instead of the percentages, the actual number of cases?—(Professor Tindal): I am afraid I would require notice of that. (Dr. Hutchison Cockburn): Have you hundreds of cases? (Professor Tindal): I should think about 200 applicants.

5019. (Lord Keith): You have been asked a number of questions on the section of the Report dealing with judicial conciliation, that is, Section II, 5 (b). Am I right in thinking that this is a recommendation for a proposal which you consider could be carried out quite practically?—(Dr. Hutchison Cockburn): Yes.

5020. Whether or not such a proposal would be successful would be very largely a question of experience?—Yes, and of the type of person who was endeavouring to effect the reconciliation.

5021. Because, Dr. Hutchison Cockburn, I think I am right in saying that the general trend of the evidence that we have heard is that once you get to the stage of divorce proceedings, and particularly if you introduce any element of compulsion, the results are so negligible that it really is not worth introducing such procedure. In other words, it just does not work so late and with the element of compulsion?—And therefore we propose that the legal aid should be given at an earlier stage.

5022. That I understand.—That is dealt with in the next sub-paragraph. If that were given then, there would be some chance of reconciliation being effected at an earlier stage.

5023. I think we fully appreciate that, but I just want to explain a difficulty that I feel personally, and it may be that others here have the same difficulty, that at the stage of divorce proceedings it may be too late to expect reconciliation. And when you introduce, as you suggest here, an element of compulsion, that makes it even more unlikely to be successful. If that is correct, is there

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any point at all in introducing such procedure?—Yes, there is a point, that the whole idea of reconciliation is new to the populace, and it would seem to me that after experience of five or ten years the idea of a reconciliation officer attached to the Court of Session or the Sheriff Court would be accepted by the people as a normal procedure. We must begin somewhere, and if we do not begin we will never get to the idea of reconciliation being accepted as a normal process in such cases.

5024. In spite of the experience of France?—I do not think that the French and ourselves are at all similar in these matters.

5025. You think we might do better?—Surely. Would you agree, Mr. Procurator? (Sheriff Philip): All I can say is that from such experience as I have had of French procedure I do not think that it is more than formal in most cases, and I do not see why the kind of procedure which we suggest should not be more than formal. There are no doubt certain cases where neither of the parties is anxious for reconciliation, but there are other cases where one party would be very anxious for reconciliation. And it does seem to me that a reconciliation officer in that type of case might very well open the door. (Professor Tindal): May I say that when this scheme was introduced in Guernsey it was introduced at the same time as the divorce laws were brought in—previous to that, Guernsey did not permit of divorce at all? Therefore Guernsey did feel that when it was opening the doors to divorce it ought to open the doors also to reconciliation.

5026. I quite see that, but do you think that that may have been in the case of Guernsey something of a posture?—No, I do not think so.

5027. May I pass from the reconciliation section, and come to what is another difficult section in the Report? I understand that the doctrinal position of the Church on marriage and divorce is at present under consideration?—(Dr. Hutchison Cockburn): That is so, Sir.

5028. And I think I am right in saying that various branches of the Church Christian have from time to time taken up different attitudes on the question of divorce. I think you will fully appreciate that a body of laymen such as we are, or any body of laymen, can hardly be asked to choose among conflicting views of the Church bodies on religious standpoints. Would you agree with that?—Within limits, I have a very high idea of the intelligence of men in your position, and I think that it is quite possible for you to read, for instance, the doctrinal statements in the second document which we sent to you with understanding.

5029. I did read them with great interest, and I hope with understanding.—Why do you deprecate your ability to understand the doctrinal position? (Lord Keith): Perhaps I might come back to that in more detail. (Chairman): I thought that Lord Keith's suggestion was that we were not called upon to express an opinion upon which of the conflicting doctrinal views was the best.

5030. (Lord Keith): That was the purpose of my question, I do not know if it was misunderstood?—But ultimately you have to choose, have you not?

5031. Maybe, but I am not sure that we have to choose from the religious standpoint, and after all these are, so far as you are concerned, I quite appreciate, the difficulties of the Church. They are doctrinal, but we are not here to resolve questions of doctrine.—Quite true.

5032. And conflicting doctrine at that. I suppose, then, you will agree that this is really a moral and social problem?—Yes, certainly.

5033. And among the many points of view that have been expressed to us, might I just indicate some for and against any change in the grounds of divorce? It has been said, for instance, that lack of divorce facilities may drive people into illicit unions. It is said that lack of divorce facilities may and does increase illegitimacy, that it produces a great deal of suffering and distress among the unhappily married. On the other hand, it is said that too many facilities might tell against married people trying to overcome marriage difficulties and trying to make marriage a success. I think you would agree that these points of view I have indicated, both pro and con—I have not given you all of them—have got some substance in them. I do not know whether you would agree that

marriage should be a union in fact and not merely in name. If it ceases to be a marriage in fact, is there any benefit to the parties or to society in such a union?—This ultimately comes down to divorce by mutual consent.

5034. I am not entirely satisfied with that, but let me, if you can, have a direct answer to the question, and I will repeat it, is there any benefit to the parties or to society in a union that is a union only in name and not in fact?—The benefit is quite direct in the value to society of a strong and deeply founded doctrine of marriage.

5035. Yes, I quite appreciate that.—And indirectly even the parties, who are finding it difficult to carry through their marriage, benefit from that.

5036. Yes, I suppose the strongest argument would really be that by maintaining a marriage in name although it has ceased to be one in fact you are encouraging the idea of marriage?—Yes, that divorce in the eyes of the Church is unusual and the exception.

5037. And, of course, the logical solution would be that there should be no divorce at all. The more you maintain marriage, even as a marriage in name, the more you are supporting the institution of marriage and discouraging any idea of divorce?—That was G. K. Chesterton's view—that the strength of marriage was that it was indissoluble, and that many people who were making no success of it said, "We have to put up with it, therefore we have to make a success of it". But logic is a very poor guide in this matter and a very hard taskmaster that interferes with the exercise of mercy and due regard for the facts of life that are incumbent upon all Christians.

5038. Therefore we must try and find some solution which will be, shall I say, a halfway house or a compromise between these conflicting views?—I do not like the suggestion of a halfway house, as though we were compromising on the question. All I say is that the Churches, and this applies to the Roman Church, the Episcopal Church, the Church of England and the Reformed Churches, either on grounds of utility or on certain relaxations in regard to the admission of divorced persons to the sacraments, and the Church of Scotland by allowing divorce for infidelity and separation, and now for other causes, have all given that sort of play to the logical situation that keeps it from being inhuman.

5039. That is just why I used the phrase, "a halfway house"; it may not be a very happy one, but shall I say a compromise?—I am just as unhappy with compromise.

5040. I do not know whether you can supply an expression?—I said play. You are tying it to the rope, but you have a certain play. The anchor is down there but you have a certain play on the tides—but the whole trouble is the amount of play.

5041. The anchor is that you must not get rid of the institution of marriage?—You must not damage it.

5042. So far as it is humanly possible not to damage it, and I think we all agree that the one ideal is that marriage should be as stable and as happy an institution as it is possible to make it!—Agreed.

5043. I wondered whether in the Deliverance that was made by the Assembly in 1937 you did not in fact recognise the principle that I have been trying, perhaps unsuccessfully or inadequately, to put forward. In paragraph 2 of Section 1 of your Report, you set out the Deliverance that was passed in 1937 with reference to the then pending Divorce Bill for Scotland?—Yes.

5044. And it was pointed out by the Deliverance that:—

"... the civil authority should be empowered to dissolve the marriage tie, the grounds on which such a course may be based having from 1973 been not only infidelity but desertion—facts which import that the union between the parties has already been destroyed."

Then the Deliverance proceeds:—

"With reference to the Bill before Parliament, the General Assembly approve generally of the proposal to extend the grounds of divorce, in so far as the provisions of the Bill, in the opinion of a Committee to be appointed ad hoc, satisfy under each head the above-mentioned condition—viz., that the facts requiring to be established import that the union between the parties has already been destroyed."

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As I understand it, that was the principle upon which the General Assembly approved of the then pending Divorce Bill in 1937?—That is so.

5045. I cannot quite remember—I do not know whether the Procurator will be able to help me there—I cannot quite remember whether at that time the Bill, it is called here the *Alnass* Bill, had in it grounds of divorce additional to those that were subsequently passed by Parliament?—(Sheriff Philip): I could not tell you.

5046. I think that there were in the original Bill rather wider proposals, some additional grounds. I am afraid my recollection is not very clear about it, or perhaps additional grounds were suggested by certain outside bodies?—There were some other suggestions, but I could not say whether they got into the Bill or not.

5047. Imprisonment and, I think, drunkenness and one or two others. But you cannot help me on that?—No, I cannot help you.

5048. It is really immaterial, but what I do want to ask, and Mr. Flecker was really on this question too, is this. If that was the principle that was approved in 1937, in what way can the General Assembly—I have no doubt it is entitled to change its mind and perhaps it does—consistently maintain today that if the union between the parties has already been destroyed divorce should not follow?—(Dr. Hutchinson Cockburn): At that time there was no real theological discussion of the matter raised by the *Alnass* Bill, and the material point here is that the words are, "the facts requiring to be established", and where it is established by facts satisfactory to the judge that the marriage has broken down, then it has broken down and does not exist. I do not see any inconsistency. But the Church does not desire a whole list of things on which the judge is to say, "On these grounds the marriage has broken down". That would seem to us to undermine the whole doctrine of marriage. (Professor Tindal): Might I say that it seems to me that it is a very difficult thing to determine at what point you are going to say, "This marriage is irretrievably destroyed"? That is one of the most difficult things to say, and the Church therefore is very slow to admit that there should be a list of things easily set forth which import that the marriage has been destroyed. It always wants to bear in mind that the law should be so advised that nothing is done to suggest that divorce is to be accepted as a normal and proper part of the life of the community, and when it comes to divorce there is a certain sense that people ought to have remorse of conscience here. It is not merely a simple ethic. It is an ethic with a religious sanction. Consequently, when this ethic is broken down there is this sense almost of stigma, of remorse of conscience. Therefore we think it very difficult to state very clearly at what point a marriage has broken down.

5049. I quite appreciate that, but I am only looking at it from the point of view of the principle. Assuming that the facts inevitably establish that the marriage has broken down, then, as I understand the *Deliverance* made in 1937, divorce follows or should follow. You would agree with that?—I think that is so.

5050. And just look at the position, will you, Professor Tindal, even on the law as it stands just now? It does not necessarily follow, does it, that because there has been adultery, or because there has been desertion, the marriage has irretrievably broken down? I suppose you recognise the possibility of repentance and the parties coming together?—Yes.

5051. From that point of view it has been suggested to us that to regard divorce as a remedy, or as a penalty, for a matrimonial offence—for in Scotland at any rate it used to be regarded as a penalty, and I am not sure that is not the view that the law still takes of it—that to regard divorce as a penalty (apart from the exceptional case of insanity) is taking far too legalistic a view of the situation and is looking at it far too much from the point of view of the legal rights of one party or another. The matter should be looked at much more from the social point of view, from the criterion of whether the marriage has irretrievably failed. And if it has irretrievably failed, then it is far better for all parties and for society that it should come to an end. That is the argument that has been put forward to us by the other side, and I would like to know—do you prefer the legalistic view of the

rights of the parties, are you in favour of certain specified grounds—or are you prepared to stand by what the General Assembly delivered in 1937?—(Dr. Hutchinson Cockburn): The whole situation in regard to marriage and divorce, the whole doctrine of the Church, is in the melting pot and under consideration today, and therefore we cannot say today whether the General Assembly would uphold the *Deliverance* of 1937. It has been seriously questioned by many people, and some desired that it should not appear here, but I insisted on it going in as the view of the Church in 1937 regarding that Act. Beyond that we are not to be understood as committing ourselves, in the light of the fact that the General Assembly will next year discuss the whole matter.

5052. If I may say so, I duly sympathise with you and appreciate your position. I quite recognise that doctrinally the General Assembly next year or any other year may change its whole attitude on the question of divorce, but you realise, and that is where I started from, that we cannot possibly solve these doctrinal difficulties of the Church?—No.

5053. If I might just turn to some of the concrete suggestions that are contained in Section III, and perhaps if these questions might be more easily answered by the Procurator, I will be glad to have his answers if you so wish?—I have just asked the Procurator to answer; Section III is his concern.

5054. These matters are more on the legal than on the doctrinal or social angle?—Agreed.

5055. On the question of divorce for cruelty, is there really very much in your proposal from the legal angle? In the matter of cruelty the position is a very flexible one, and I think I can say that the court can form varying views according to the various circumstances of any case. In the vast majority of cases, if cruelty has taken place, the court will hold that it would be quite wrong and unsafe to force the pursuer to go back with the possibility of having to endure a repetition of that cruelty. Would you agree with that?—(Sheriff Philip): There are cases where that is not so. There was a case which your Lordship decided—the case of *Cox v. Cox*. The man had been, I think your Lordship would agree, a habitual drunkard for a period of years, nevertheless your Lordship held that he had recovered.

5056. I thought he had. The Court of Appeal thought that I was wrong—On the evidence. My point with regard to that type of case is that that is, if I may respectfully say so, a little unrealistic, because to listen to medical evidence from experts as to whether a man has recovered from drunkenness, appears to me to be somewhat unrealistic.

5057. You agree, do you not, that it is for the ering spouse to establish that he has reformed?—Yes.

5058. And in very few cases is that ever a possibility?—That might be so, but if your Lordship were in agreement that *Cox* might have resulted in an injustice then that would be a clear case of injustice.

5059. It would not result in any injustice if it were the fact that the husband had reformed?—I would respectfully contest that, for this reason. Let me give a simple case of two precisely similar cases of cruelty, and two precisely similar actions being taken. In the first year, Year 1 of the action, the wife would not be in a safety in returning to her husband. In Year 3 she would be in safety. In one action there is a House of Lords appeal taken between Years 1 and 3 and the pursuer in that action loses her remedy. In the other case there is not a House of Lords appeal. The proof is taken in the first year and the pursuer gets her remedy. The circumstances in those two cases are entirely the same, but in the one case the pursuer gets her remedy because the proof is taken in Year 1, and in the other case she does not get it because, owing to a misfortune over which she has no control, she does not reach the proof until Year 3. That, if I may respectfully say so, is the view which the Lord Justice Clerk had in mind in the case of *Danby* in 1950, and while it may not be tenable under the existing law it seems to me that it is a most reasonable and commonsense view. May I also say that the other theory depends on the protective element in the remedy of divorce for cruelty? The remedy is only given where there is need

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of protection, yet the remedy when it is given lasts permanently, it does not last for the period of the necessary protection. It seems to me, therefore, that protection may have been introduced in a somewhat unnecessary form. Surely if there has been at a specific date need of protection from cruelty then the pursuer should get her remedy or his remedy, and that remedy should only be excluded by her thereafter.

5060. I do not want to get into an unnecessary argument, Mr. Procurator, but perhaps I might say this. Of course, as to your illustration of Year 1 and Year 3, it is quite true that we cannot devise a perfect system, and it so happens that that is the misfortune or accident of the time factor. But there is a more general question. Does it not occur to you that the fact that an act of cruelty has taken place, and then is an irretrievable ground of divorce, is rather offending against the idea of repentance, assuming, of course, that repentance can be established, which is very difficult, and can only happen in the exceptional case that the erring spouse has genuinely repented? It seems to me rather against the doctrine of the Church.—It is the same position as with an act of adultery.

5061. I quite agree, that is why I stated the question in a general form.—The present administration of the law leads to injustice and inequity not only in the case I have given, but in other cases, too. It is very much more difficult to establish need of current protection, for example, in relation to mental cruelty or intoxication, or for that matter, in relation to physical cruelty, because usually when the cruelty has taken place it leads to separation from that moment onwards and there is not the same evidence of need of protection for the future. The pursuer is really deprived of the evidence which would have existed if she had still been living with the defender, because she is now separated from him.

5062. I think we can pass from that chapter. As regards insanity, I understand that although the Church's view is that there are certain objections to divorce for insanity which we can all appreciate, you do agree that if insanity is to remain, then the certification of the defender should not be a *sine qua non*?—And the reason for that is the type of case that you get in *W. v. W.* (1945 *Scotts Law Times*) where, for example, a husband was detained for seventeen years in a voluntary home, but owing to his never having been certified a remedy was excluded. It seems inequitable.

5063. You say that the insanity may result from the cruelty of the other spouse, yet the latter will have the right to divorce the one he or she has ill-treated. Is there not provision in the Divorce Act that if the conduct of the pursuer has led to the insanity the court can refuse a decree?—That is correct.

5064. Then that point in your Report is not quite accurate?—That point is not.

5065. And the other point is a question more of medical fact. You say:—

"It is doubtful, moreover, if insanity for the five years' period at present in force is sufficient, according to the latest medical opinion, to preclude all hope of recovery."

From what we have heard I think that the medical evidence is all in the other direction. If there was insanity the medical profession would by modern methods be able to ascertain fairly definitely, within a relatively short time, whether the insanity was permanent or not; there are certain modern treatments, and the view of the profession is that the five years' period is not at all necessary now?—This, of course, is a matter on which we have no expert knowledge, but at the same time a view was expressed in Committee, and because of that query having been raised, we thought it was right that the Royal Commission, who would have the opportunity of investigating that matter, should have the query brought to their notice.

5066. On the question of malicious denial of sexual intercourse, that, so far as Scotland is concerned, I think would hardly be regarded as a new ground or an extended ground. It is quite true that the House of Lords did decide, contrary to the long experience of opinion and decision in Scotland, that it should not be a ground. But the view in Scotland had been held for, I suppose, a century or more that it was a ground?—Yes.

5067. And you are really reverting here to what was the originally accepted view of the profession generally in Scotland?—That is so.

5068. May I turn to the proposed grounds of nullity?—I should say that these were taken from the 1937 Act.

5069. I do not know whether you have any view on this, whether these grounds are properly grounds of nullity rather than grounds of divorce. Let me give you an illustration. They all involve the element of misrepresentation, do they not?—Yes.

5070. And you are familiar, of course, Mr. Philip, with the idea of reduction of a contract on the ground of misrepresentation. Does it occur to you that nullity may not be quite the logical remedy, and that divorce is really perhaps the proper remedy?—These are all reductions *ab initio*.

5071. That is the effect, they do go back to that, but you do not have any definite view?—No, except that I think it would be unfortunate if on one side of the Border they were treated as nullity and on the other side as divorce.

5072. I do not think we would think of that. Probably the law of the countries would be uniform in that respect, at least I should hope so. With regard to property rights, I want to be clear upon this. At the end of paragraph 5 in Section III you say:—

"It is submitted that, now, the law should be so altered as to confer on the court power to award aliment on the dissolution of a marriage, and also to regulate property rights and vary settlements."

Now, are these alternative or cumulative?—May I explain more fully what we had in view? First of all, on the footing that perhaps ninety per cent. of divorcing spouses are likely to get benefit from aliment rather than the old Scots legal rights, it seems desirable that aliment should at least be available as an alternative where legal rights would be of no value. Further, if aliment were available, that would destroy the argument which is often put, that judicial separations are resorted to in certain cases because the spouse can then get aliment whereas in divorce it is not available. So far as regulation of property rights is concerned, it would be inappropriate where aliment is granted that there should also be legal rights. It seems that the one must exclude the other, and to that extent you will regulate legal rights. Our proposal for variation of settlements rather relates to the variation of marriage settlements.

5073. I was going to ask about that. I was not quite clear what you had in your mind, because at present under the law, so far as marriage settlements are concerned, they operate as if the divorced party were dead, and therefore in what way would you need to vary the settlement?—It seems to me that it would be valuable if there were an alternative discretion for the court to vary settlements at that point. (Chairman): Might I say, arising out of that, that in England, there is a very wide power to vary settlements, not only marriage settlements but settlements of all kinds, and even certain provisions which, in the ordinary use of the word "settlement", might not be so considered?

5074. (Mr. Justice Pearce): Dr. Hutchinson Cockburn, I want to put to you this question about marriage with a divorced wife's sister. I follow your argument, and there is obviously force in that which leads one to approach the subject with caution. You have heard the argument on the other side, put by my Lord Chairman, in which you would agree there is also considerable force?—(Dr. Hutchinson Cockburn): Yes.

5075. I suppose one approaches this problem keeping two things in mind, firstly, to avoid the promotion of immorality, and secondly, to avoid the promotion of unhappiness through hardship. Would it be fair to say that both those are important considerations?—Yes, certainly.

5076. The danger that you put forward is by necessity hypothetical?—Yes.

5077. The hardships that my Lord has spoken of do, we know, exist, that is to say, there are cases where it has been a great hardship that, particularly for the sake of the children, the husband is unable to marry his divorced wife's sister. It needs, does it not, strong hypothetical

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arguments to overcome contrary arguments which are founded on actual cases?—I hardly think that it is right to say that one is hypothetical and the other real, and therefore the hypothetical goes by the board, because it is not a case that is in actual practice at the moment, and therefore we have to apply what wits we have as to what would happen in a certain set of circumstances.

5078. I did not want by that to connote that because your arguments were hypothetical they were therefore to be more lightly regarded. But we must bear in mind, in weighing them up, the fact that they are hypothetical?—Yes, as long as there is no sinister meaning in the word, "hypothetical".

5079. There is not. May we cast back our minds to the question of marriage with a deceased wife's sister? It would be fair with regard to that to say that the abolition of the ban on marriage with a deceased wife's sister has worked satisfactorily?—Yes.

5080. Casting one's mind back to a consideration of it, one of the hypothetical arguments against allowing that would have been that it would be an incentive to murder, would it not?—Not really, in modern circumstances. It might have been in the days of Moses, but not now.

5081. It would be an argument which it would be possible to adduce?—Of infinitesimal value.

5082. And you and I would discard it, would we not, as reasonable men?—Yes.

5083. Because we would say that, weighing it against existing hardships, though undoubtedly that is a possibility that may arise, we do not think it outweighs the hardship. That is how we should approach it?—Yes.

5084. Do you not think that you are giving rather too much weight to this "hypothetical" fear that the reform now suggested will disturb family relationships? You postulate the case of a man who will break up his marriage because he foresees the hope of a marriage with the sister-in-law. That is right, is it not?—Yes.

5085. You are postulating the case of a man who is sufficiently disregarding of marriage as to be prepared to break up his marriage, yet is sufficiently keen on marriage to embark on an affair with somebody whom he would leave chaste if he could not marry her?—Yes.

5086. So that the danger is not a danger from every person, because some would be too good to be moved by it, and some would be too bad to be moved by it?—It only applies to the exceptions.

(The witnesses withdrew.)

PAPER No. 64

MEMORANDUM SUBMITTED BY THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF GREAT BRITAIN AND NORTHERN IRELAND

This memorandum is based on the views expressed by members of some of the 244 clubs (with a total membership of over 14,000 women) who together form the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland.

I. (A) CHANGES WHICH SHOULD BE MADE IN THE LAW OF ENGLAND

Changes in the present grounds for divorce

Desertion

1. It is recommended that Section 1 (1) (b) of the Matrimonial Causes Act, 1950, be altered by providing that the period during which the respondent shall have deserted the petitioner shall be a period of at least three years during the three-and-a-half years immediately preceding the presentation of the petition, instead of a period of at least three years immediately preceding the presentation of the petition, as at present.

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5087. Even in the case of the exception do you think that it would be bound to be the deciding factor between a man's behaving himself and not behaving himself?—It certainly would not invariably be the deciding factor, but in some cases it would.

5088. Really the fear you are advancing is not a fear that is applicable to everyone, and it is a fear that really might have very little application to real facts, is it not?—It might have, but it might have a larger effect. It might weaken the whole conception of marriage in certain areas where it is weak enough already.

5089. And do not you think that the words that you have used—"disturbing the relationship"—might have been used as an argument against marriage with the deceased wife's sister, because the fact that a man may if his wife dies be able to marry his sister-in-law in two or three years might have a disturbing influence?—I remember that in the General Assembly, when that matter was discussed, there were very prominent people who would not have it on any account because of that consideration. That has been proved to have been more or less unjustified, but you have a different element here that needs very careful watching. That is all the Church says. (Mrs. Duncan): Might I mention that about a fortnight ago there came to my notice an actual case of a man marrying his divorced wife's sister in a country not our own? I got a number of facts, but, of course, the Committee has not met since then, and I have not been able to put it before them, but the result is that family has been acute distress. I would just like to endorse what Dr. Hutchison Cockburn has said with regard to the disruption of family life caused in such a case. I can give details if the Commission would like them.

5090. (Lord Keith): Did the acute distress occur after the marriage with the divorced wife's sister, or before the marriage?—Both before and after.

5091. What was the acute distress afterwards, was it with the children?—Partly with the children and very largely with the parents of the sisters.

5092. (Chairman): I think that the Commission would be glad to have the particulars of the case which you mention.—In private.

5093. Perhaps you could put them in writing and send them to the Secretary?—I could.

5094. That, I think, concludes our questions. We are very grateful to you for the memoranda and for coming here to help us today.—(Dr. Hutchison Cockburn): Thank you very much, my Lord.

2. A husband who has deserted his wife who is anxious for him to return to her may ask to come back to his wife without any intention of making a permanent reconciliation but merely with the idea of preventing the wife from obtaining a decree against him. If the deserted wife persistently attempts a reconciliation she should not be penalised when the husband's offer to return is not genuine. By allowing the parties a period of, say, six months, during which they may live together without the period of desertion having to commence again from the subsequent separation, the intentions of the deserting spouse could be tested.

Cruelty

3. It has been held that conduct sufficiently grave to justify a refusal to cohabit any longer with the offender may, nevertheless, be insufficient to entitle the sufferer to relief on the grounds of cruelty. It is recommended that the definition of cruelty be extended to cover conduct such as would justify a refusal to cohabit but which, at the present time, would not amount to cruelty.

B

PAPER No. 64. MEMORANDUM SUBMITTED BY THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF GREAT BRITAIN AND NORTHERN IRELAND

Insanity

4. It is recommended that Section 1 (1) (d) of the Matrimonial Causes Act, 1950, be amended by deletion of the words "and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition", thus making a ground for divorce that the respondent is incurably of unsound mind. The proof that the respondent is of unsound mind should be a matter for medical witnesses and should depend on the state of medical knowledge at the time the medical evidence is given.

5. If a husband or wife is, according to the best medical opinion, unlikely to become sane, no good purpose is served by insisting on the petitioner waiting for five years before presenting a petition.

New grounds for divorce

6. While many clubs recommend that the law should be changed by adding to the grounds for divorce, one club at least deplores the attention which is being given to making divorce easier and recommends that far more consideration should be given to preventing it, on such lines as are advocated by the Marriage Guidance Council. A further suggestion is that entrance into the marriage contract should be made more difficult.

7. The following are the recommendations which have been made by clubs who are in favour of extending the grounds for divorce:—

(a) *Divorce by agreement*

(i) It is appreciated by those who put forward this recommendation that to make provisions for divorce by mutual agreement strikes at the foundations of the present law relating to divorce. But, nevertheless, provided that proper safeguards are made for the care and maintenance of the children of the marriage, if any, it is the opinion of many that when two people of full age and understanding have, after due consideration, come to the conclusion that they can no longer continue to live together, then those two people should be able to apply to a court and obtain a dissolution of their marriage. A provision such as this would put an end to the "hotel divorce" which at present brings the law into disrepute.

(ii) A modification of this recommendation is that it should be possible for both parties to agree to apply for a divorce after actual separation for a period of, say, three years.

(b) *Divorce after a long period of separation*

It is recommended that some form of relief should be available to a spouse who has been living apart from the other spouse for a considerable period of time even though that spouse be the one who is now known as "the guilty party" unless "the innocent party" can prove that he or she has conscientious objections to divorce. The period of time which has been suggested varies from five to seven years. Under the present law a spouse who has been deserted may refuse to divorce the other because of unworthy motives, and such refusal prevents the other spouse from marrying again, although he or she may be living with another woman or man, and would marry and lead a happy family life if not prevented by the spite or other unworthy motive of the deserted spouse. This state of affairs can work great hardship, particularly if the separation occurs when the parties are young. If the deserted spouse has genuine objection to divorce on moral or religious grounds such objection should be respected. There should be proper safeguards for the care and maintenance of young children of the marriage and for the maintenance of the deserted wife.

(c) *Divorce by husband on grounds of his wife's unnatural practices*

By Section 1 (1) of the Matrimonial Causes Act, 1950, it is provided that a wife may present a petition for divorce on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality. It is recommended that an amendment should be made enabling a husband to present a petition for divorce on the ground that his wife has, since the celebration of the marriage, been guilty of lesbianism.

(d) *Divorce on grounds of long term of imprisonment*

It is recommended that where a husband or wife has been sentenced to a long term of imprisonment or several terms of imprisonment for a grave criminal offence committed after the celebration of the marriage, the other spouse shall be enabled to obtain a divorce on that account. It is felt that the term of imprisonment or the aggregate of the terms of imprisonment should not be less than seven years.

Abolition of damages for adultery

8. It is recommended that Section 30 of the Matrimonial Causes Act, 1950, be repealed.

9. For a husband to be able to claim damages from any person on the ground of adultery with his wife is a relic of the time when the wife was regarded as a chattel. Judges are frequently questioning whether there is any, and if so what, value to be placed on a suffering wife.

10. If a claim for damages against the co-respondent is to be retained then power should be given to a wife to claim damages from any person on the ground of adultery with her husband. It is inequitable that a wife should not be able to make such a claim whereas her husband in similar circumstances can make a claim. If damages could be recovered from a woman named, it would be of assistance to the wife who had been left to bring up a family of young children.

Maintenance

11. It is recommended that after a decree of dissolution or nullity of marriage the court may have the same powers to order the wife to pay alimony and maintenance to the husband and to order security as it now has in the case of orders against the husband in respect of the wife.

12. It is unfair on a husband that such orders cannot be made at the present time. A husband with little or no income may have been married for a great many years to a wife with a substantial income. He would during this time have been living in a style suitable to his wife's income. If the wife should then, through no fault on the husband's part, leave the husband to live with another man, perhaps leaving the husband with young children to bring up, it is a great hardship to the husband not to be able to make any claim against the wife and it is considered only fair that the husband should be able to obtain an equivalent order against his wife as a wife would be able to do if the circumstances had been reversed.

Enforcement of maintenance orders

13. It is recommended that the periodical payment of any sum of money not exceeding £500 a year directed to be paid by any order of a court having jurisdiction in divorce should be enforceable by a court of summary jurisdiction in the same manner as the payment of money is enforced under an order of affiliation.

14. At the present time many women suffer hardship because they find that orders which they have obtained against their former husbands are both difficult and expensive to enforce. It is felt that it would be a great advantage if the machinery which has been found to be effective for the enforcement of orders of courts of summary jurisdiction was made available for the enforcement of the small orders of the High Court.

1. (B) CHANGES WHICH SHOULD BE MADE IN THE LAW OF SCOTLAND

Changes in the present grounds for divorce

15. *Willful desertion for three years.* At present the petitioner must swear and prove willingness to adhere and must submit proof of efforts to bring about a reconciliation. It is recommended that the innocent spouse should not be required to affirm willingness to adhere, as in many cases such affirmation is fiction.

New grounds for divorce

16. The suggestions which have been made concerning changes which should be made in the law of England have also been made regarding changes which should be made in the law of Scotland so far as such changes can be applied.

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17. The general opinion is that the law of both countries should, as far as possible, be brought into line and that any changes which are made should tend to lessen the existing differences rather than to accentuate the points of variance.

Judicial separation

18. It is recommended that new standards of cruelty should be defined, as it is considered that the present legal measure of cruelty is too exacting. Some members express the opinion that judicial separations are largely brought about owing to the unsatisfactory nature of the property rights of spouses on divorce. It is suggested that if some arrangement were made whereby on divorce the innocent spouse would be paid regular sums by way of maintenance, the number of judicial separations would decrease.

II. (A) CHANGES WHICH SHOULD BE MADE IN POWERS OF COURTS OF INFERIOR JURISDICTION IN ENGLAND

19. Recommendations under this heading have also been dealt with under Section IV and reference should be made to that part of this memorandum.

Separation and maintenance orders

20. (a) It is recommended that a maintenance and/or separation order should not be granted within twelve months of the marriage unless a probation officer or recognised social worker has placed before the court a report that all attempts at reconciliation have proved abortive.

It is appreciated that many enlightened magistrates' courts are reluctant, indeed often refuse, to grant a summons until such time as their probation officers have reported that reconciliation is impossible, and indeed, the number of reconciliations brought about by probation officers is most commendable.

(b) It is further recommended that should the court deem it wise or necessary to have both parties to the dispute before them, they should be given the power to insist on the attendance of either or both parties. In particular, where a husband has deserted his wife leaving her and her children without support there should be power to bring him before the court on a warrant.

It is appreciated by those who make this recommendation that the National Assistance Board have power to apply to the court for such a warrant if the husband leaves his family chargeable (National Assistance Act). Moreover, the officials of the National Assistance Board often have knowledge of the whereabouts of the husband. It is felt, however, that this power is insufficiently exercised.

In this connection, it is further recommended that the attention of the National Assistance Board, centrally, might usefully be drawn to this point, with a recommendation that instructions be issued to local officers along these lines. Prompter action might well be taken, and it be thus ensured that the summons granted to the wife could be served upon the husband immediately upon his arrest on a warrant granted to the National Assistance Board.

(c) It is suggested that more use should be made of probation officers' reports including information as to means obtained prior to the hearing of a case. A precedent for this lies in the home surroundings report prepared by a probation officer prior to the hearing of a case before a juvenile court; such reports are not produced until the case has been proved, and are then found to be invaluable to the magistrates.

(d) It is recommended that power should be vested in a magistrates' court to order that payments under a maintenance order which have fallen into arrears might be deducted at the source of earned income, where applicable, and remitted direct to the court's collecting officer by the employer. (It should be noted that this power already exists under Scottish law.)

It is appreciated that power exists to detain on the property of the husband in some cases, and where applicable, but this power is seldom exercised. Maintenance orders are difficult to enforce, and all too frequently the only course open to magistrates in dealing with non-compliance to pay, and arrears, is punishment by

imprisonment. This method is of no help to the wife, not to the taxpayer if the wife is receiving national assistance benefit, as is frequently the case.

It is fully appreciated that this power would not meet the case where the husband is self-employed, but power to collect at source of income where men are employed in large factories would cover a large percentage, as was the case, say, via Army allowances, used extensively during the war.

II. (B) CHANGES WHICH SHOULD BE MADE IN POWERS OF COURTS OF INFERIOR JURISDICTION IN SCOTLAND

21. It is recommended that the Sheriff Courts should have jurisdiction to deal with divorce cases in addition to the jurisdiction which they already have to deal with cases of judicial separation and actions for aliment.

III. (A) CHANGES WHICH SHOULD BE MADE IN THE LAW RELATING TO THE PROPERTY RIGHTS OF HUSBAND AND WIFE IN ENGLAND

22. There is a very considerable body of opinion in the Federation in favour of changes in the law relating to the division of the income to a matrimonial home and the ownership of furniture bought out of housekeeping money.

23. In cases where the wife has no income of her own she is at a great disadvantage in that she has no money which she can spend entirely at she likes. Furthermore, she cannot claim any profit which may accrue by the expenditure of money given to her by her husband for housekeeping. For example, if a wife spends a sum out of her housekeeping money in a football pool and wins a large sum of money, that money belongs to the husband.

24. In cases where the wife has an income of her own, difficulties and hardship may arise when she buys furniture for the matrimonial home out of moneys which are made up of the housekeeping allowance given to her by her husband and her own earnings.

25. It is appreciated that solutions to these and allied problems are very difficult to formulate and that many changes which could be suggested would alleviate some cases of hardship but at the same time would create new cases of hardship and might aggravate present difficulties.

26. It can be argued that where, as at present, the wife is not entitled to claim any part of the housekeeping allowance as her own, she is not encouraged to be thrifty. On the other hand, if a provision was to be made whereby the wife would be entitled to retain as her own a proportion of the amount she was able to save out of the housekeeping allowance, it might be argued that many husbands might suffer by reason of their wives' miserly attributes. Nevertheless, it is only fair to the wife that some credit should be given to her for the pecuniary value of her unpaid work in the home, which work the husband would have to pay a housekeeper to do should his wife be leaving him with young children.

27. In spite of the difficulties, the consensus of opinion of the members of the clubs forming the Federation, is that changes should be made giving a wife a right to some part of her husband's earnings in cases where she has no income and, conversely, a husband who has no income should be entitled to some part of his wife's income.

28. The law of Sweden gives the husband and wife a special right or "giftorätt" in the property of the other, of a legal nature. The study of Swedish law on the subject might prove very helpful and the introduction into English law of some of the principles which have been found to work well in Sweden might help to solve some of the difficulties which now exist in England.

29. As regards the furniture of the matrimonial home, such furniture as belonged to the husband or wife before marriage should remain his or her property but some scheme of equitable division of the furniture, bought in contemplation of or after marriage, should be devised. The need for such a scheme becomes apparent on the break-up of a marriage and one way of dealing with the matter would be to give power to the court granting a

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decree of divorce or nullity or a maintenance or separation order of complete discretion as to the division between the husband and wife or otherwise of the furniture in the matrimonial home.

30. The court should also have power to make an order relating to the tenancy of the dwelling-house which up to the time of the separation of the parties has been used as the matrimonial home. Great hardship is caused at the present time when the husband, who is usually the tenant of the house occupied by the family, deserts his wife. Landlords, including local authorities, are reluctant to transfer the tenancy to the wife. This lack of security for the wife and children could, in appropriate cases, be prevented by giving the court power in its discretion to vest the tenancy of the matrimonial home in whichever party the court deemed desirable.

III. (B) CHANGES WHICH SHOULD BE MADE IN THE LAW RELATING TO THE PROPERTY RIGHTS OF HUSBAND AND WIFE IN SCOTLAND

31. The suggestions made by the English clubs under Section III (A) have also been made by Scottish clubs, particularly as to the right of sharing income, tenancy of a house and savings from housekeeping money. In addition, it has been suggested that a husband should not be responsible for his wife's income tax; and also that a husband divorcing his wife should be entitled to one-third (or one-half) of her moveable estate equal to her right in his estate on divorce against him, and that a wife should have the same rights in his heritable estate, as a husband has in her heritable estate on divorce.

32. The proportion of income to which the other spouse should have legal right varied in the reports of the clubs, but not more than one-half of the income was mentioned, and that not exceeding £300 per annum where the income was large. A sliding scale was also suggested, according to the income and the cost of living.

33. All the clubs making reports, however, were unable to suggest methods of making practicable and enforceable the proposed right of a spouse to a share of the income of the other without the possibility of breaking up the marriage.

IV. CHANGES WHICH SHOULD BE MADE IN THE ADMINISTRATION OF THE LAW

(1) County courts to have divorce jurisdiction

34. County court judges have shown themselves capable of dealing with matrimonial causes, because when sitting as a special commissioner acting under a Special Commission, a county court judge may try and determine all classes of matrimonial causes, subject to rules of court, and all the county court judges have been appointed special commissioners for this purpose.

35. It is recommended that county court judges should be empowered to try and determine all classes of matrimonial causes, not only as special commissioners but also as county court judges, in their own courts.

36. Difficulties would be encountered by county court judges being unable to give sufficient time to long defended actions, having regard to their other work. It is suggested that to obviate this difficulty the county court judge should be given power to transfer any such action to the Probate, Divorce and Admiralty Division of the High Court.

37. The advantages of giving divorce jurisdiction to county court judges in their own courts would be many, but chief among them would be the saving of expense. The cost of an undefended divorce case is very high at the present time and a great deal of the expense would be saved if it could be tried in the county court.

(2) Proceedings under the Summary Jurisdiction Acts, 1895 to 1925

38. The matrimonial jurisdiction at present exercised by justices is probably the most difficult of the work done by justices, as the law which they have to administer is complicated and the cases are ones in which personal prejudices and feelings are liable to prevail. Justices have difficulty in reaching a decision which is in accordance with a decided case but which, at the same time, is

in their opinion contrary to commonsense and not in accordance with their personal feelings.

39. Two suggestions are made with a view to overcoming this difficulty. Those who support the second suggestion are not in favour of the introduction of the first suggestion. The first suggestion is that the matrimonial jurisdiction at present exercised by justices under the Summary Jurisdiction Acts, 1895 to 1925, should be transferred to the county court, because a county court judge, owing to his training, should not experience the same difficulties as lay magistrates experience.

40. The second suggestion is that power under the Summary Procedure (Domestic Proceedings) Act, 1937, as to the constitution and sittings of domestic courts, be further extended to provide that a special panel of justices be appointed to sit in domestic proceedings courts similar to the special provisions now in force relating to the constitution of juvenile courts.

41. It is appreciated that although the majority of justices may well be men and women who are familiar with social work, the special experience of some justices along these lines might well be used to better advantage if such provisions were in force.

(3) The court having matrimonial jurisdiction to have powers regarding property

42. In this memorandum it has been recommended under Section III that on the break-up of a marriage the court granting a decree of divorce or nullity or a maintenance or separation order should be given complete discretion as to the division between the husband and wife or otherwise of the furniture in the matrimonial home and should be able to make an order regarding the tenancy of the house used as the matrimonial home.

43. At the present time, on the break-up of a marriage, there are very often two sets of proceedings in two different courts. If the recommendation were effected, the court dealing with the case from the aspect of the marriage would also deal with questions between the husband and wife as to property which have hitherto been dealt with by the High Court or county court under the Married Women's Property Act.

44. It is felt that this recommendation should be adopted whether or not the alteration suggested in Section IV (2) above is effected. Not only would the adoption of this recommendation often save long and costly proceedings but it is felt that justice would be more likely to be done between the parties if all aspects of the dispute were dealt with by the same tribunal.

(4) The provisions under the Legal Aid and Advice Act, 1949, to be implemented as soon as possible

45. It is recommended that legal aid be made available to litigants in county courts and magistrates' courts immediately.

46. Some injured parties prefer to seek redress in the lower courts but cannot do so as assisted persons. Not only does legal assistance help the litigant but it also assists the court. At the present time many justices' clerks ask solicitors who practise in their courts to act for one or other of the parties to matrimonial cases for no fee or a nominal fee (sometimes paid out of the poor box). Such arrangements are only possible through the generosity of the solicitors concerned and an unfair burden may fall on those who are willing to assist. The courts recognise the value of legal assistance and justices and clerks to justices look forward to the day when any litigant who comes before them and who wishes to have legal aid is able to obtain such assistance without relying on the charity of members of the legal profession.

(5) Reconciliation

47. It is believed that many of the ills that beset marriage are like many of the ills that beset the body, in that they can be cured if taken in hand in time by skilled people. Few couples want to see their marriage break, but there is rarely hope of successful reconciliation when matters have become so bad that one spouse has filed a petition for divorce.

48. It is felt that what is needed is a nation-wide service of skilled conciliators to which married people may turn for guidance and help when signs of matrimonial trouble

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MISS M. B. SMITH AND MISS A. STUART-COOPER

29 October, 1952]

first show themselves. Marriage guidance councils are doing good work, but they are not ubiquitous, their work and existence are not widely enough known and too much reliance is placed upon voluntary work.

49. At the present time, when trouble starts in the married life of young people, so far as these young people know, there is no one to whom they can turn for advice except their parents. Often they are too proud to let parents know of the trouble, and even if that is not the case parents are not the best people to view the matter dispassionately and advise disinterestedly.

50. It is felt that if there was a nation-wide conciliation service staffed by trained men and women to whom any married person could apply for advice and help knowing that anything disclosed would be secret and that the only desire of the person consulted would be to help to maintain the marriage, in the course of time husbands and wives would readily make use of such a service and thousands of marriages would be saved from breaking up.

51. In spite of what has been said in the second paragraph under this heading, it is thought by those putting forward the suggestion that there would be no objection to a person seeking a divorce being required first to consult a member of the conciliation service.

(6) Child witnesses

52. It is recommended that it be made illegal for any child of sixteen or under to be called as a witness in a case before a domestic proceedings or divorce court.

53. In a court of summary jurisdiction where, for example, a wife makes an application for a maintenance and/or separation order on the grounds of persistent cruelty, it happens quite frequently that the only available direct witness of such cruelty on the part of the husband is a child or children of the marriage (or step-children). In cases where a child is called to give evidence it is very likely to be harmful to the child and experienced magistrates feel that the evidence of children is of little value.

54. As well as the harm which may be done to the child who is called to give evidence, there should also be considered the effect on the parent against whom the child has given evidence. If the case is not proved and home life is resumed, children's references to the case in court can be irritating to both parents, and productive of further trouble which might otherwise be gradually resolved. Where a case is proved the guilty parent finds it difficult to forgive the child for speaking against him or her.

V. CHANGES WHICH SHOULD BE MADE IN THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

55. It is recommended that the following be substituted for Part II of the First Schedule of the Marriage Act, 1949.

- (i) (a) Deceased or divorced wife's sister.
Deceased brother's wife.
Brother's divorced wife.
Deceased or divorced wife's brother's daughter.
Deceased or divorced wife's sister's daughter.
Father's deceased brother's wife.
Father's brother's divorced wife.
Mother's deceased brother's wife.
Mother's brother's divorced wife.
Deceased or divorced wife's father's sister.
Deceased or divorced wife's mother's sister.
Brother's deceased son's wife.
Brother's son's divorced wife.
Sister's deceased son's wife.
Sister's son's divorced wife.
- (b) Deceased's sister's husband.
Sister's divorced husband.
Deceased or divorced husband's brother.
Father's deceased sister's husband.
Father's sister's divorced husband.
Mother's deceased sister's husband.
Mother's sister's divorced husband.
Deceased or divorced husband's brother's son.
Deceased or divorced husband's sister's son.
Brother's deceased daughter's husband.
Brother's daughter's divorced husband.
Sister's deceased daughter's husband.
Sister's daughter's divorced husband.
Deceased or divorced husband's father's brother.
Deceased or divorced husband's mother's brother.

56. This recommendation is put forward by several clubs as they feel that hardship is caused to persons who are not allowed, after dissolution of an earlier marriage, to marry their previous "in laws". As against this, there are others who hold the opinion that if further exceptions were added to the prohibited degrees in the manner suggested above, this would remove a possible deterrent to divorce and would therefore be a bad thing.

(Received 15th January, 1952.)

EXAMINATION OF WITNESSES

(MISS M. B. SMITH and MISS A. STUART-COOPER, representing the Scottish Division of the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland; called and examined.)

5095. (Chairman): We have before us from the Scottish Division of the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland Miss M. B. Smith of the Ayr Branch of the Federation?—(Miss Smith): Yes.

5096. I understand that there is another lady accompanying you.—Yes, Miss A. Stuart-Cooper, President of the Scottish Division.

5097. Your memorandum begins by saying:—

"This memorandum is based on the views expressed by members of some of the 244 clubs (with a total membership of over 14,000 women) who together form the National Federation. . ."

Would you tell me how many of these clubs are in Scotland and how many in England?—I am dealing with the Scottish clubs only and there would be about seven Scottish clubs who sent in answers to many of the questions, representing about 600 members.

5098. You sent round questions to your clubs?—Yes, a questionnaire in the terms of the five questions on which the Commission invited submissions.

5099. Seven of the clubs in Scotland gave their answers?—Yes, there were one or two other clubs who answered certain questions, but seven clubs dealt, on the whole, with all of them.

5100. The memorandum, so far as it relates to Scotland, is based upon those answers?—Yes.

5101. I shall pass over Section I (A), which is headed "Changes which should be made in the law of England", because you are not going to speak about that, are you?—No.

5102. Then, in Section I (B), we come to your recommendations for changes which should be made in the law of Scotland. The first is under the heading "Wife's desertion for three years"—I have no questions on that. The second heading is "New grounds for divorce", and you say there:—

"The suggestions which have been made concerning changes which should be made in the law of England have also been made regarding changes which should be made in the law of Scotland so far as such changes can be applied."

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MISS M. B. SMITH AND MISS A. STUART-COOPER

[Continued]

Then you express the general opinion that the law of both countries should, as far as possible, be brought into line and that any changes which are made should tend to lessen the existing differences rather than to accentuate the points of variance. I want you to turn now to the changes which have been suggested in the law of England, because you say that some at least of your clubs have suggested these should apply to Scotland. Paragraph 7 in Section I (A) of the memorandum states:—

"The following are the recommendations which have been made by clubs who are in favour of extending the grounds for divorce . . ."

You start off with divorce by agreement, and the first sentence is:—

"It is appreciated by those who put forward this recommendation that to make provisions for divorce by mutual agreement strikes at the foundations of the present law relating to divorce. But, nevertheless, provided that proper safeguards are made for the care and maintenance of the children of the marriage . . ."

and so on. I do not propose to ask you questions about this, because we have had so many witnesses who have discussed the arguments for and against it. Your clubs apparently are divided upon it?—Yes.

5103. I do not think that it would be fair to cross-examine you on it—we have taken note of the suggestion—unless you wish to add anything to what is in the memorandum?—There is one point I would put generally and that is that in Scotland marriage used to be easily entered into. Prior to 1938 a man and woman could take each other as married partners without any witnesses. There was some advantage in that they could easily get out of marriage without coming into the orbit of the law to do so. We realise of course that the children ought to be cared for, and that regulations had to be made for their upbringing, but nevertheless I feel that Scotland has now lost a lot of liberty in that a man and woman must get someone else to marry them.

5104. "Must get someone else to marry them"?—There is a mutual consent. If each party takes the other they get married but, as you know, if one person had given consent under duress the marriage can be annulled. If one party breaks that consensual arrangement, the other party can get a divorce for desertion, if that party is willing to adhere. Yet when there are two parties who have given up marriage, who do not live together, and there is no consent to the continuance of the marriage on either side, neither party can get a divorce. We think that where there is no consent whatever there should be some arrangement made whereby either party can raise an action for divorce or to have the marriage dissolved.

5105. I do not quite understand your saying, "where there is no consent whatever". How can two people get married without consent?—If one of them was drugged, or something like that. There have been occasional cases, though they have been few and far between.

5106. I do not think I want to ask any other questions about that. You did say that under the old system when people could get married easily they could get divorce without going to the court. Perhaps Lord Keith will deal with that later, because I am not very familiar with it. Then you also say that you recommended that some form of relief should be available to a spouse who has been living apart from the other spouse for a considerable period of time, even though that spouse be the one who is now known as "the guilty party", unless "the innocent party" can prove that he or she has conscientious objections to divorce. You say the period of separation which it has been suggested should qualify varies from five to seven years. That, again, is a suggestion which has been made so often and opposed so often that I think we are familiar with the arguments on both sides, and we note the views of your clubs on it. How many of your seven clubs who answered the question made that particular suggestion?—Two clubs only.

5107. Coming back to the suggested changes in the law of Scotland, would you turn to paragraph 18, in Section I (B), where you deal with "Judicial separation"? You say:—

"It is recommended that new standards of cruelty should be defined, as it is considered that the present legal measure of cruelty is too exacting."

Then in the section dealing with suggested changes in the divorce law in England you say, in paragraph 3:—

"It is recommended that the definition of cruelty be extended to cover conduct such as would justify a refusal to cohabit but which, at the present time, would not amount to cruelty."

Was that the sort of thing which the Scottish clubs had in mind?—Yes.

5108. Then I come to Section II (B), which is headed, "Changes which should be made in powers of courts of inferior jurisdiction in Scotland". We had that very fully dealt with on the first day of our hearings here.—The memorandum is not quite accurate here, Sir. There were another two clubs which reported against that, so that actually the reports became even.

5109. So it should be really "Half the clubs which answered recommend . . ."—Yes.

5110. Would you turn now to Section III (B) of the memorandum, which deals with changes which should be made in the law relating to property rights of husband and wife in Scotland? That, as I understand it, is simply a statement of what the clubs suggested?—Yes.

5111. And you end up by saying:—

"All the clubs making reports, however, were unable to suggest methods of making practicable and enforceable the proposed right of a spouse to a share of the income of the other without the possibility of breaking up the marriage."

—Yes.

5112. So that your clubs were aware that there were certain dangers in saying that a proportion of a wife's income shall belong to the husband and a proportion of the husband's income shall belong to the wife?—Yes.

5113. (Lord Keith): I would like to know, if you can give it to me, the proportion of the clubs in Scotland that suggested divorce by agreement, that is, by mutual consent?—Two clubs, with a membership of 200.

5114. Two clubs out of seven?—Yes.

5115. Then it was the same proportion as in the case of divorce after a period of separation?—Yes.

5116. In the case of the other five, were they adverse to these suggestions, or did they just return no answer?—They did not raise that point.

5117. In the questionnaire which you circulated did you put the question of divorce by agreement and divorce after separation?—No, the questions were the general ones set by the Commission and it was left to the clubs to raise any points they liked.

5118. And two of the clubs who replied proposed divorce by agreement?—Yes.

5119. And was it the same two which proposed divorce after separation?—Yes.

5120. How many clubs did you circulate altogether?—Twenty-four.

5121. And does that mean that out of the twenty-four only seven replied?—Yes.

5122. Are the twenty-four clubs scattered pretty well over Scotland?—Yes.

5123. Can you tell me to what areas the two clubs belong that made these two proposals?—Edinburgh and Ayr.

5124. (Chairman): And what post do you hold in the Ayr Club?—I am just an ordinary member now, I was President at one time.

5125. Were you President at the time these answers were sent in?—No.

5126. (Lord Keith): In the changes which should be made in the law of Scotland you deal with wilful desertion for three years and the question of adherence; how many of your seven clubs made this proposal?—The same two.

5127. I am beginning to wonder what the other five clubs did propose, but perhaps we will come to that. Would you turn to "Judicial separation", which is dealt with in paragraph 18? You say there:—

"It is suggested that if some arrangement were made whereby on divorce the innocent spouse would be paid regular sums by way of maintenance, the number of judicial separations would decrease."

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[Continued]

I wonder whether your clubs have any view on the question of whether a young woman, with no children, who is able to work and support herself should get maintenance from her husband after she has secured a divorce? Has that matter been considered at all?—Why should a woman who is able to support herself not get some money from the man she has married, as against a woman who may be lazy?

5128. That is against the husband whom she has married. But what about the case where she is divorced from her husband? Would you still say she should get some money from her ex-husband although she is able to support herself?—We cannot see why a woman who may not wish to work should be allowed alimony as against a person who is willing to work and does work in order to support a family. After all, the basis is the marriage contract, and the law as it stands says that a man is bound to alimony his wife irrespective of whether she can support herself or not.

5129. You do not seem to be a very strong supporter of sex equality, Miss Smith?—We are fully aware that we cannot be equal in many things. We are of the opinion that men and women are complementary to each other.

5130. We come to the question of changes in the jurisdiction, that is, whether the Sheriff Courts should have the power to divorce. The clubs were equally divided on that?—Yes, but there were another two clubs who stated that there should be no change.

5131. Does that mean they were divided, two to two?—Yes.

5132. That is four, and the other three did not deal with this at all?—No.

5133. Can you tell me, just out of interest, Miss Smith, what the five clubs that did not deal with changes in the law of Scotland, under Section I (B), did propose? Is that a complicated business, because if it is I do not want to bother you about it? It is just out of interest that I would like to know.—What did they propose other than the two which I have mentioned?

5134. Yes.—One of them suggested a new ground for divorce, incapacity of either party during the marriage.

5135. You mean impotency?—Yes. Another one dealt with alimony.

5136. Alimony of the wife?—I have not got them all down here.

5137. It was just to get some idea of what it was that was suggested, but I gather that there were various suggestions made by the other five clubs which you have not thought worth while incorporating in this memorandum. Is that right?—No, they have all been incorporated.

5138. Can you tell me what has been incorporated that was dealt with by the other five clubs?—So far as I know all their recommendations are included in the memorandum. Our Headquarters in England drew up the memorandum. I sent them the views of the Scottish clubs for inclusion. That is why I am having difficulty in answering your questions.

5139. It may be that it is more proper to direct some of these questions to the English body when they are giving evidence?—Yes.

5140. I just want to come to one or two of the points that you mentioned as expressing your own view. You pointed out that marriage in Scotland at one time was marriage by the simple consent of the two parties; they could agree to take one another as husband and wife

without any ceremony and, in theory at any rate, without any witnesses, and that constituted marriage.—Yes.

5141. And I think you said that in that case, as they married by consent, they could divorce themselves by consent, or did I misunderstand you?—They did divorce themselves by consent—by just parting.

5142. What you mean is, they did not disclose their marriage to anybody and as no one knew anything about it they could then just separate?—Yes.

5143. I thought that was what you meant, I see the point. But you do agree, that if two parties married by consent and they wished to have their marriage established they had to bring a declarator of marriage in the courts?—Yes.

5144. I think your other point was this, I want to know if I am putting it right, that if divorce can be obtained where one of the spouses rejects the marriage, why should divorce not be obtained where both spouses reject the marriage? Was that the point you were making?—That is the point.

5145. That was with reference to divorce by mutual consent?—That was raised by one of the clubs, that it seems strange that there should be no divorce obtainable when both parties do not want the marriage to continue.

5146. (Chairman): May I ask you one other thing? Did I understand you to say to Lord Keith that, apart from sending in the replies to the questionnaire, you had nothing to do with the preparation of this memorandum?—No, not the principal memorandum, it was prepared by Lady Littlewood. I sent her the report of the Scottish clubs and she incorporated it in the principal memorandum.

5147. (Lady Bessy): Am I right in thinking, Miss Smith, that in each club in Scotland there is one representative, and one only, of every profession?—I guess a great many professions. (Miss Stuart-Cooper): We have as many as care to be members from all the professions and businesses. It is not limited to one each.

5148. Do you mean to say that there might be two probation officers?—Yes, there might be ten.

5149. What I really want to know is who actually in each club answered these questions? I can imagine that you would have possibly a children's officer, a probation officer, a doctor, a solicitor and a barrister, and probably that those people, the representatives of those professions, might have formed a committee of experts to answer the questions. Can you give me any help in how each club arrived at its proposals?—In some clubs they did have a small committee, but it was not necessarily drawn from the professional members. It was really the committee of the club. The members might have been from any profession or any business, but very often there was one of the legal members assisting.

5150. You did not pay special attention to those members who had specialised knowledge?—No.

5151. And would it be right to say that most of the members of the Federation would be unmarried women?—That is rather difficult to say. There would be quite, I should say, forty per cent. married.

5152. As high as that?—Yes, I would say that, roughly.

5153. But, in general, you would say it was not a specialists' memorandum, everybody had a share in it?—No, it is not a specialists' memorandum.

(Chairman): Thank you, Miss Smith and Miss Stuart-Cooper, for the memorandum and for coming here to help us today.

(The witness withdrew.)

(NOTE.—Evidence was given by the English representatives of the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland on Monday, 24th November, 1952 (Thirty-Fourth Day).)

PAPER No. 65

MEMORANDUM SUBMITTED BY THE SOLDIERS', SAILORS' AND AIRMEN'S FAMILIES ASSOCIATION

A. PREAMBLE

Nature of the Association

1. S.S.A.F.A. is a voluntary association which was founded in 1885 and incorporated by Royal Charter in 1926. Its objects are to study the welfare of the wives, widows, children and other dependent relatives of men and women who are serving or have served in H.M. Forces. S.S.A.F.A. has approximately 1,500 branches in the United Kingdom and overseas, staffed by about 15,000 voluntary workers. In 1950 nearly 200,000 problems were referred to S.S.A.F.A. for solution.

Principles of S.S.A.F.A. work

2. S.S.A.F.A. is by nature concerned in promoting family life on a healthy, secure and permanent basis and all its endeavours are consistently applied to that end. It is, therefore, a fundamental principle of the Association that no S.S.A.F.A. worker will ever willingly help to provide evidence for, or to institute, divorce proceedings. In any marital dispute the Association invariably tries to effect a reconciliation between the parties. Should the attempt fail and the couple be determined on divorce or judicial separation, they are referred elsewhere.

The Association has adopted this attitude, apart from any question of principle, because of the absolute necessity of ensuring the frankness and confidence of those who seek its help.

Volume of reconciliation work

3. S.S.A.F.A. does a considerable amount of reconciliation work. Of the 200,000 problems referred to S.S.A.F.A. in 1950, only about 37,000 involved help with money or in kind. The remainder were advisory, and of these a substantial proportion concerned matrimonial questions, or were consequential on a marital dispute.

When a soldier or airman wishes to stop payment of marriage allowance to his wife, S.S.A.F.A., at the request of the War Office and the Air Ministry, investigates the possibility of a reconciliation before the stoppage is put into effect.

The law of Scotland

4. Part G sets out certain proposals relating to the law of Scotland. These have been prepared at the Headquarters of the S.S.A.F.A. Scottish Branch by their Honorary Legal Adviser.

Oral evidence

5. S.S.A.F.A. would be willing to appoint representatives to give oral evidence before the Royal Commission if so desired.

B. PRIVILEGE

6. It is in S.S.A.F.A.'s view a fundamental condition of successful reconciliation work that both parties to a dispute should feel able to speak freely and frankly, secure in the knowledge that no word of what is said will ever be repeated to a third person, or be used against them. There can be nothing more damaging to this confidence than a newspaper report of a divorce case which quotes evidence given by a marriage counsellor, S.S.A.F.A. representative, or some other welfare worker.

7. S.S.A.F.A. representatives have made the fullest possible use of the protection at present given by the law as it stands, but there are many cases, particularly in undisturbed divorce proceedings, where "privilege of the parties" grants no protection to the marriage counsellor.

8. S.S.A.F.A. representatives have instructions never to give evidence in divorce cases except under subpoena and then only, after protest, at the express direction of the judge. In S.S.A.F.A.'s experience most justices are sympathetic towards the position of welfare workers engaged in reconciliation and on occasions the judge has expressly commended the attitude of the S.S.A.F.A. representative.

9. Nevertheless, S.S.A.F.A. strongly urges that legislation be introduced to grant absolute privilege to welfare workers in respect only of their attempts to effect reconciliations between parties to a marital dispute.

10. It is considered necessary that this privilege should extend to marriage counsellors, probation officers, S.S.A.F.A. representatives and workers for the Family Welfare Association, etc. The difficulty of devising a legal definition which would cover all those who should be covered, but which would not be too wide, is appreciated, but S.S.A.F.A. hopes that it would not be insuperable.

C. LEGAL AID FOR DESERTED WIVES

11. S.S.A.F.A. considers that legal aid should be made available to a deserted wife (particularly if she has children) to enable her adequately to present her case for maintenance to the court. When a wife with young children has been deserted, she is most often left without means. Her husband, on the other hand, has the wherewithal of his earnings with which to pay for legal representation. In S.S.A.F.A.'s opinion the resulting inequality in the presentation of the wife's and the husband's case sometimes results in miscarriage of justice.

D. ENFORCEMENT OF COURT ORDERS

Onus on the court

12. S.S.A.F.A. feels very strongly indeed that legislation should be introduced to place the onus of enforcing an order for maintenance, alimony or affiliation upon the court which made it. It is at present far too easy for a man to evade payment. He has only to change his employment and residence to be able to ignore the order for the rest of his life. While the wife can go to court and obtain a warrant for the man's arrest, no action is taken until she succeeds in tracing him and can provide the police with his address. It is, in S.S.A.F.A.'s view, grossly unfair to place such a responsibility on a wife, particularly when she is without adequate means. The court, on the other hand, has at its disposal the police and the National Register and should surely be automatically responsible for enforcing the orders which it makes. At present, court orders are, in S.S.A.F.A.'s view, widely treated with contempt.

Enforcement overseas

13. S.S.A.F.A. is glad to see that the number of Commonwealth territories in which orders made in the British courts can be enforced is growing. With the intermingling of peoples which took place during the late war and since, this is particularly important. Notwithstanding the agreements on enforcement which have been made, it is extremely difficult for a wife resident in the United Kingdom to carry out all the procedure necessary for the enforcement of an order against a husband in, for instance, Ontario. For this reason, S.S.A.F.A. would particularly urge that the recommendations contained in paragraph 12 above should apply equally to the enforcement of orders (where arrangements exist) against men living overseas.

Payment of arrears of maintenance

14. Under the law, as it stands, if a man is arrested for failing to obey a court order and sentenced to a short term in prison, such a sentence automatically cancels the arrears which he has failed to pay. The purpose of a court order is to provide for the support of the man's dependants. This is not ensured by the man spending a few weeks in jail. S.S.A.F.A. considers that a prison sentence should not absolve a man from paying some, or all, of the arrears on the order.

E. CHILDREN

Custody

15. S.S.A.F.A. considers that the custody of the children of a marriage should never be decided until the court has seen and heard both parents and the children themselves. This is not always so at present.

PAPER NO. 65. MEMORANDUM SUBMITTED BY THE SOLDIERS', SAILORS' AND AIRMEN'S FAMILIES ASSOCIATION

29 October, 1952]

MISS I. C. BUCHAN AND COLONEL A. SPROT, D.S.O.

Tenancy of the home

16. In S.S.A.F.A.'s view, the courts should be empowered to award the tenancy of the family home to whichever parent is granted the custody of the children.

Furniture

17. S.S.A.F.A. also considers that the courts should be empowered to allocate to the parent to whom custody is granted sufficient beds, bedding and other essential furniture to provide for the reasonable needs of the children, irrespective of whether that parent owns the furniture or not.

F. REMOVAL OF DETRUMENTS TO RECONCILIATION**Condonation**

18. In some respects the present divorce laws provide deterrents to reconciliation. Where a couple have been separated for a prolonged period (as so often happens when the husband is a Serviceman) and a matrimonial offence has been committed by one or the other, any attempt at settling their differences by trying to live together for an experimental period would now be regarded as condonation. It is S.S.A.F.A.'s experience that when, during a period of enforced separation, there has been matrimonial trouble, a man returning from overseas is deterred from making an attempt to save his marriage by the fear of prejudicing his right to obtain a divorce.

S.S.A.F.A. suggests that, where a matrimonial offence has been committed, a reasonable period of cohabitation should be permitted without prejudicing the legal rights of either party.

Desertion

19. In the same way the present requirement that a desertion must have lasted for at least three years since the couple last lived together discourages real efforts at reconciliation. Few would risk the failure of such an attempt, towards the end of the three-year period, knowing they would then have to wait another three years for their freedom. Solicitors naturally advise their clients accordingly to the law as it stands.

S.S.A.F.A. suggests that to encourage attempts at reconciliation it should be sufficient, to obtain a divorce, if a desertion has amounted to an aggregate period of three years during the last five, of which perhaps six months of continuous desertion should have taken place immediately before the petition.

G. LAW OF SCOTLAND**Divorce for desertion**

20. In cases of divorce for desertion, Scottish courts insist on evidence of the pursuer's willingness to adhere during the whole period of three years. It has often been felt that this places the pursuer in a very difficult position, in that he or she has to use, or at least appear to use, every reasonable means to persuade the other party to return, even when it is apparent that a real reconciliation would be hopeless. Obviously this state of the law puts a premium on provocation and accordingly it is considered that legislation should be introduced to make it competent for the court to grant a divorce for desertion in any circumstances where the court is satisfied that the alleged desertion was real desertion and not merely separation by mutual consent.

21. Further, adultery of the pursuer during the three-year period is at present an absolute bar to divorce for desertion. It is thought that the court might be given some discretion in this matter.

Divorce for cruelty

22. In Scotland, the court has to consider the position as it exists when the case is before it, and not at the date when the act of cruelty was committed. If there has been a separation between the spouses, this may be a serious hardship to the pursuer as the person who committed the cruelty may meantime have been living an exemplary life. That would not mean, however, that the cruelty would not begin again as soon as the spouses took up life together, and it is thought that legislation should be introduced on the lines of the English Matrimonial Causes Act of 1937, which allows a petition for divorce where the petitioner has been treated with cruelty since the celebration of the marriage, without any reference to the position of matters at the date when the petition is presented.

Property rights of spouses on divorce

23. It is considered that the innocent spouse should no longer be able to claim legal rights in the other spouse's estate, but that it should be left to the court to decide the nature and extent of any provision which should be made for the innocent spouse. In any event, the law relating to property rights should be the same for husband and wife. It should also be for the court to decide what provision should, in appropriate circumstances, be made for the support of the pursuer in case of divorce on the ground of insanity.

(Dated 20th December, 1951.)

EXAMINATION OF WITNESSES

(MISS I. C. BUCHAN and COLONEL A. SPROT, D.S.O., representing the Scottish Branch of the Soldiers', Sailors' and Airmen's Families Association; called and examined.)

5154. (Chairman): We have before us representatives of the Soldiers', Sailors' and Airmen's Families Association, Colonel Sprot, who is Secretary of the Scottish Headquarters, and Miss I. C. Buchan, who is Secretary of the Glasgow Branch. We are going to hear from that Association in London on the 19th November; and the two witnesses here today have come to speak for the Scottish Branch of the Association. I should say by way of preface that it has been explained to us that as the legal points mentioned in the Scottish Branch's memorandum will be adequately dealt with by the Society of Writers to the Signet and other legal societies, the Branch has nothing to add on those points by way of oral evidence, but I understand that Colonel Sprot would like to tell us something as to the organisation of the Association in Scotland, and that Miss Buchan is prepared to answer any questions on the reconciliation work of the Association.—(Colonel Sprot): Ladies and Gentlemen, it was only my intention to try to be helpful by giving a few sentences about that part of our Association which is in Scotland, normally known now as the Scottish Branch. It is composed of thirty-eight county and city branches. That is the normal organisation of our Association throughout Britain, by counties, and in certain cases, large cities. I would like to point out that we in

Scotland are all part of the whole Association, but we are permitted to adopt the policies laid down by the Council of the Association in the South so that they may fit in with our own laws in Scotland and the preferences and customs of our people in Scotland. Apart from that, Sir, there is no difference at all and we accept and carry out the policies laid down by the Headquarters Council in London, on which Scotland has certain representatives. Because of that, Sir, we thought it might be useful to the members of the Commission for them to learn, if they wished, some of the experiences of our workers and, in particular, I asked Miss Buchan of the City of Glasgow Branch, who has great experience particularly in relation to these marital cases and difficulties, if she would be prepared, as the most certainly was, to come here and let you know what you wished, either by question and answer or by any other means. But as this is the first occasion on which you have heard evidence from our Association, I would like to make it very clear that it is the guiding policy of the Association in no way to support divorce, but always if possible to mend the fracture and to get the pair together again.

5155. Thank you, Colonel Sprot. Before I ask Miss Buchan to tell us about her work, I would like to ask one question arising on the preamble to your memo-

29 October, 1952]

MISS L. C. BUCHAN AND COLONEL A. SPADY, D.S.O.

[Continued]

random. The last sentence of the third paragraph states:—

"When a soldier or airman wishes to stop payment of marriage allowance to his wife, S.S.A.F.A., at the request of the War Office and the Air Ministry, investigate the possibility of a reconciliation before the stoppage is put into effect."

What about the sailors? You say "a soldier or airman"—is there nothing corresponding to that for the sailors?—(Miss Buchan): Yes, sailors also. We get cases from all three Services, and before the marriage allowance can be stopped they ask us to visit and report on the situation, on whether there are grounds for stopping the marriage allowance. That applies to the Navy as well as to the Air Force and the Army.

5156. Can you understand why that sentence refers only to the War Office and the Air Ministry, and not to the Admiralty?—I think I can give what is probably the correct reason. The Navy have a very strong welfare service of their own. They are, as you know, frequently referred to as the "Silent Service", but that does not mean that they have no dealings with a welfare association such as S.S.A.F.A. [See also Question 7537, *Minutes of Evidence for the Thirty-First Day*.]

5157. I understand that you are willing to give us some account of your reconciliation work, and I think perhaps it would be convenient if you would tell us what you have come here prepared to tell us, before we ask you any questions on it.—If I might be allowed just to make a very brief statement, and then perhaps the Commission would like to ask me questions about individual cases. I will not cite any cases in this preliminary statement, but I would like to state what I consider to be the main reasons for marriage alienation within the Services, and I would like to preface my remarks by saying that some people do not know that S.S.A.F.A. is entirely a voluntary body. Although it is used by the Services it is not kept up by the Services and it is not a Service body. I must stress the word "voluntary". S.S.A.F.A. does act as a liaison between the Services and the families, and all our interviews are voluntary, confidential and informal. Sometimes the request for help comes from the wife, sometimes from the husband in the Services, and sometimes from the Commanding Officer on behalf of the husband in the Services.

In the past year—I have confined myself to the past year—I have personally dealt with at least sixty-six cases of marriage reconciliation. That is a very conservative estimate, for I have waded out all those cases in which there were merely quarrels between the husband and the wife over various things and they were not willing to see another, and then the trouble was cleared up. The sixty-six cases were not cases of that kind, but cases where there was real danger of marriage alienation. Of those sixty-six cases, which I have dealt with in the year October, 1951, to October, 1952, seventeen cases are known cases of reconciliation, fifteen where the reconciliations were doubtful or there was no reconciliation, and in the remaining thirty-four I have no knowledge of the outcome. The main cause of estrangement or alienation was, first and foremost, separation of the husband from the wife and family with no chance of establishing the married relationship. This resulted in a lack of security in the home life. The man may be moved away, the family must vacate the married quarters, or no quarters are available, and they go to live with "in laws", relations, or in a hotel. Such separation results in the family being increasingly vulnerable to gossip, scandal, and anonymous letters. It results sometimes in infidelity of one or other partner. Too early separation after marriage can also cause estrangement. The second main cause of alienation is homelessness. The third cause is too easy marriage, or what I call an abuse of the special licence laws about marriage. I do not know the legal position with regard to special licence for marriage, but I do know of too easy marriage and certainly of an abuse of these special licence laws. I am speaking personally now when I say that I wish a hundred times a day that marriage was more difficult than it is at present. It seems to me that anyone can get married at any time without any preparation whatsoever. I am not speaking for the Association when I say that, that is my personal view.

I would also like to make the point, on the position of children in divorce or legal separation cases, that it is apparently possible, which I did not know before I came into this work, for such cases to go through without any ruling regarding the custody of the children. And a further point—I understand that a man may elect to go to prison rather than support his wife and family, and apparently get away with that.

The conclusion that I draw after doing this kind of work for four years is that the War Office spare no money or pains to being partners together if the marriage is breaking up. This is excellent ambulance work after the casualty. They have a very fair system of points for married quarters, but the system breaks down for two reasons. There are not enough quarters and therefore many married families cannot live in quarters. Secondly, a man is moved away and the family must vacate the quarters. They either go home to live with "in laws" or they go to a hotel as a temporary arrangement until other quarters can be found. That, in my opinion, is unsatisfactory, because the greatest security against the break-up of marriage is the permanence of a home, not temporary lodgings. A young family cannot be moved around from pillar to post. Every man has, in my opinion, an inalienable right to the security of a home.

I have now finished my outline, but I have got with me details of a number of cases, thirty in all, and you may be very surprised to learn that of these thirty, which I have dealt with this year, twenty-two have no homes of their own. They are living with "in laws" or with relations or in lodgings; three families are in married quarters; five have homes of their own.

5158. We are very grateful to you. Your statement was most interesting. I would like to ask you this question. In the year from October, 1951, to October, 1952, you personally dealt with sixty-six cases which might have led to divorce?—Yes.

5159. Now would you turn to paragraph 3 of the memorandum. There are certain figures there:—

"S.S.A.F.A. does a considerable amount of reconciliation work. Of the 200,000 problems referred to S.S.A.F.A. in 1950, only about 57,000 involved help with money or in kind. The remainder were advisory, and of these a substantial proportion concerned matrimonial questions, or were consequential on a marital dispute."

I wonder if you could tell me, in the year 1951 were the figures approximately the same?—I can only speak with reference to Glasgow.

5160. I really wanted the total for the whole country, but I would like to get the Glasgow figures if these are all you have.—In Glasgow in the same period we dealt with a total number of 4,780 cases of all kinds.

5161. October, 1951, to October, 1952?—Yes, and of these a very conservative estimate of the number of matrimonial reconciliation cases is the sixty-six I have quoted.

5162. You mean that the sixty-six you have mentioned are all the marriage reconciliation cases dealt with in Glasgow during the year?—In Glasgow, yes.

5163. You did the whole of them?—Yes.

5164. That is a little surprising because, if you take the figures in paragraph 3, one gets the impression that a very large proportion of the 200,000 problems were concerned with matrimonial questions?—That may be. I cannot speak for other parts of Scotland, but I can speak with authority for Glasgow. I am the acting Secretary and I do all the marriage cases.

5165. You say sixty-six out of 4,780, that is only a little over one per cent.—Yes, but I think I should say in elucidation of this point that I have really taken out these sixty-six cases with special reference to this Commission. There are very many cases where there were difficulties at home but which were not leading to divorce or separation, and I have not included these in that sixty-six.

5166. If you had included them the number would have been very greatly increased?—(Colonel Spady): May I be allowed to intervene? I would like to explain that I did not produce any figures so far as Scotland was concerned

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because those will all come in the general statement which you will be receiving from our Headquarters in England. (Chairman): Thank you, I quite understand.

5167. (Lord Keith): Miss Buchan, am I right in understanding that so far as S.S.A.F.A. is concerned there are rather special problems arising in marriage owing to the absence of the husband on service?—(Miss Buchan): Yes.

5168. And therefore we can say that this is an unfortunate, but perhaps inevitable, consequence of the necessity of maintaining armed forces?—I would say yes to that, with a qualification. I think that the War Office are making every effort to increase the number of married quarters and hostel accommodation. But where the system falls down is, in my opinion, that the married quarters so often simply mean temporary lodgings, and, if I might give my own opinion on this point, I think that the Services will need to reconsider the claims of the married man with a family if he is going to remain in the Services, and make some quarters available for a family wherever the husband may be, not quarters which must be vacated. I know the difficulties of this situation. When I came into this work at first I was shocked to discover that a family might have quarters in Tripoli, the man moves away from Tripoli, there are no quarters where he is going, and the wife must leave her quarters and is left homeless. The hostel accommodation is designed to meet that need, but it does not. I think that the War Office in the future will need to make some kind of provision—I do not know what kind of accommodation you would call it, whether you would call it hostel accommodation—but at least a home that is permanent for a family, wherever the husband may be. How that is going to be worked out is not my business.

5169. No, but it does seem to me that in the Services you can never get a permanent home for a married couple in the true sense of the term at all?—Perhaps not. I have one case on my files where a couple have been separated for twelve years and, counting all the man's periods of leave and so on, they have had one year of life together out of that twelve.

5170. And of course obviously that system inevitably leads to matrimonial . . . marriage estrangement, that is my point.

5171. I quite see that and, so far as I can see, unless the Services were to draw exclusively on single men, I think that is a problem that will always be with us.—Perhaps so, but I think it should not be.

5172. I am sure we would be as glad as you if we could see a solution. Might I ask you this? Glasgow is probably the biggest area in Scotland from the point of view of S.S.A.F.A. work?—Perhaps I should explain that Glasgow is a county for certain purposes in its own right and is not included as part of Lanarkshire. I do not know how many cases Lanarkshire deals with, but I think it is true to say that we are probably the biggest city branch of the Association, apart from London.

5173. Yours is the biggest branch in Scotland?—Yes.

5174. And therefore you will see as much of this problem as probably anybody in Scotland?—Yes, I think so. I do nothing else, I do not do any other case-work except this.

5175. (Mr. Justice Pearce): Do the War Office refer to you as a matter of routine any case where a soldier wishes to stop his allowance?—Yes, they ought to anyway.

5176. In the particular cases you deal with, the soldier has to see you before he can get the authorities to stop his allowance?—No, I do not often see the soldier, but I must see the family. I must interview the wife. I very seldom see the soldier or the airman or the sailor, but I do when I can.

5177. Do you not see both parties in most of your cases?—Unfortunately no, except in special cases. If the man is home on leave or has been given compassionate leave, then I see both parties. If the man is in Korea and his home life is breaking down, the War Office or the unit may decide to fly that man home. They have done that. That is what I mean when I say the War Office spare no expense if they think that bringing a man home will prevent the breakdown of a marriage. But the men do not always get leave, and in that case I have to send out a very confidential report through our London Headquarters to that man's unit, and the Commanding

Officer must deal with the situation from the man's end and may or may not report back to me the result.

5178. And I gather that you have had almost an equal number of known failures and known successes in the last year, seventeen to fifteen?—Yes, of the cases that I am aware of.

5179. Is that a fair average, do you think, of the cases that come your way?—It is very difficult to answer that question because, as I said, there are thirty-four that I have never heard the result of.

5180. I am dealing only with known results. It is fair perhaps to infer that the unknown ones may have the same proportion as the known ones, but dealing only with the proportion of known results, is fifty per cent. success a fair average?—I would not like to commit myself on that. When I was preparing this survey I was rather surprised that the result was fifty-fifty, I thought our successes were fewer.

5181. I wonder if you could help at all on this point. Do you think that if a court referred to some person with your sort of qualifications all cases for divorce that came before it, either just before the divorce proceedings started or just after the divorce proceedings had started, there would be the same sort of chances of success as you have?—I think that there ought to be this kind of service before divorce proceedings are started.

5182. Supposing it was necessary that before starting divorce proceedings the parties should be put in touch with someone with your sort of qualifications, do you think it would be reasonable to hope for the same sort of proportion of successes as you get?—I could not answer that dogmatically. I think that it should be tried, but I cannot say in how many cases it would succeed.

5183. It would probably be much lower, because they would have got further on the road to divorce than at the time at which you get them; but do you think that there would be a reasonable hope that some proportion of marriages would be saved?—Yes, some of them would be saved.

5184. Do you think from your dealings with these parties that there would be any feeling of resentment on the part of the people if someone with your sort of qualifications were sent to them, assuming it were necessary that that should be done before proceedings were started?—I think that a lot would depend on the status of the person sent. We do not find this resentment because the wife knows that we are there in her interest. We never take sides, and I make it quite plain from the start that I want to help her and that I want to hear all that she has to tell me. She knows that I am there in her interest. Equally, I say the same thing to the man and then, if possible, I get them both together.

5185. Assuming it was made clear by the person dealing with the matter, as you make it clear, that he or she was not trying to favour either side but was merely there to help and to see if a breakdown could be avoided, do you think there would be any resentment felt?—There might be in some cases, but I still think it would be worth doing. I have had occasional cases where the person sits and says nothing, and I spend perhaps twenty minutes in trying to break down that resistance. But whenever they come to see that I have no axe to grind and that I only want to help, sometimes all the story comes out of once and I am there for another hour after that.

5186. Your view is that it would be valuable if, as a preliminary to court proceedings, someone with your sort of qualifications went to interview the parties?—Yes, most decidedly.

5187. (Chairman): That suggests another question I would like to ask. When the soldier or airman or sailor wishes to stop payment of a marriage allowance, is the procedure that you are asked to go and see the wife, or is it that you write and ask the wife to come and see you?—We are asked to visit the wife, but in practice I do not; I ask her to come to me because I can talk to her in my office in private. That is next to impossible in the houses that we go to visit, and it is simply for that one reason that we ask the marriage cases to come to the office. If they do not come then we visit the home.

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5188. The reason why I ask is that I know of one voluntary worker who gets communications like this: "Private X has stopped his pay to his wife, who lives at such and such a place. Will you go and see her?" Then the worker goes and talks to her, and I think that the wife then knows, as in your case, that this is somebody who is going to look at the problem from her point of view and is not working against her. That has been your experience, too, I understand?—You mean they are unwilling to come for interview?

5189. I mean whether you go to see them or whether they come to see you, they will realise that you have been asked to see them by the War Office or the Admiralty and that you are not merely a busybody "bullying in"?—Yes, that is understood.

5190. (Mr. Lawrence): Would you explain a little further the work that you do? I gather it happens like this: you get a report from the War Office that a serving man wants to stop his allotment to his wife.—If I may correct you, the reports usually come from the unit.

5191. I suppose in a great many cases that is because the man has had some report from a friend or relative that his wife is misbehaving herself, or she has not written to him for a long time?—Yes.

5192. You go and interview the wife to see whether there is any foundation for the suspicions of her husband?—Yes.

5193. And in the successful cases you have mentioned, I suppose it means that you have discovered that there is no real ground for complaint against the wife?—I have known both true.

5194. I follow what you mean, you find both true, and the successful cases that you have mentioned, the seventeen in the recent year, are those cases where, whether there was ground for complaint or not, the serving man has agreed to resume the allotment to his wife?—Yes. In some cases there were grounds for doubt about the relationship, and these have been brought to light and the injured partner has forgiven the other partner. In other cases the allegations were untrue. I can think of one case in particular where fortunately the serving man was sent home from his unit and came to see me in the office before proceeding to his wife, and I was able to show him how the matter looked from his wife's point of view, and he went home in a very different spirit than he would have done if he had gone straight home first. There was a reconciliation in that case.

5195. Do you ever find that, having effected a reconciliation, the same thing occurs again with the same man?—Yes, I can think of one case where the reconciliation did not hold. The wife went back to the other man again.

5196. But, by and large, would you say that the reconciliations that you effect in these cases are lasting?—That is very difficult for me to answer, because we cannot do follow-up work.

5197. No, but if the partnership broke down again, the one would come back again through your hands, providing the wife was still living. . . . Quite right. We assume that everything is going on normally if we do not hear to the contrary, but we have no proof. I can think of two cases where both men are discharged; one man has got his discharge on compassionate grounds, and the other was due for discharge next year and the War Office have allowed it earlier on compassionate grounds. Both these cases are going on successfully and I have had recent dealings with both of them. But they are now out of my jurisdiction because the men are now out of the Services.

5198. But your experience tells you that this reconciliation work has a durable and lasting value. It is not merely a temporary patching that subsequently breaks down?—No, I do not think so; I should hope not.

5199. (Mrs. Jones-Roberts): In the course of your preliminary statement, you said that you thought that entry into marriage was much too easy. I think that the Chairman may rule that this is outside our terms of reference, but with his permission I would like to ask you whether you have any views as to how this problem might be overcome, to the advantage of those entering marriage? Had you, for instance, in mind sufficient time to enable marriage guidance to be given, or to enquire, say, whether

there is housing accommodation available, and practical matters of that kind?—If the idea behind this Commission, as I take it, is to recommend to the Government changes in the law, if necessary, then I would hope that the marriage laws will be brought up to date.

5200. (Chairman): I do not rule out the question in the least, but I do not think that Miss Buchan's idea of our function is quite correct. I think you will see, if you will read the terms of reference, what we are required to do. We are asked to consider whether any changes should be made in the law concerning divorce and other matrimonial causes, or in its administration.—I think I can answer your question now. I can think of one case where the couple knew each other for only four days before marriage. Now, to my mind, that sort of thing should be impossible. It was the case of a sailor who met a girl in a cafe where she was employed as a singer. He invited her out to the pictures twice and then asked her to marry him, which she did.

5201. (Lord Keith): Might I ask a question on that, Miss Buchan? In that case there must have been a special application to the Sheriff, must there not, to shorten the period of notice of marriage?—Presumably, yes, because marriage does take place.

5202. (Mrs. Jones-Roberts): I do not know about the position in Scotland, but I think that in England it is possible to obtain a Superintendent Registrar's certificate, which enables parties to get married in little over twenty-four hours. I do not know if that is the case in Scotland?—That is what I mean when I talk about the abuse of special licences. I know that there are occasions when it is advisable to have a special licence to marry in a hurry. For example, the parties may have known one another for a long time and perhaps one is suddenly going abroad on business or in the Services and they want to get married right away. There should be no reason against that, but it seems to me an abuse of special licences if a couple can marry with four days' acquaintance.

5203. Have you any particular qualifying period in mind?—No, I have not. I know of a successful marriage where the couple did not know each other for a long period before marriage. But four days is far too short a period.

5204. (Chairman): I do not want to interfere unnecessarily, but I think there is probably a wrong idea conveyed by the use of the term "special licence" in Scotland, because there is not any such thing.—No, I am probably calling it by the wrong name, but whatever the law is that makes such marriages possible, to my mind it should be amended.

5205. (Mrs. Jones-Roberts): In Scotland I believe that you do not require parental consent if a person is under twenty-one but over sixteen?—They may marry at sixteen, I understand, but they must have the consent of the parents. I may be wrong, here again this is a legal matter with which I am not conversant, I do know of people who have been married at sixteen.

5206. But the type of marriage you have in mind is where the families are not brought in, just casual acquaintanceships that end up in the registrar's office or something of that kind?—Yes.

5207. Without any family sanction or any enquiries?—Yes.

5208. So we can really take note that in your experience it is a very unfortunate occurrence?—Yes, certainly.

5209. (Mr. Macle): Would you turn to paragraph 15 of your memorandum, which deals with custody of children? You express the view in this memorandum that the custody of children of a marriage should never be decided until the court has seen and heard both parents and the children themselves. Do you, from your own personal experience, support that?—By and large, I would.

5210. Have you any experience of any case where the husband is not in the Services?—No. All my cases are Service cases.

5211. Your experience is that the husband is away and cannot have custody, is it not?—It does not work out like that. Perhaps it would be helpful if I gave you an example. A husband was a serving soldier and he had two boys and one girl. The wife was not a good woman and it was not thought desirable that the children should

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he left in her custody, but in the court the husband was given the legal custody of the two boys and nothing was said about the girl who was very young, she was five or six at the time. That girl remained with her mother, and we got the case when the question of the welfare of the child arose. The father was concerned for the child's welfare and felt the child was being neglected, and it was true enough. When I wrote to the solicitor concerned to ask him what had been the findings of the court on that occasion I was told that the question of the custody of the daughter had not arisen.

5212. Then the husband was petitioning for divorce?—I cannot remember whether it was divorce or legal separation. I think it was divorce.

5213. But the husband on the petition would make a declaration as to the number of children of the marriage?—Presumably.

5214. So it would be before the court that there was this young child?—I would not have thought so.

5215. (Chairman): May I intervene for a moment? Do you know what was or was not before the court on this occasion?—I wrote to ask and that is what I was told.

5216. You were told that no order was made about the little girl, but do you know, from your own knowledge, what was or was not before the court in the way of information when the court heard the case?—I have no detailed knowledge of that.

5217. Have you any knowledge of what was before the court on that occasion?—I have only the report that our London Headquarters gave to me, that the question of the girl's custody had not been before the court.

5218. (Mr. Maddocks): I would like to make clear, for the benefit of the other members of the Commission, how you work. Your memorandum talks about the War Office and the Air Ministry. The position is this, is it not: you do not get instructions from the War Office, they nearly always come to you from the welfare officer of the unit?—Not always, we sometimes get communications from the War Office, but most of them are from the unit. They eventually do go to the War Office.

5219. I thought you got it from the unit?—We get communications from the units of all three Services, also the Air Ministry, the War Office and the Navy Welfare Offices.

5220. (Lady Portal): Miss Buchan, may I ask you to clarify one or two points for me about the allowance paid to Servicemen's dependants? Is the allowance easily stopped, does a woman lose her allowance easily?—No. A man cannot say, "I am going to stop my wife's allowance," he cannot decide that without due checking up of the situation. But it is the unit or the War Office who will write to us asking us to look into this matter and find if there are grounds for withdrawing the allowance, because after all it is not the man's money, it is the Government's money. Two guineas under the rank of sergeant is the Government allowance and the man only gets 17s. 6d. from his pay. Therefore, if the allowance is going to be stopped it is the Government's money that is going to be stopped, not his, except for the 17s. 6d.

5221. Yes, but it is not stopped arbitrarily?—No, never.

5222. Please do not think I am belittling your efforts, but I am rather trying to connect it up in my own mind with some sort of organisation or officer who would function in civilian cases. I am wondering whether the high proportion of success that you have had in reconciliation could possibly have been attributed to fear on the part of the women of easily losing the allowance?—On the contrary, we do not raise that issue unless we are obliged to. I do not think it is a question of fear. None of the people who come to us are afraid of us because we always make it very plain that we are out to help them. And when the question of the marriage allowance is raised, if there is no hope of reconciliation, we always tell them what the result will be if they do not wish to cohabit with their husbands. We point out that they will lose their allowance, and they are very

willing to lose it if there is no reconciliation. But it is never a case of being afraid of us or of the consequences, never.

5223. (Dr. Robertson): I would also like to ask about the custody of children, Miss Buchan. If it were possible to make arrangements for the fuller care of children in court the existing services available for such work would not be adequate. S.S.A.F.A. could not undertake any more work, or even the children's officers. Do you agree?—I think that is probably right. I do not have intimate knowledge of that, but I think that is probably right. The children's officer would be swamped with families needing attention. What happens in practice if the man gets legal custody of the children while he is in the Services is that they are usually parked out with relations, his mother or someone like that.

5224. Have you so far made use of the comparatively new Marriage Guidance Council?—Yes, in two very successful cases we have had the co-operation of the Marriage Guidance Council.

5225. (Mrs. Allen): You said, Miss Buchan, that you generally invite the women to visit you in your office?—Marriage cases only.

5226. I take it that in many of such cases the question of children will come in?—Yes.

5227. How do you assess their position if you do not go into the home, or do you go into the homes when the question of children arises?—When we are worried about a child, such as in the case I outlined, we do go to the home time and again to see how the child is being cared for. That is not with a view to discussing the situation from the wife's point of view; it is simply to find out about the welfare of the child. We are asked time and again, "Will you go to So-and-so's home, he thinks his children are being neglected", in which case we would go to visit the home to find out. We do that time and again to see how the children are faring, but that is rather different from trying to effect reconciliation between husband and wife.

5228. Yes, I appreciate that, but very often the husband is away from the wife. It is the lack of care of the children that creates the first doubt, I see.—We would always go to visit the home if there was any question like that involved.

5229. (Mr. Brown): May I go back to your seventeen cases of reconciliation? Did I understand it correctly that sometimes the soldier felt he had a grievance, but the complaint was on completely false grounds?—Sometimes, yes.

5230. Could you tell me what proportion of your seventeen reconciliations were based on completely false grounds?—I have not had experience of many cases of that kind. I have only two cases here. In one, the grounds were completely false and a reconciliation was effected, and in the other, we are still continuing the case, reconciliation is doubtful. We have been working on this case since 1949.

5231. The point I am trying to get at, Miss Buchan, is that where the grounds of accusation are completely false you could hardly call it a real reconciliation because there was really no true ground for any difference?—Although I appreciate your point of view that where there were no grounds for doubt there would be no need for reconciliation, it does not work out like that in practice, because a lot of ill-feeling has been engendered, and the parties do not get back to normal relations quite so easily.

5232. But there is a difference surely in character in a case where there are true grounds of complaint, and I would say that approaches more nearly the normal civilian case. There is a difference between that case and the case where the accusation is made on completely baseless grounds. But in any case, I think you have answered my point by saying that of your seventeen there were two cases that might come into that category.—There were two out of the seventeen, yes.

5233. (Dr. Baird): I wonder if you have any views on the kind of training that a person doing your sort of reconciliation work should have?—I find that very difficult to answer. I get my training not in marriage guidance at all but in training for youth leadership; over twenty-two years, working with youths and girls of marriageable age.

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I got my training in the Y.W.C.A. and it is quite fortuitous that I am doing this work now. I know that the Marriage Guidance Council have training courses, and I think that that kind of thing would be very helpful. I certainly feel that normal training in dealing with young men and young women in any sphere of work, youth work, club work, anything like that, would give an insight into their problems. But I certainly think that if you are taking up this work you cannot go into it without any experience whatever. I think training would be necessary. I do not know if that answers your question?

5234. Yes, you mean some sort of training in social work?—It does not follow that because you are married you are a good counsellor, nor does it follow that because you are not married you cannot do the job.

5235. (Mr. Beloe): Earlier you expressed a good deal of dissatisfaction that the court did not see children before a divorce was granted. Have I quoted you correctly?—That is right.

5236. Is that because you have been shocked at the bad arrangements that the parents have made for the children, or is it for some other reason?—No, it is for that reason. In the case that I have already cited, if the court had known fully the kind of home where that girl continued to live it would not have agreed to it.

5237. In that case the girl was not mentioned in court at all, was she?—No.

5238. Are there any other cases you can think of, or is that the only one?—No. I can tell you what I find frequently—I get coming to me very frightened women, who are estranged from their husbands, but who are still keeping up a semblance of marriage because they are afraid the husband will take away their children.

5239. And you think it would be better for the children to stay with their mother in such a case?—Yes. The only question should be—what is in the best interest of the child? Should the child go with the father or with the mother? I think that the ground of that judgment should be—where will the child have the better chance?

5240. Is it the mother or the father who is at fault in those cases you have been mentioning?—In the cases I have mentioned the father is at fault, except in the one case, that I mentioned earlier, which was before the court.

5241. I see, but even then the mother is frightened that the father will take the children away?—Yes, and I feel that there ought to be some judgment that is objective, not just the father or the mother deciding which is the best thing for the child to do. They often cannot view that question objectively.

5242. (Lord Kelt): Might I ask, Miss Buchan, what you mean by saying that the father is at fault? You say that in all the cases except one the father was at fault.—If I did say that I did not mean to convey that. I was dealing with the cases of frightened mothers, and in these cases the mother had reasons for breaking up the marriage, but was afraid to carry it out in case she would also lose her children.

5243. (Mrs. Brace): Miss Buchan, when you were giving us figures you mentioned sixty-six cases. You then went on to say that there were thirty-four cases about which you had no subsequent information. Can you tell me why you have no information about the thirty-four cases? The reason I ask that question is because these amount to a little over fifty per cent. of the original sixty-six.—In each case either the husband, or the Commanding Officer on behalf of the husband, has asked us to see the wife and find out the cause of the estrangement. If reconciliation can be effected we do that, and we interview the woman and send a confidential report to our Headquarters in London. Headquarters send that under sealed cover out to the unit. Presumably the Commanding Officer deals with the man, but we may never hear any more about that afterwards.

5244. So that in half of the sixty-six cases you did not hear the actual results?—No, in many cases we do not know the results.

5245. So it may be that of the sixty-six cases you mentioned, there may be more than seventeen reconciliation cases?—There may be, but I have no knowledge of them. Colonel Sprot points out to me that in some cases the men may have left the Services since, and therefore we have no further information.

5246. And then you did say, in reply to another question, that you could not follow up cases. I would like you to amplify that?—We have only sufficient staff to deal with the requests that come to us, we have not adequate staff to do follow-up work.

5247. And is that a question of finances?—Yes, mostly finance and lack of voluntary workers. We get cases in—I do not mean marriage cases when I say this, but all kinds of cases—at the rate of twenty or thirty every day. They total over 4,600 in a year. There is just myself the acting Secretary, in the office and one case-worker and one welfare visitor with a car, one typist, one recorder and one part-time welfare assistant. That is our staff and it takes us all our time to cover the day-to-day requests without attempting to do follow-up work. I think that follow-up work should be done, but we cannot do it at the present time owing to lack of money and lack of staff, and lack of voluntary workers.

5248. (Lady Begg): Miss Buchan, you told us that you would be sent to check up on a situation or to establish the facts?—Yes.

5249. Supposing you hear from the unit that a man's wife has been unfaithful to him. You see the wife and the denies it but, for one reason or another, you rather doubt that reply. Do you leave it at that and send a report to the unit to the effect that the wife denies the allegations, or do you yourself make further investigations in order to be able to send a more accurate report?—If we think we can get any further with the case we do. There are some cases that I have been dealing with for as long as fourteen months. What very often happens is that the unit informs us that a Serviceman affirms certain allegations. We call the woman in again and confront her with that statement and find out what she has to say to that. We do that kind of thing when it is necessary or when we think any useful purpose can be served.

5250. Are you in a position to get information from anybody other than the wife herself?—We do not do that. It is against our principles to take secondhand information. While we may receive secondhand information, in reporting we would always say that the information was secondhand and that we would re-visit and try to see the wife herself. We probably may give our own head office the information we have received secondhand, but they know not to accept it as authentic.

5251. (Sir Frederick Burrows): You stated that every soldier had 17s. 6d. deducted from his pay as an allotment. Is that a compulsory or voluntary allotment?—It is a compulsory allotment.

5252. Secondly, you said that some of the marital unhappiness is caused through lack of married quarters. Would that be among the regular soldiers or among the National Servicemen?—All the cases I have outlined are of regular Servicemen.

5253. So the provision of more married quarters at least for home stations would, you think, go quite a long way?—Yes, I went through the cases to find out if any of these were National Servicemen, because obviously the Services cannot be expected to produce married quarters for people who are only two years in the Service.

5254. I am grateful to you for clearing that up in my mind, because I think it would be completely impossible for married quarters to be provided for National Servicemen.—If I could go back to the question of allotments, most husbands give their wives a voluntary allotment in addition, but it is not obligatory.

5255. The voluntary allotment is over and above the 17s. 6d. which is compulsory?—That is called the qualifying allotment. The serving man pays it out of his pay in order to qualify for the Government's two guineas as the marriage allowance.

5256. Then he can make whatever allowance he likes in addition, as a voluntary allowance?—Our difficulty is to get the man to give a voluntary allotment to his wife. They often have far more pocket-money than the wife, who is trying to keep her family and the home going.

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[Continued]

5257. (*Mr. Flecker*): I gathered that nearly all the cases you dealt with were cases from overseas—you mentioned Korea. Is that entirely so, or do you have home cases as well?—Of the cases I mentioned, in two cases the husband was in this country and in all the others the husband was overseas.

5258. (*Lord Keith*): You mean out of the 4,780?—No, I am talking of the marriage cases only.

5259. (*Mr. Flecker*): Out of the sixty-six?—No, out of these thirty of which I have summaries here; there were two in this country and twenty-eight abroad.

5260. If they were home cases it would be easy for you to see both husband and wife?—Providing the Commanding Officer is willing to give the man leave, which is not always the case.

5261. If a man can be flown home from Korea in order that you may help him, surely he may take a train from Portsmouth?—It seems most astonishing, but again you have very different Commanding Officers.

(*Chairman*): Thank you very much, Colonel Sprot and Miss Buchan, for coming to help us.

(*The witnesses withdrew.*)

(*NOTE*—Evidence was given by the English representatives of the Soldiers', Sailors' and Airmen's Families Association on Wednesday, 19th November, 1952 (Thirty-First Day).)

(*Adjourned to Thursday, 30th October, 1952, at 10.30 a.m.*)

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MINUTES OF EVIDENCE

TAKEN BEFORE THE

23

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

TWENTY-THIRD DAY

Thursday, 30th October, 1952

WITNESSES

MR. R. BROUGH } representing the Scottish Children's
MR. T. JOHNSTONE, B.Sc., D.P.A. } Officers' Association.
MR. D. W. R. BRAND, representing the Scottish Committee of the
Catholic Union of Great Britain.



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1953

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TWENTY-THIRD DAY

Thursday, 30th October, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (Chairman)

Mrs. MARGARET ALLAN
Mr. R. BRIDG, M.A.
Mrs. E. M. BRACE
Lady BRAGG
Mr. G. C. P. BROWN, M.A.
Sir FREDERICK BURROWS, G.C.S.I., G.C.I.E.
Mr. H. L. O. FLOCKER, C.B.E., M.A.
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Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 66

MEMORANDUM SUBMITTED BY THE SCOTTISH CHILDREN'S
OFFICERS' ASSOCIATION

PART A

1. Incompatibility

The Association directs attention to the tragic situation which occurs when a woman and her children are forced by the unsatisfactory and unbearable behaviour of the husband, to leave him and live apart. The children suffer because the mother has either to work to support them or to live precariously on national assistance. The father usually refuses to contribute towards their support unless they return to live with him. Divorce in such cases is generally impossible and time only perpetuates and accentuates the unhappiness and deprivation suffered by the wife and children. It is suggested that consideration be given to the plight of such mothers and children in their "illegal" separation.

2. Mutual separation

When a couple mutually separates, the present machinery whereby a wife may obtain a decree for arrestment of the husband's wages for maintenance for herself and her children is very cumbersome. Decree is only granted for one arrestment. Many husbands are now skilled in the art of becoming unemployed or changing jobs to avoid further arrestment. It is suggested that some type of "continuing decree" of arrestment might be considered whereby the wife did not have to make repeated approaches to the Sheriff on the husband's subsequent defections.

3. Marriage of minors

This Association feels that the existing marriage law in Scotland makes it far too easy for minors to marry without parental consent. Our experience in caring for children who are the fruits of such early, unstable and casual marriages confirms us in the view that, if minors were compelled to have parental consent for marriage, fewer of these marriages would take place but many more of them would prove to be happy, permanent unions. It is suggested that persons under the age of twenty-one in Scotland should require the consent of their parents for marriage, with the right of appeal to the Sheriff for unwarranted parental refusal.

4. Legal separation

The Association deplores the fact that in Scotland a legal separation can be arranged without any court proceedings or previous investigations by a trained professional social worker.

5. Recommendations

We would recommend that in Scotland there is a paramount need for the services of trained professional workers, perhaps drawn from existing organisations, to be consulted in all questions of separation, divorce, or marriage of a minor, more especially if there is a child or children involved.

Where a separation or a divorce is contemplated and the question of the welfare of, access to, or custody of a child or children is at issue, it is suggested that the legal body should, previous to decision, receive and consider a report on investigations made by a trained professional social worker.

It would be the duty of this professional social worker to report primarily if the differences could be resolved without action and failing this, how the welfare of the children, in all its aspects, might best be adequately ensured.

In this connection it is realised that in Scotland there is no existing machinery comparable to the domestic disputes court of England.

PART B

6. Intermittent and repeated desertion of a wife by a husband

(a) It is proposed to show that many women suffer grave injustice and hardship by reason of repeated desertion by their spouses for periods of less than three years, which periods, individually, do not constitute grounds for divorce, but when added together form a total of more than three years. In the worst cases these recurrent desertions extend over the greater part of the couple's married life.

(b) It is recommended that the law be amended to enable such injured spouses to petition for divorce when the periods of desertion are in excess of a period of time to be considered by the Commission.

7. The life of the deserted wife

The sum of human suffering, spiritual and material, endured by many wives whose husbands are habitual deserters for periods of less than three years, is often far greater than that borne by wives deserted by their husbands and who are able, in the present state of the law, to petition successfully for divorce.

In the overwhelming majority of cases, the general character of the husband is in keeping with that which

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the act of desertion suggests. Many a drunken wastrel returns to his wife for a period as short as a week during a whole year or after far longer periods of desertion. The result is commonly a steady increase in the number of their children and a continuous reduction in the standard of life. It is deplorable that men of such character should be able to deny to their wives a remedy in law by such a simple and heartless device. This occurs in thousands of cases and frequently the wife's efforts to support herself and to improve the condition of her children are rendered futile by the return of a worthless husband and by the pregnancies resulting from his fleeting attentions.

The impertinence of such visits is often aggravated by cruelty, and far from augmenting the household income, the husband commonly squanders his wife's income as well as his own earnings or denudes the household of such comforts as his wife has gathered in his absence and when he is unemployed she is indeed in a sorry plight.

8. Impact upon the children

It frequently happens that the wife, tortured beyond all endurance, either leaves the home and the children to the ministrations of a husband who is drunken or otherwise unfit to have the care of them or places them with relatives or strangers. In either event it often happens that the home is broken up and the children are finally received into the care of the local authority. Whether this happens or not, the effect of such a life upon the minds of the wife and children is often disastrous. There is no emotional or physical security. The wife becomes a neurotic or suffers otherwise from ill-health; the children, often under-clothed and under-nourished, can be depended upon to suffer in mind, to develop behaviour problems and to turn to delinquency. The mother is too enervated and discouraged to control them.

9. Effect of proposed amendment

Alteration of the law to enable those women to divorce would, it is true, have the effect of finally severing the marriage bond. It would, however, preserve the family life of the wife and children and remove the incalculable

mental stress and much of the financial insecurity to which they are a prey.

10. Equality at law conceals inequality in fact

Women's approach to equality of status in divorce is historically recent. At the present time, in relation to divorce for desertion, man and woman are equal in that no petition may be presented by either in respect of a period of desertion of less than three years. There the equality ceases. It is in the nature of things that a man is freer to resort to habitual desertion, the wife being, as a rule, tied to her home and her children. While the husband is absent he has only himself to support and his income is not reduced by his defection. The wife, if she has dependent children, is often dependent upon national assistance.

11. Action recommended

That the Divorce (Scotland) Act, 1938, should be amended to include as ground for divorce:—

Repeated desertions by a spouse which, taken together, inflict so much emotional or material hardship or both upon the husband or wife of that spouse or upon their children, if any, or upon both, that the enjoyment of the ordinary advantages of family life are denied to the husband or wife of that spouse and to their children if any.

12. Custody of children

It is suggested that the Commission give consideration to the thought that a woman, who is defending an action for divorce raised on one act of adultery or on the ground of desertion, is not necessarily to be regarded as an unsuitable person to have the custody of the children.

The Commission might consider it advisable to recommend that, in all or in certain cases, a report on this aspect of the case be obtained from a qualified social worker, such as a children's officer, whose report might well also be of value in deciding the question of access.

(Received 26th December, 1951.)

EXAMINATION OF WITNESSES

(MR. R. BROUGH AND MR. T. JOHNSTONE, B.Sc., D.P.A., representing the Scottish Children's Officers' Association; called and examined.)

5262. (Chairman): We have before us, as representatives of the Scottish Children's Officers' Association, Mr. Brough, who is the Children's Officer in Glasgow, and Mr. Johnstone who is the President of the Association and the Children's Officer for Renfrewshire, is that right?—(Mr. Johnstone): One correction. I am the Vice-President of the Association.

5263. I had been misinformed. Turning to your memorandum, you have modestly not told us about your membership and constitution. Of course, we know a good deal about the Children's Officers' Association, but have you anything you would like to add about it?—(Mr. Brough): The membership is 100 per cent. of the children's officers in Scotland.

5264. Is there anything you would like to add to your memorandum before I ask you questions about it?—The memorandum explains some of the problems that we considered should be rectified, but the Association is mainly concerned with the care of children and with giving any help we can to the court in deciding matters concerning the care and welfare of children.

5265. As to paragraph 1, you direct attention:—

"... to the tragic situation which occurs when a woman and her children are forced by the unsatisfactory and unbearable behaviour of the husband, to leave him and live apart. The children suffer because the mother has either to work to support them or to live precariously on national assistance. The father usually refuses to contribute towards their support unless they return to live with him."

Then you go on:—

"Divorce in such cases is generally impossible and time only perpetuates and accentuates the unhappiness and deprivation suffered by the wife and children."

In England, if the husband behaves in such a manner that the wife is forced to leave him, that would be regarded as desertion by the husband, and at the end of three years, she would probably obtain a divorce on the ground of desertion. Could not the wife in Scotland obtain separation and alimony from the husband in circumstances such as you describe?—We refer later in our memorandum to the type of case where there is intermittent desertion.

5266. Yes, I see, that is rather a different point. It may be that others more familiar with the law of Scotland will correct me, but I should have thought that in circumstances such as you set out here, the position would have been as I described. Mr. Justice Pearce reminds me that in England the wife in such a position could get a police court order straight away on the ground of what is called constructive desertion.—Quite.

5267. In paragraph 2, you refer to the cumbersome machinery for arrestment of the husband's wages. I would like you to explain one phrase, for my benefit, as I am not so familiar with Scottish legal terms. You say that "decree is only granted for one arrestment". What does that mean—one arrestment?—(Mr. Johnstone): It means, my Lord, that when the husband is traced and the court wishes to take from his weekly earnings some sum of money to compensate the mother and the children, then that particular order applies only to that particular week, and the ensuing weeks require another order. In some cases, if the husband learns about this in advance and goes idle, there are no funds to arrest at all.

5268. Do you mean that the decree of arrestment only applies to one week, and that next week and every other week she has to get a fresh decree?—Yes.

5269. (Lord Keith): I think, Mr. Johnstone, if I might intervene, that is not correct. It is not a decree, it is

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[Continued]

a warrant of arrestment, and you can only arrest for aliment that is past due, is not that right?—Yes.

5270. And therefore when you have arrested for aliment that has been in arrears, say, for a fortnight or a month, that will cover that aliment. But then the husband may continue to default and you have to put on another arrestment through default. Is that what you mean?—Exactly.

5271. That is the way it works, you have to put on an arrestment for each continuing default. You can never arrest for anything that is not in arrears. The decree is the same decree, it never changes.—It is a question of procedure. What we wish to bring out is that this woman has to go each time and make fresh arrangements for money that has not been paid.

5272. (Chairman): I am obliged to Lord Keith for clearing up the question. What exactly do you suggest? Do you suggest that if there have been such arrears as justify making one order of arrestment that order should continue to operate week by week on the same man?—We feel that that would be a more satisfactory and a more permanent way of ensuring the wife's aliment.

5273. Of course, you would always be running the risk that the husband, not liking to have this order made against him, would change his employment?—(Mr. Brough): And become unemployed. (Mr. Johnstone): We are perfectly aware of that. We think that the lesser of the two evils.

5274. I will not ask you questions about paragraph 3. We observe what you say with interest but we think that the reform of the marriage law in Scotland is outside our terms of reference. As to paragraph 4, you say:—

"The Association deplores the fact that in Scotland a legal separation can be arranged without any court proceedings or previous investigations by a trained professional social worker."

Now in England, of course, there is nothing to prevent a married couple from agreeing to separate without any court proceedings or previous notice. They may record their terms in a deed, or they may simply separate. Is it different in Scotland? Perhaps Lord Keith would help? (Lord Keith): I do not know what the witness means by legal separation.—(Mr. Brough): That is where we are in error. We use the word "legal" when we mean an arrangement, whereby two parties can go to a solicitor and arrange a mutual separation.

5275. A separation agreement?—A separation agreement. My I just refer to paragraph 3 for one moment, and point out that for the purposes of the Children and Young Persons (Scotland) Act, 1937, and, of course, the corresponding English Act, a child or young person means a person under the age of seventeen, and under the Children Act, 1948, we can continue the care of children to the age of eighteen? And we may continue to supervise such children until they reach the age of twenty-one. And yet young persons under that age are free to marry.

5276. (Chairman): That is very interesting.—For the purposes of that Act there is a definition of a juvenile, a minor, and yet such a person can marry.

5277. Your suggestion is that the age for marriage should be the same as the age at which your duties end?—Until the person is considered an adult.

5278. (Lord Keith): Are you referring, Mr. Brough, to all children in Scotland, or only to children that come under your jurisdiction?—I would refer to all children in Scotland.

5279. (Chairman): May I return to paragraph 4? Is it not a little difficult to lay down by Act of Parliament that a husband and wife shall not separate by agreement?—I doubt whether Parliament would accept the suggestion in paragraph 4, for that would be an interference with the freedom of subjects.

5280. In paragraph 5, you say:—

"We would recommend that in Scotland there is a paramount need for the services of trained professional workers, perhaps drawn from existing organisations, to be consulted in all questions of separation, divorce, or marriage of a minor, more especially if there is a child or children involved."

I understand that suggestion if it means that there are to be available for consultation such trained professional workers, but I wondered whether you were going further and were suggesting that it should be the law that they must be consulted in all such cases. Which did you mean?—We, of course, as I have already said, are mainly concerned with children and we do think that in every case where custody of a child is in question an independent person should give a report to the court, similar to that made in adoption cases.

5281. The next sentence, of course, deals with that and you say:—

"... it is suggested that the legal body should, previous to decision, receive and consider a report on investigations made by a trained professional social worker."

You mean, of course, before deciding as to custody or access?—Exactly.

5282. At the end of that paragraph you say:—

"In this connection it is realised that in Scotland there is no existing machinery comparable to the domestic disputes court of England."

What exactly were you referring to there?—We have no experience, of course, but we understand that in England the separation cases go before a special court and special consideration is given to these cases.

5283. Then, paragraph 6 refers to intermittent and repeated desertion of a wife by a husband, and your recommendation is this:—

"It is recommended that the law be amended to enable such injured spouses to petition for divorce when the periods of desertion are in excess of a period of time to be considered by the Commission."

I understand you to mean there that the wife should be allowed to petition for divorce when the periods, added together, exceed a specified period?—That is so, my Lord. In many of the cases coming to our notice men are very cruel to their wives. They leave their wives for periods of time, and then come back for a few weeks, and the wife, in view of her economic circumstances, has to accept the return of her husband.

5284. Then, in paragraphs 7 to 10, you set out some very striking and very sad facts about what sometimes happens to unfortunate wives in unhappy marriages, but I do not wish to ask you any questions on these paragraphs. We have studied them with great interest. The action recommended comes in paragraph 11 and there you say:—

"That the Divorce (Scotland) Act, 1938, should be amended to include as ground for divorce:—

Repeated desertions by a spouse which, taken together, inflict so much emotional or material hardship or both upon the husband or wife of that spouse or upon their children, if any, or upon both, that the enjoyment of the ordinary advantages of family life are denied to the husband or wife of that spouse and to their children if any."

I quite appreciate what the object of your recommendation is, but my difficulty is that it is unfortunately very vague. We have to make recommendations for changes in the law if we think they are advisable, but we have also to indicate with clarity exactly what we suggest in place of the existing law. Your suggestion would be a very difficult one for the courts to administer.—I appreciate, my Lord, that it would be difficult to operate, because of the return of the husband, or perhaps the wife, to the home, and to family life, even though for a very brief period. I appreciate that, but that is one of the difficulties we find in some of the lives we work amongst.

5285. Would it meet your case if your earlier suggestion were adopted, that the periods of desertion should be put together, and if they exceed a specified period the spouse should be entitled to divorce? That is at least, whether it is right or wrong, a clear and practical suggestion, and I wondered whether that, coupled with the existing law about cruelty, might meet the case?—It is tied up with the previous suggestion.

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[Continued]

5286. Then, in regard to custody of children, you say in paragraph 12—

"It is suggested that the Commission give consideration to the thought that a woman, who is defending an action for divorce based on one act of adultery or on the ground of desertion, is not necessarily to be regarded as an unsuitable person to have the custody of the children."

I can tell you from my own experience that she is not in England necessarily regarded as an unsuitable person to have the custody of the children. It is realised that, especially in the case of children of tender years, even if the wife has perhaps on one occasion fallen into adultery she may nevertheless have been a very affectionate mother. And although, of course, the adultery is an element to be taken into consideration, she is not necessarily regarded as unsuitable to hold the custody merely because she has been guilty of adultery. But, in your experience, that is not so in Scotland?—There are very few contested cases of custody. I think that in normal practice when a divorce is being sought the guilty party gives up the custody of the children. I am speaking of a divorce which is undefended. We find that the children generally leave the guilty party.

5287. Then the gist of it really comes in your recommendation:—

"... that, in all or in certain cases, a report on this aspect of the case be obtained from a qualified social worker, such as a children's officer, which report might well also be of value in deciding the question of access."

As I understand it, you are saying that whether the divorce case is defended or undefended, the court should have the assistance of a qualified social worker?—That is our main concern, my Lord.

5288. And you do not think it is right that the parties should agree between themselves as to custody?—No, my Lord.

5289. Would you suggest that in every undefended divorce case the social worker would be consulted?—I would, my Lord.

5290. (Lord Keith): Mr. Brough, I gather that neither you nor Mr. Johnstone is a lawyer?—We are not, my Lord.

5291. Do any of the children's officers get any training at all in legal aspects of husband and wife, and children?—No, a new course has commenced in the University and Mr. Johnstone may be able to say if that is one of the subjects. (Mr. Johnstone): There is a difficulty here, my Lord. Before the Children Act there was a service which dealt with children's affairs. Since 1948, as you are aware, a new service—the children service—has come into being and has set new standards. I cannot say that as yet we fully attain to them. But we are making plans for them, and under the new plans—they are already to a limited extent in action in Glasgow—the members of the children's officers' departments will have a general university education with graduation, plus the social certificate or diploma, and on top of that perhaps, a specific course such as the child care course run by the Home Office in England at two universities. Incorporated in that type of training there will be instruction sufficient to provide a general knowledge of the legal position of husband and wife, and children, etc.

5292. The reason I asked that was that there were certain observations made in this memorandum that I do not think are strictly accurate according to the law in Scotland.—(Mr. Brough): We agree.

5293. I thought you would probably appreciate that. Might I ask you this? This memorandum is divided into two parts, Part A and Part B. Part B consists entirely of proposals with regard to treatment of habitual desertion, is that not right?—That is so, my Lord.

5294. And what is Part A supposed to cover?—General observations.

5295. Mr. Brough, I take it you know nothing whatever about the doctrine of constructive desertion?—We are not versed in that.

5296. I am not versed in it either, and I think I should say, for the information of the Commission, that I do not think Scots law recognises constructive desertion in the sense that English law does. I noticed a statement

that I was inclined to query, Mr. Brough, in paragraph 10, where you say that women's approach to equality of status in divorce is historically recent. What did you have in mind so far as Scotland is concerned?—The information was compiled, may I say, rather hurriedly, and was culled from many children's officers. We are a young association, we were not, I am afraid, able to put down in strict legal terms what was in the minds of the members.

5297. You probably know this from your general knowledge, that in Scotland husband and wife, so far as divorce is concerned, have always been equal in the matter of remedy, that is to say, either husband or wife can take divorce against the other on precisely the same grounds?—Yes, my Lord.

5298. (Chairman): Might I add, without suggesting which country was the more enlightened in that respect, that there was a difference in England until, I think, 1923? Perhaps you had that in mind, Mr. Brough?—It may have been that, my Lord.

5299. (Lord Keith): I would also like, Mr. Brough, to put in a caveat with regard to paragraph 12, in which you deal with custody of children. You say:—

"... that a woman, who is defending an action for divorce raised on one act of adultery or on the ground of desertion, is not necessarily to be regarded as an unsuitable person to have the custody of the children."

Did your Association think that women who had committed adultery or were in desertion were necessarily barred from having the custody of the children, so far as the court was concerned?—(Mr. Johnstone): Might I answer that, my Lord? The feeling was that we should use the opportunity to put that in writing, because it seems to be an accepted view by the public in general that a woman who commits this one act has given over the right to care for children. We thought it desirable that it might be aired publicly that that is not necessarily the case.

5300. It might be useful to take this opportunity to disabuse the public, if that is their view, Mr. Johnstone. I think I can assure you that the view of the court is that it is the welfare of the child that is the paramount consideration, and there are very many cases where a wife who has committed adultery, or a wife who is in desertion, is allowed to have the custody of the children when she comes before the court.—We agree with that principle. (Mr. Brough): Particularly if the children are very young.

5301. (Chairman): Might I return for a moment to paragraph 11? Lord Keith has told us that the doctrine of constructive desertion does not apply in Scotland. I gather from your first paragraph that you would rather like the law to be altered, so that if, say, the wife is forced by the unbearable behaviour of her husband to leave him and live apart he, and not she, ought to be the one who is considered as being in desertion?—That is exactly the case, my Lord.

5302. (Mr. Justice Pearce): With regard to the problem of custody of children in undefended cases, where the child may go to the wrong parent, you appreciate that, if an investigation is made into every undefended case, then that will mean a good deal of extra work and expense?—(Mr. Johnstone): We appreciate that.

5303. And to justify that, of course, one wants to know whether there is a large number, or only a very small number, of cases where the children go to the wrong parent. Do you agree?—(Mr. Brough): We do.

5304. Have you formed any view as to the number of cases where children go to the wrong parent in circumstances in which the court could, if it had fuller information, conveniently order them to go to the other parent? You see, there are some cases where children are with the wrong parent, because the right parent will not or cannot take them, and to order that parent to take them would obviously not do any good to anybody. Have you any idea of the number of cases where children go to the wrong parent when a court could conveniently order them to go to the right parent?—I would not think that there were very many cases where the children have gone to the wrong parent. (Mr. Johnstone): I would like to say that it is not at the stage when the child goes to one or other of the parents that we have knowledge of the case. It is later, when the deterioration occurs, perhaps

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one, two, three, four or more years afterwards, and we cannot say at that stage that the arrangements made earlier by the parents were good or bad, because we do not know the circumstances that existed then. It is what we see afterwards, the aftermath, that leads us to consider that, in many cases where custody is agreed to, it is agreed to wrongly.

5305. I quite see that you do not come on the scene very often at the exact moment of divorce, but I want you to give me your help on this if you can. Do you think, from seeing two or three years later that the children are with the wrong parent, that it would have been possible at the time of the divorce to say that that was the wrong parent?—My view is that each parent is thinking of his or her own point of view at that stage, and I must confess that I do not think that either of them in certain instances is very much concerned with the child's welfare. I do feel that if some unbiased and disinterested person were to represent, in so far as he could, the child's point of view at that time, then that might provide a more lasting and permanent arrangement for the welfare of the child, because the aftermath is complicated by the number of years that the child has stayed with the wrong parent, and it is a bigger tangle than ever to unravel at the later stage.

5306. Of course one has to consider the fact that when a court is imposing on parents some other arrangement than the one they themselves have made, it has to be careful that it is not making bad worse?—(Mr. Brough): That is why we suggested the appointment, such as in adoption cases, of a curator ad litem, a trained child welfare worker, to make a report to the court.

5307. I was assuming that the court will have a report by the right kind of person. I am trying to find out from you in how many cases he is likely to be able to set right what might otherwise go wrong. There are some cases, are there not, where if the parents have made an arrangement, it would be quite inadvisable for the court to alter that arrangement because it might make bad worse?—(Mr. Johnstone): Yes, Sir.

5308. You cannot give me any idea at all as to how many cases you think there are where the child has gone to the wrong parent, when it could have been sent to the right parent by the court, had the court had the report of some officer such as you suggest?—Are you asking us to tell you as against the number of divorces granted the number where we feel that the arrangements were wrong?

5309. I am really asking if you can give me any idea of numbers at all. Can you yourself recall to mind any case where you think that the child went to the wrong parent after a divorce?—I could give you innumerable cases, my Lord.

5310. And are those cases where you think that a better arrangement could have been made by the court?—I sincerely believe so. (Mr. Brough): I have the feeling that if we can prevent even a few children going to the wrong parent then the service would be worth while.

5311. (Lady Bragg): Mr. Brough, would you explain what you mean by the words, "When a couple mutually separates" in paragraph 2? Does that mean without any court case?—Yes, it does.

5312. I did not understand that you could then bring in this arrangement of arrestment of wages. I thought that that was only as the result of a court case, is that not so?—(Mr. Johnstone): No. (Lord Keith): It depends. If there is an agreement, then the agreement can be enforced, and in that way you could get an arrestment. (Mr. Macleod): If it were an agreement would you have to get a judgment first? (Lord Keith): You would in practically every case. (Mr. Young): There is no doubt about that at all. You must get a decree of the court. (Lord Keith): The only other way would be to agree to register for execution, but that would practically never be done. (Mr. Young): In my experience I have never known that to be done. It is much simpler to get a decree of the court than to register an agreement.

5313. (Lady Bragg): In paragraph 5, you say, "there is no existing machinery comparable to the domestic disputes court of England". What machinery do you think there is that you would perhaps like to copy?—(Mr. Brough): In Scotland there is no arrangement whereby a trained welfare worker gives advice to the court.

5314. Are you thinking of the probation officer acting in a matrimonial court, in a magistrate's court, in England?—Yes, we are. (Mr. Johnstone): We are thinking of that as a parallel, not as the possible solution for Scotland.

5315. Will you tell me then what sort of trained social worker you are thinking of? And are you thinking of one officer to do reconciliation work and a separate officer to advise on the disposal of the children?—(Mr. Brough): We do not want any duplication, but the Children's Officers' Association is concerned only with children. There are marriage guidance councils, and in England the probation officers give advice to the court. We are merely mentioning the problem that exists and the lack of any similar arrangement in Scotland.

5316. You are leaving somebody else to decide the details?—(Mr. Johnstone): I think we might say that we would feel that the children service would like to offer its services in all respects except actually trying to reconcile the adults.

5317. (Chairman): As I understand it, you think that as regards access to and custody of children, your body should be consulted before a decision is made?—(Mr. Brough): We offer the suggestion that a person trained and experienced in child care should be consulted.

5318. (Lady Bragg): There is one further question about the custody of children that I should like to ask you. Do you sometimes feel that neither the father nor the mother, perhaps through no fault of their own, through illness or through having to go out of the country, or for other reasons, is suitable to have the custody of the child?—We do.

5319. And there is no other relative available. Would you like to see something like a fit person order made and the child to be placed in the care of the local authority?—(Mr. Johnstone): It is Scottish law, under the Children and Young Persons Act, 1937, that a child may be committed to the care of the local authority.

5320. From both the Court of Session and the Sheriff Court?—I believe so.

5321. (Lord Keith): It will practically always be the Sheriff Court.—And in some cases the juvenile court.

5322. (Lady Bragg): I should be very interested to know if you get many cases made over to the local authority in that way?—(Mr. Brough): We never, of course, have any divorce cases made over like that.

5323. That is what I was really asking.—We do get the aftermath of the divorce.

5324. (Lord Keith): You only get it, Mr. Brough, in cases where the court is authorised to do it under the Children and Young Persons Act, that is to say, where a child is beyond control or it is in need of care or protection. These are two typical cases.—Yes, under the Act of 1937.

5325. (Lady Bragg): I do not think that I have made myself clear. I mean in a custody case where neither party is suitable.—(Mr. Johnstone): There is no provision, to my knowledge, for committing such cases to the care of a local authority at present.

5326. Then what would you like to see done?—Exactly what you suggest.

5327. But it cannot be done now?—It could be done, I think Lord Keith would agree.

5328. (Lord Keith): You want it done by amendment of the law?—(Mr. Brough): Yes.

5329. (Lady Bragg): That is what I wanted to know, you cannot do it now, but is that what you are hoping might be done?—We do suggest that. If neither party is suitable in the eyes of the person making the report, just as the curator ad litem reports in adoption cases, if that person recommends that neither of the parties is a suitable parent to the child, then we would recommend the commitment of the child to the care of the local authority.

5330. Then the children's officer would have that child?—We would have the care of the child.

5331. (Mr. Brace): Do you ever have any children before you who are suffering as a result of a broken home? I am thinking of pre-divorce.—Yes. (Mr. Johnstone): No.

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5332. One says no and the other says yes.—I was shaking my head as to knowledge of the actual number who do come to us. It was a gesture of despair rather than a denial.

5333. And what would you suggest then as a remedy for those children who are in broken homes? (Chairman): Might I just say, of course, that in the case of a divorce there is a broken home also? (Mrs. Brace): But I am talking of pre-divorce when the marriage has gone on the rocks and the parents are more or less holding together, perhaps magnificently, for the sake of the children, when perhaps the children are suffering more than the parents realise, and it is then that they come within the province of the children's officer.—(Mr. Brough): When the parents are still together we do not have these cases, except on the occasion perhaps of the wife going to hospital and the children having to be cared for; we may take children then. But we have no right to receive children into care if they are living with their parents.

5334. That is what I really wanted to know.—The only time that we come in on a case where the children are with both parents is if there has been cruelty to the children, and either the R.S.S.P.C.C. or the children's officer has been called in. (Mr. Johnstone): Perhaps we should say that the active word here is really the word "receive". We do not take children into care, we receive them, and the receiving of them is at the instance of many different organisations, but these organisations come to us and ask us to receive the children.

5335. (Mr. Beloe): Would you return to what you were discussing with Lady Bragg? I think you said that you would like a child to be handed into the care of the local authority if neither parent were suitable in the opinion, not of the court, but of the reporter. Was that so?—(Mr. Brough): Of the court. (Mr. Johnstone): Surely the court.

5336. My second point is this: the Children and Young Persons Act requires a fairly high standard of unsatisfactory conditions, does it not, before a child can be handed into the care of a fit person?—May I answer by saying that perhaps in the past too much stress has been laid on physical conditions and too little on emotional and spiritual conditions?

5337. May it not be that the standard which one would adopt towards taking a child away from parents under the Children and Young Persons Act would be a different standard from that which one would like to adopt when parents break up their marriage?—(Mr. Brough): It would be. The standard laid down by the Children and Young Persons Act is a physical standard, and depends on neglect or cruelty. But you are getting into the realm of mental cruelty in considering the welfare of a child of a divorced couple.

5338. That was what I rather imagined you might feel. Therefore it is so in invoking the provisions of the Children and Young Persons Act? You must have some other, new provision if you want to be able to take the child away from either parent or from both parents on divorce?—Yes. (Mr. Johnstone): I am not fully in accord with that. Looking at the Act, I find that there is a measure of elasticity in it, for it says that children in need of care or protection may be those who have "a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship".

5339. (Chairman): You think that the wording of the Act is at present wide enough to cover what Mr. Brough suggests should be done?—Perhaps not quite wide enough, but the possibility is there, were it to be pursued. Care and guardianship does not mean just the provision of clothing and physical comfort alone.

5340. (Mr. Beloe): How is the judge to ascertain what kind of people the parents are in an undefended action? Do you really think that it is justifiable to have a guardian *ad litem* or a reporter in every case? Or do you think that there is possibly a way in which the judge could be apprised roughly of the conditions appertaining in each case, and could then ask for a report in cases where he thought it necessary?—(Mr. Brough): I would suggest that in every case where there are children there should be a report to the court.

5341. But a report to the court, and a guardian *ad litem*, are quite different matters. I am thinking of the possibility of a report such as is made under the Children and Young Persons Act when a child comes before a juvenile court. Do you feel that a report such as that, made in respect of every child whose parent came before the Divorce Court, would give the judge sufficient information on which to decide whether he wanted a further report in detail?—(Mr. Johnstone): I think I would agree with that. (Mr. Brough): Yes.

5342. One other point. You spoke of the cases where you had not been able to find out that a child had been placed with the wrong parent until several years after the divorce. Do you feel that there is any case for the court to have continuing care of a child after divorce, perhaps through the probation officer or the children's officer or some other agency?—(Mr. Johnstone): In adoption cases, the carter's duties call for that person to give to the Sheriff, shall we say, advice as to whether or not he thinks the adoption should go through automatically or whether there should be a probationary period. My experience as to the number of cases where that is necessary is small, but I still believe that such a facility should be available to the person giving the report.

5343. (Mrs. Allen): Regarding the deterioration in the conditions of the child following the divorce, may that deterioration not arise from changed circumstances within the home, such as alteration in economic circumstances?—(Mr. Brough): It could.

5344. May I return to the question of arrestment of wages? I take it from the evidence that you have given that there have been difficulties in its operation in respect of regularly employed people. But what about the position of the casual worker? What is your experience, and have you any suggestions to make as to an alternative method of ensuring compliance with maintenance orders?—It would not, I think, be appropriate for us to make suggestions in respect of maintenance orders now. We are not really concerned with maintenance orders now. The local authorities, prior to 1948, had the care of the separated wife and children. In Glasgow, there were 1,600 cases in the year ending May, 1948, of separated wives, involving 3,000 children. The husbands were proceeded against by court officers of Glasgow Corporation. But regarding the machinery of the courts for arrestment of wages, I am afraid that is a matter on which we are not really able to give advice.

5345. May I put the question in a different form? Your experience is with children, and the question of the husband's contribution to the wife is a very important factor in this matter of the care of the children. Are you quite satisfied with the present system of arrestment of wages which operates in Scotland?—As we said earlier, we are satisfied that at present it is too easy for a man to discard his responsibilities.

5346. (Lady Penck): Would you turn again to paragraph 27. Have you any experience of having to receive children into care as a result of those mutual separations of the parents? Presumably the parents make their own arrangements with regard to the children, and I would like to know if subsequently many of those children have to be received into care.—Many of these people are in good economic circumstances and have been able to consult solicitors. We are more concerned with the case where there has not been a legal separation or a separation arranged through a solicitor. I cannot say that we have much experience of children from the type of cases you mention coming into care. (Mr. Johnstone): My experience is that when parties mutually separate, some figure—frequently about 10s. weekly per child—is agreed upon. But suppose that a wife with two children receives £2 a week, which is in certain cases known to be augmented by the National Assistance Board. On terms like these you can see that the prospects are that when the mother is ill or there is an extra demand on the income the stage will be reached where we are asked to receive the children from her.

5347. You do not find that you have to receive them often on moral or spiritual grounds?—I am not very sure about "spiritual grounds". I wonder if you could clarify that question?

5348. You spoke as if the home to which the children have gone under a mutual separation broke down only

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occasionally, and then on economic grounds, but what I am trying to ascertain is how often the wrong parent gets the children in such cases, and whether you find that subsequently the home where the children are breaks down on moral grounds.—We find that when the husband and wife separate the usual arrangement is that if the husband receives the children he does not rear them, it is his mother who rears them. We always find a woman in the picture somewhere, and if, of course, she falls ill or something happens, then they come to us. That, you might say, is not an economic breakdown, I do not know how you would describe it. On the other hand, if the mother has the custody of the children, the biggest factor, I should say, would be economic. But there is another factor, too, which I should mention. The mother perhaps receives kindnesses and courtesies from someone, she finds someone who, to begin with, comforts her and agrees with her regarding her husband's misdeeds. Ultimately, shall we say, they become intimate. She has to go to hospital for a confinement. You might call that sort of situation moral grounds or spiritual grounds. We have experience of that, too.

5349. (Mr. Lawrence): I come from the South, and I want to know exactly what we are talking about. Should I be right in thinking that your area is predominantly an area of weekly wage earners?—(Mr. Brough): Yes, the cases we get are predominantly from that section of the population.

5350. And it is that part of the population, I suppose, that you have mainly in mind in the recommendations and suggestions that you put forward for our consideration?—So far as the custody of children in divorce cases is concerned, we are concerned with every child.

5351. Now I want to follow that up, if I may, for a moment, just to see what is the extent of the field which really would be usefully covered by the suggestion which you made of enquiry by some competent person in all undefended cases. Of course, I suppose that your experience leads you to believe that there are in existence many cases where the parents are living together in amity but where for one reason or another, whether because of economic conditions or by reason of temperament and character, neither of the parents is really fit to be a guardian of the spiritual and physical welfare of the children?—Yes, quite a number.

5352. Of course, we are not concerned with that class, nor could there be any investigation into their mode of life without a revolutionary interference with the privacy of the ordinary citizen. Similarly, I suppose your experience leads you to believe that there are a number of cases where the parents are living together but not in amity, and are quarrelling and so forth, where equally neither of them is fit to have the care of the children, and we are not concerned with those.—(Mr. Johnstone): May I say that I do not quite accept the reference to our experience, because it is not our practice to make investigations in a home where there is a married couple living together? I can assure you that we are not in such homes unless we are invited. Thus, our experience as to the children of married couples living together, I will have to be quite blunt, is very limited. We cannot speak on that.

5353. I follow exactly, but I want to narrow the field of what is really relevant for our purposes. Now we come to those cases where the home is being broken by an order of separation or a decree of divorce. I suppose that I may set on one side those cases where the parties are so much at arm's length that there is no agreement about the disposition of the children, and consequently the court has to make provision for their ultimate welfare?—(Mr. Brough): Yes.

5354. In such a case, where a wife is proceeding on the ground of gross cruelty either to herself or the children, plainly there would be no accommodation between the parents as to the children. That brings us to the case which, I think, you have in mind, where the parties are not at arm's length to that extent, but they have reached a stage where for good or bad reasons one or both want a divorce or separation. Now your point is that in that case the parents have their attention so much focussed and concentrated on the obtaining of the court order or decree that the welfare of the children tends to become a secondary matter?—Yes.

5355. That is really the field in which you suggest there should be investigation by a trained person and a report to the court?—(Mr. Johnstone): Yes, Sir. (Mr. Brough): Yes, Sir.

5356. We have narrowed it to that. Suppose, as you have already agreed with Mr. Justice Pearce, that that would involve a considerable expenditure of public money and an extension of the public service. Suppose it were done. It is possible that you would be met in those cases with an agreement between the parents as to what was to be done with the children?—Yes.

5357. What better evidence could the investigating officer find of what was right for the children in those circumstances than the agreement of the parents? How could he go behind that? This is the point that is troubling me. I can understand that one, two, three, four or five years later, experience may show that the agreement of the parents was mistaken, either genuinely or deliberately wrong. I can understand that, but at the moment of enquiry by this investigating officer, who has to make his report to the Divorce Court, when he goes into the home for the first time and is met with an agreement by the parents as to what is best for the children, how is he to proceed in the face of that other then by accepting it?—(Mr. Johnstone): He first of all meets the parties as individuals in their own homes and he asks them if this agreement has been reached for the benefit of the children. That, in itself, is a most important question.

5358. The answer that he would obviously get would be, "yes".—We find that we very rarely get an answer of "yes" or "no". The person always qualifies the answer and from that there is something that we can reach. We find that the answer of "yes" or "no" is a rare thing in our experience. In fact sometimes we have to listen to interminable tales, tales that we cannot tell in court.

5359. I will want you to put your minds to the point where the investigating officer comes into the case, not with the knowledge gained after the event years later, but at the moment of the divorce when the parents are confronting him with their agreement as to the disposition of the children. I would like to know, if you can tell me, how you think that the expenditure of further public money would really bring about any material improvement over what in fact happens now?—(Mr. Brough): I do not think that there would be a considerable expenditure.

5360. Let us leave the amount of expenditure out, whatever it may be.—There is a service available which could carry out this work with very little additional staff. So far as finding out what is going to be best for the child and making the report to the court, the officers we are suggesting are doing nothing but child care. They are experienced in assessing the value of the home. They would be able to find the background of the child; if the child were at school enquiries would be made at the school and school teachers and relatives could be visited. In adoption cases, relatives of the proposed adopters are visited. A very full investigation would be made, and I consider that child care officers would be able to assess what was best for the child.

5361. I can understand those cases which no doubt come into your hands where something has plainly gone wrong with the children, and it is because that has happened that you are brought on the scene. But you see, you are suggesting that you, or some other officer, should make his investigations at a much earlier stage, before anything has gone wrong with the child. What has gone wrong is the relationship of the parents, there is an impending divorce. In that case, when the officer makes his investigation, the parents may say, "We are both agreed about this, we think the best thing is for the child to go to the father", or to the mother, as the case may be. How is any investigating officer going to improve upon that situation, so far as the court is concerned?—(Mr. Johnstone): I think the first point is that, to begin with, he would not see the parents together. He would see them individually and he would get from them their own personal views on the care of the children. After all, when two people agree and make a joint statement, in practice that does not always mean that they are really in agreement. Such a statement sometimes conveys a suggestion of convenience, but when you get to the root of

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the matter with each person, there you find that some of the minor differences lead to great divergences as far as the future of the child is concerned.

5362. I think I follow that. I suppose that the result of those investigations might be to put the parents' mind upon a different line from that which they had reached by themselves?—(Mr. Johnstone): Exactly.

5363. In some of those cases which you would be investigating, I suppose, you would expect to find that what the parents had agreed upon was, in fact, the best thing?—Yes, very much so. (Mr. Johnstone): Yes.

5364. In a number of cases, I suppose, you would envisage the possibility that what the investigating officer thought was best for the children was not, in fact, what the parents were prepared to agree upon. What do you suggest that the court should do in those circumstances?—(Mr. Brough): In many of the cases where there was agreement by the parents that would be the proper arrangement for the child.

5365. We have passed that. I am now dealing with those other cases—let me put the concrete illustration, because I want you to face this if you will and give me an answer if you can. Imagine a case where there are two children and the parents have said, "We are agreed that they should go to the mother". The investigating officer makes enquiries such as you have mentioned, and he comes to precisely the opposite conclusion, that the mother is not a fit person to have them, and that the father ought to have them. The father does not want them. What do you suggest that in those sort of circumstances the court should do, or could do?—(Mr. Johnstone): I should say that if the mother does not want them or should not have them and the father does not want them or should not have them, the next stage is to find a relative as near as possible, say, a grandmother or an aunt. In that case there would be committed to the child to the care of the grandmother or the aunt, as a fit person. That is done under the Children and Young Persons Act at the present moment. Having exhausted the field of blood relatives, then there is the possibility of committing to the local authority.

5366. A similar question was put to one of the witnesses for the Church of Scotland, and I think he said in answer, "Well, in those circumstances if the father would not have them and the mother was, in the opinion of the guardian of lives, unfit, the court most reluctantly would have to order commitment to the mother", but you would demur?—I would not accept that.

5367. (Mr. Madocks): The answer given by that witness was, "Very reluctantly I should give the custody to the mother although she was not a fit person".—I cannot conceive of a child being committed to anyone, however close in blood relationship, if that person is not willing to have that child. I would say that that would be a retrograde step.

5368. (Mr. Lawrence): Having heard the view expressed yesterday to this Commission, I wanted to have the benefit of your experienced views in these matters over the sort of people with whom you daily come into contact.—(Mr. Brough): In the case you have instanced where the mother was not fit and the father did not want the children, I would recommend commitment to the local authority.

5369. (Chairman): Unless, as I understand it, there was a near relative who was suitable and prepared to receive them?—Yes, we have already said that, a relative first.

5370. (Mr. Lawrence): Having narrowed the field to what I hope are its actual dimensions, you would still be of the opinion that there should be this independent enquiry into cases of undefended divorce where the parties have agreed upon the disposition of the children?—I would be.

5371. And that good results, if only in a few cases, would come of it?—Yes.

5372. And I suppose that even if you save only a few children from disaster you would regard that mission as having been fulfilled?—If only one child is saved then the expense does not matter.

5373. (Mr. Flecker): I want to ask a question or two on the subject of access. In general, do you have trouble because access is given to a parent when it is undesirable that he or she should have it?—(Mr. Johnstone): Yes, Sir. Some mutual separations have broken down because of the untimely access that are caused by one or other of the parties seeking access to the child, wherever he or she may be.

5374. Are your powers sufficient in such a case to do anything about it? Can you take that to a court or any other authority and say, "These children are having a raw deal because the parents have mutually agreed to separate and are making their lives impossible"? Can the local authority intervene in such a case under the Children Act?—Only in the case where the child was with a person other than the father or mother, and then the case would be covered by Section 1 (1) (c) of the Children Act.

5375. May we turn for a moment to those cases in which there has been an action in court? In some cases of divorce or separation, I imagine that nothing whatever is said with regard to access to the children, and the matter is never dealt with at all in court?—Yes.

5376. And in that case it is assumed, I imagine, that access is allowed to the parent with whom the children are not living?—Yes.

5377. In a case like that if you felt that things were going wrong for the children, could you have the case brought back to the court for decision? Have you any power to do that?—No, Sir.

5378. Are those cases at all frequent or significant in number?—(Mr. Brough): I would not say that they were frequent in divorce cases, but in separation cases they are quite frequent. The conflicting loyalties created in a child being seen by a father who is not living with the child are not good for the child.

5379. But you cannot do anything about it?—We do have cases coming into the care of the local authority where we find that there are conflicting loyalties, and on occasion we prevent the parent whom we consider to be having an adverse effect on the child from visiting the child in our children's homes. We do try to avoid both parents visiting if they are in conflict. We assess for ourselves the parent that we consider is the better parent, the proper parent.

5380. (Chairman): That answer, I understand, is limited to children who are in your children's homes?—(Mr. Johnstone): Already in our care.

5381. (Mr. Flecker): One last question. In the case where there had been what I am going to call an "unofficial" separation, there must arise doubt in some cases as to who is the responsible parent. Who is the responsible parent?—(Mr. Brough): The person with whom the child is living. That is arranged for in the Children Act.

5382. You have got a responsible parent to deal with in those cases?—Yes.

5383. In the case of a divorce the same would apply a fortiori?—Yes.

5384. You would simply assume that whosoever the child was living with was the parent who had the authority and was the one you should consult?—Yes. That last question is arranged for in Section 27 of the Children and Young Persons (Scotland) Act, which provides that any person who has the actual possession or control of a child shall be presumed to have the custody, charge or care of that child.

5385. (Sir Frederick Barrow): Mr. Brough, do I understand that you approve of the system of arrestment of wages as far as it goes in Scotland, but that you would like to see the powers extended?—That is the case.

5386. So that you would like to see power given so that one warrant of arrestment would be an authorisation or order to the employer to deduct week by week the sum due to the wife from wages?—Yes, Sir. (Mr. Johnstone): I would agree.

5387. Have you had any experience of how the present limited system of arrestment of wages is regarded in Scotland? Is it favourably received, or is it resented?—(Mr. Brough): It is resented.

5388. By whom?—(Mr. Johnstone): By the individuals concerned.

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[Continued]

5383. And is it not also resented by the trade unions who act on behalf of the majority of employees?—(Mr. Brough): I would not say so. (Mr. Johnston): I could not venture an opinion on that.

5390. You have not seen any pronouncement by the Scottish Trades Union Congress on this question?—(Mr. Brough): I have not.

5391. Do you think that your proposal would be favourably received or unfavourably received by that body?—Any neglect of the family would not be countenanced by trade unions.

5392. Are you sure of that?—That is my opinion.

5393. Is it that you are sure in your mind, or have you any evidence to produce to the Commission that an extension of the system of arrestment of wages would be favourably received by the Scottish Trades Union Congress?—(Mr. Johnston): We could not venture an opinion on that. (Mr. Brough): We have no evidence.

5394. But in your capacity as children's officers you think it is desirable?—We do.

5395. (Chairman): May I turn to one of your answers to Sir Frederick? You said that arrestment was resented by the parties concerned. Am I right in thinking by that you mean, firstly, by the person himself and, secondly, by his employers?—(Mr. Johnston): No, Sir, we have great co-operation from the employers. As soon as they know that it is something connected with the welfare of a child we have found the employers very co-operative with check numbers, wage statements and so forth.

5396. I just wanted to clear that up. In a sense both the man and his employers are parties concerned and I was not quite sure what it was you meant, but you meant that it was resented by the man?—Yes.

5397. (Mr. Mac): May I ask a question arising from that? When do you approach employers to get information as to a man's earnings?—If we have children in care, and there has been a court order granted against that man, and he is a defaulter, we naturally wish to claim from him a certain sum, even if it is only a token sum.

5398. When do you approach employers—is it after a court order has been made?—No, Sir. It may happen in other cases, for instance, where a man whose wife has left him has asked us to receive the children into care, and has given us a written statement that he agrees to pay so much per week towards their cost.

5399. Should he default, then you go to his employers?—We go through the legal procedure. If he refuses to pay after being contacted, or if we have lost trace of him, our only means of getting this money from him is fulfilment of his written promise is by arrestment of wages.

5400. Do you approach the employers before you go to the court?—(Mr. Brough): In order that recommendation of an adequate sum from that man may be made we must have knowledge of his actual earnings.

5401. (Chairman): And so you do go to the employers?—We do go to the employers.

5402. (Mr. Mac): If the employers will not give you the information, you cannot demand it from them without going to the court first, can you?—(Mr. Johnston): Quite right.

5403. And once you have authority from the court the employers have to give you the information?—We have found that we very rarely require to go to the court.

5404. (Mr. Bell): Do you find that the employer ever dismisses the employee?—No, Sir.

5405. You do not?—We find that if possible he will see that the man gets more work in order that he may pay more.

5406. You have no experience of a man being dismissed because there is a decree for arrestment of wages against him?—I have no experience, Sir. (Mr. Brough): Neither have I.

5407. (Dr. Robertson): I should like to ask the witnesses one point with regard to Mr. Flecker's question about access. Reference was made to the local authorities' children's homes, but it would only be in residential homes that access to one or other parent would be granted.

That would be very rare in the case of the large number of boarded-out children, of whom Glasgow Corporation has fully 2,000 cases committed by the court. They would not be accessible to the parents concerned unless by special permission. That is the position?—Frequent visiting by parents is mainly to children in residential homes. There is not much visiting of the children by parents when the children are boarded out with foster-parents.

5408. (Chairman): Is the position this, that if there is visiting either in boarded-out homes or in your homes and the visiting has, in your view, a bad effect on the child, you make it cease?—Yes.

5409. And, as I gather from what you said to Dr. Robertson, there is less visiting when the children are boarded out than when they are in residential homes?—Of course, the children who are boarded out are, generally speaking, permanent charges on the local authority.

5410. Do you mean by that that the parents would not be able to see them?—That is the case, my Lord.

5411. (Dr. Robertson): That is where a child is committed by court order, but I think that occasionally a father in the Services might be given permission to visit his children if they are committed by his wish.—The Glasgow Children's Committee certainly grants permission in certain cases for parents to visit boarded-out children. Permission is generally given to widowers.

5412. (Mr. Young): How many years' experience have you had, Mr. Johnston, of this work?—(Mr. Johnston): I was a schoolmaster, and I did voluntary welfare work as well as school teaching until the year 1949. I have therefore been in this work whole-time only since 1949.

5413. And you have personal experience of the system of arrestment of wages only since 1949?—Yes, Sir.

5414. (Chairman): But how long experience have you had, Mr. Brough, on arrestment of wages?—(Mr. Brough): I was on the Glasgow Parish Council, and then in the Public Assistance Authority which later became the Welfare Department. On occasions I was supervising all the divisions in the city.

5415. How many years?—I have been in the service since 1912. I have been in the children's service on different occasions. I was in the Children's Department as a junior and then as an inspector and then in charge. I had experience of arrestment of wages during my nine years as a Poor Law Inspector.

5416. What period was that?—From 1921 to 1930, Poor Law Inspector, and from then until 1934 I was a senior officer in a divisional office.

5417. In that capacity would you have had experience of arrestment of wages?—We had experience of separated husbands.

5418. Specifically?—In Glasgow it is a bigger concern, and we tend to specialise in departments. We had the court officers who dealt with wages.

5419. May I put it this way, over how long a period have you had a chance to observe whether arrestment of wages was likely to lead to a man's dismissal?—I would say seventeen years.

5420. During what period?—From 1921 to 1930, and then from 1935 to 1940.

5421. Mr. Johnston told us that, in his experience, arrestment of wages did not lead to the man's dismissal by his employers. I would like to have your experience. What do you say about that?—I would agree.

5422. Do you remember any cases in which arrestment of wages led to the employers dismissing a man?—No, I cannot say I can.

5423. (Mr. Young): Would you know, if the matter had been dealt with by another official?—Yes.

5424. I want to get the facts about this. You do not think that the position is affected by the state of employment in a city, that is to say, if there is plenty of employment, the employer keeps the man on his staff no matter what the trouble is, but if there is a dearth of employment then the man, because of the trouble involved as a result of arrestment, will get the sack?—That could be the case, depending on the employer, but so far as I am concerned, I cannot remember cases where on an arrestment an employer dismissed a man.

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5425. (Chairman): Do you ever have an arrestment of wages for the children, as distinct from the wife, or is it always an arrestment of a particular sum to be paid to cover both wife and children?—The only experience we have now is for children. Since the 1948 Act we do not deal with the wives.

5426. At the moment it is arrestment for the children?—Yes.

5427. In the earlier days did you have experience of arrestment for payments to be made to the wife?—Yes.

5428. The evidence you have given does relate both to the earlier times when you were dealing with arrestment for the wife and to more recent times when you were dealing with arrestment for children?—We have very little experience of arrestment in recent days.

5429. I think that what underlay the earlier suggestion put to you was that employers might be more kindly disposed to arrestment for children than to arrestment for wives. Have you any views on that?—That could, of course, be the case.

5430. Have you noticed any difference between the two?—We have had so few cases of arrestment, so far as children are concerned, in recent days. When a man is threatened with court action, and he knows that he will have to go to court, he commences paying and the court proceedings are then terminated.

5431. (Lord Keith): Might I just clear up a point? When you speak about arrestment for children, is it not generally the mother who holds the decree for the payment, perhaps in respect of the children? You never get a decree of court in favour of the children direct?—No.

5432. The order of the court for payment is not an order for payment to the child, is it?—No, generally to the mother.

5433. It is generally to the mother in respect of the children?—(Mr. Johnstone): And the local authority receives the decree as the guardian of the child where it has the care of the child.

5434. (Mrs. Allen): What is your experience of the operation of the system of arrestment in regard to the day or the casual worker?—In Glasgow it would be useless to try to enforce an arrestment when the man was a day worker. Prior to the war, the dockers were paid daily and it was useless trying to enforce any arrestment. The man changed his employment.

5435. (Lord Keith): There was nothing to arrest.—Nothing in arrest. It can be done only with weekly or monthly wage earners.

(The witness withdrew.)

5436. (Mrs. Allen): But there are certain types of workers who would be on a daily rate for one, two, or three days. I would like to know just how it would operate in those cases? (Lord Keith): It cannot operate. Once the money has been paid you cannot arrest. (Mrs. Allen): The arrestment of wages has a very limited operation? (Lord Keith): It only arrests wages which are unpaid. You give notice to the person who is to pay the wage instructing him not to pay it over. (Mrs. Allen): There is no provision within it for an amount to be deducted from the daily rate? That person can get away with it? (Lord Keith): I think that there is no provision for that type of case. (Mrs. Allen): I am trying to find out, because, quite frankly, listening to the evidence and the concern that has been expressed about the arrangements for the welfare of the children, it seems to me that in the area in which the two witnesses carry out their duties this type of worker would be in a very large majority?—(Mr. Brough): The day worker is in the minority nowadays, very few are paid daily.

5437. (Chairman): A member of the Commission has asked me to put this further question to you. You have told us that you do not remember any case of a man being dismissed by his employers because there had been an arrestment of wages. Do you remember any cases in which the man himself, finding an arrestment order against him, has changed his employment?—Yes. (Mr. Johnstone): Yes.

5438. Are there many cases of that kind?—Yes. (Mr. Brough): I am sure that the National Assistance Board officers could speak on that in the present day. (Mr. Young): I know of more than one case where a man who normally was paid weekly, when he had an arrestment made against him went to his employer and arranged to be paid daily in the future.

5439. (Chairman): Do you think that the suggestion made in paragraph 2 of your memorandum would really make a great deal of difference? Might it not cause a man more readily to leave his employment voluntarily, in order to avoid payment?—You do get that type of case where husbands do everything to resist paying their wives. If they have left their wives they do not care what happens to them, and it may be the case that if the action which we propose were taken, it might have the effect of making the man give up his job, but all I believe that it would be the proper action.

5440. You see, we are thinking of the welfare of the wife and children. Do you think that on balance the wife would be better off if this step were taken, as you suggest?—It would save court action, it would save the wife going frequently to court.

(Chairman): Thank you for your memorandum and for your help this morning.

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INTRODUCTION

The teaching of the Catholic Church on marriage and divorce is, we believe, widely known and, further, we understand that a detailed exposition of Catholic doctrine on these subjects is being submitted to the Royal Commission by the Catholic authorities in England. In these circumstances we do not consider it necessary to include an exposition of these matters in this memorandum. It will perhaps suffice for us to say that we could only recognise a right to dissolve marriage based on divine authority and in our view there is no such authority for the exercise of this power by the civil courts.

In presenting this memorandum, then, our object is to comment on and make proposals with regard to the present state of Scots law relating to marriage and divorce, with a

view to lessening the disastrous consequences of the present divorce laws, which we consider to be contrary to divine law. In approaching this task we feel that it is necessary to have regard to the history of the law and its sources. As is well known, the Scots common law of husband and wife was largely based upon the canon law. That the canon law principles were to a considerable extent preserved in the common law after the Reformation can be seen from the works of the institutional writers. Thus, Stair held that marriage was something more than a mere contract—"Marriage itself and the obligations thence arising are *jure divino*, and natural". And again, "It [marriage] is not a human but a divine contract". Stair's view, accordingly, was that marriage was regulated by divine and natural law. (Stair, I. 4. 1, 2.)

With regard to the dissolution of marriage, Stair says that the dissolution of marriage is only natural by death.

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(I. 4. 7.) He goes on to say that there are just occasions upon which injured persons may annul it and be free, namely, adultery and desertion, but he observes that the canon law will not dissolve a marriage on these grounds but will only grant a separation. It is significant, however, that Stair seeks scriptural authority for the proposition that marriage can be dissolved on account of adultery or desertion, and he thereby clearly implies that marriage can only be dissolved by divine authority. He recognises that marriage is regulated by divine law. Thus, it can be seen that the moral basis of the law relating to marriage was preserved in the post-Reformation period. This continued to be the position until 1838 when the Divorce (Scotland) Act of that year introduced grounds of divorce which were unsupported by even a semblance of any divine authority. As a result of the provisions of the 1838 Act, the moral and religious significance of marriage has been undermined by enabling marriages to be dissolved on grounds which do not even claim to have any moral or spiritual justification. We therefore consider that, so long as the law confers power on the Scottish courts to dissolve marriages, the grounds of divorce should be restricted to the traditional matrimonial offences, namely, adultery and desertion, but that the remedy of judicial separation should be preserved for the other recognised matrimonial offences.

Although actions of divorce have been entertained by the Scottish courts since the sixteenth century, it was not until the present century that actions of divorce in substantial numbers were raised in this country. The numbers have now become so large that we believe that the time is appropriate to consider whether divorce has not become too easy to obtain and whether, instead of extending the present grounds of divorce, as is being advocated in certain quarters, the existing grounds of divorce should be restricted and the machinery for obtaining divorce reviewed. With many others we believe that the family is the basis of a sound and healthy society and we consider that all responsible persons must be seriously concerned with the rising tide of divorce, not only on account of the welfare of the spouses themselves, but also on account of the effect on the children of broken homes, on the rising generation in general and for the future of the country. Against this background we consider that it might be helpful to the Royal Commission if we put forward certain detailed proposals based on broad moral principles which, we feel, should be acceptable to anyone who realises that the family is the fundamental unit of society and that all laws affecting marriage and the family should have some moral basis. Although we put forward these proposals, we wish to make it quite clear that we are not in any way departing from our standpoint as Catholics that no human authority has power to dissolve the bond of matrimony.

PROPOSALS

I. The contracting of marriage

It is apparent that many young persons nowadays enter into marriage in a reckless and irresponsible or at least thoughtless manner and without consulting their parents or anyone else in a position to offer advice. On the other hand, considerable facilities are now available to provide advice for intending spouses, such as marriage guidance counsellors. We believe that a considerable number of marriages are entered into by young persons who have only known each other for a matter of days or weeks or who lightly enter into marriage without giving proper time and consideration to the implications and responsibilities of matrimony. With a view to avoiding this we suggest that the period between legal intimation of the intention to marry and the actual celebration of the marriage should be considerably extended. We therefore recommend that the Marriage Notice (Scotland) Act, 1878, should be amended so as to provide that intimation of an intended marriage must be published by the registrar for not less than twenty-one days altogether, with any further amendment of the existing law which such amendment would naturally entail. Provision might be made for the reduction of this period in special circumstances, but only on application to, and with the approval of, the Sheriff.

II. Divorce generally

(1) Restriction of divorce during early years of marriage

We recommend that there should be statutory provision to the effect that no action of divorce may be instituted within three years of the date of a marriage. We consider that such a provision would prevent people from precipitately and impulsively seeking the remedy of divorce in the early years of marriage when a period of delay might enable them to resolve difficulties which had arisen in the initial stages of cohabitation and settle down to a happy married life.

(2) Evidence and procedure in undefended actions of divorce

As every broken marriage has its effect, not only on the parties but also on their children and on the State and the country, we recommend that in all undefended actions of divorce the Lord Advocate for the public interest should be represented by counsel. We are satisfied that there is a widespread uneasiness among the legal profession in Scotland that many decrees of divorce in undefended actions proceed on evidence which, although *prima facie* sufficient, would not stand up to the test of cross-examination and in some cases, if subjected to that test, would prove to be insufficient or perhaps perjured. By adopting the proposal hereinbefore mentioned a safeguard would be introduced to prevent decrees of divorce being granted in undefended cases on evidence which, if tested, would not justify the granting of such decrees and at the same time prevent the administration of the law from falling into disrepute, as it tends to do under the existing system which is open to such abuse.

(3) Welfare of children and custody

We are of opinion that in many actions of divorce the parties make no proper arrangements for the custody and welfare of the children of the marriage and frequently the question of custody is not brought before the court. We therefore consider that in all actions of divorce where there are children of the marriage the court should be required to satisfy itself that satisfactory arrangements have been made for the welfare of the children before pronouncing decrees of divorce, regardless of whether the question of custody has been brought before the court by the parties or not. Even where the question of custody is raised in the action, the more or less formal evidence which, under present practice, is led in support of an uncontested conclusion for custody, is, in our opinion, quite inadequate and unsatisfactory. We suggest that in all cases the best method whereby the court could be fully informed as to arrangements for the care of the children would be by remitting to a reporter to make full enquiries and to report. We accordingly recommend that in all actions of divorce where there are children of the marriage the court should be required, having heard evidence regarding the grounds of divorce, to continue the cause pending a report on the arrangements made for the care of the children and that, after consideration of the said report and any further evidence which the court deems desirable, decrees of divorce should only be pronounced if the court is satisfied that the foresaid arrangements provide adequately for the moral and material well-being of the children.

(4) Actions of divorce at the instance of persons who have themselves been guilty of matrimonial offences

We consider that no person who has himself been guilty of a matrimonial offence should be entitled to ask the court to pronounce decrees of divorce in his favour, whatever be his ground of action, without asking the court to exercise a discretion in his favour. For instance, it seems to us unjustifiable that a husband who has committed adultery many times should have an indisputable right to divorce on the ground of an isolated act of adultery by his wife. Moreover, we consider it unreasonable that a spouse who by his own conduct has virtually driven his partner to commit a matrimonial offence should himself be entitled to pursue an action of divorce on grounds for which he may be largely responsible.

III. Divorce for cruelty

On the assumption that this ground of divorce is to be retained we believe that the testing of evidence by cross-examination is particularly necessary in actions of divorce on the ground of cruelty and that at present many

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undoubted actions of divorce for cruelty are successful when the true facts with regard to the relations between the parties could not support a decree of divorce. This demonstrates the need for the adoption of a measure such as we have suggested under paragraph II, (2) *supra*. It appears to us that in many cases cruelty is made the ground of action simply because no other ground is available and that the cruelty complained of, if subjected to the test of cross-examination, might not measure up to the standard of cruelty which the law requires.

IV. Divorce for desertion

The temptation to commit perjury to which we have already adverted is, in our opinion, particularly strong in actions of divorce for desertion. We consider that in many cases the petitioner's alleged willingness to adhere throughout the trilemma, although formally deplored to, is not genuine. The present state of the law on this matter is clearly unsatisfactory and in our view one effective way of remedying the situation would be by returning to the law as it existed prior to the *Conjugal Rights Act, 1861*. This would mean that no person could sue an action of divorce for desertion without having previously obtained a decree of adherence. We consider that this is the most satisfactory method of proving willingness to adhere and we accordingly recommend a return to the pre-1861 procedure. We are satisfied that, if the law is not amended to require satisfactory proof of willingness to adhere, the present situation will deteriorate still further until divorce by mutual consent after a statutory period becomes generally recognised.

The reduction of the period of desertion from four to three years by the *Divorce (Scotland) Act, 1938*, was, in our opinion, a retrograde step, and we recommend that the four-year period, as required by the *Act of 1573, C. 55*, should be restored. This would give further time for reconciliation to take place and would give marriage guidance councils and other bodies who are concerned with the mending of broken marriages a better opportunity to carry out their work.

V. Divorce for insanity

Without prejudice to our general attitude as explained in the Introduction to this memorandum, we submit that divorce on the ground of insanity can have no possible moral justification. The person against whom an action on this ground is directed has been guilty of no matrimonial offence and we do not see why a spouse should be entitled to divorce simply because his partner has suffered the misfortune of mental illness. We cannot imagine a more flagrant or more cynical violation of the marriage vows. The natural and equally illogical corollary would be to grant divorce on the ground of incurable physical illness which might be deemed to occur where one spouse has spent a specified period in hospital without recovery.

We accordingly recommend that the provisions of the *Divorce (Scotland) Act, 1938*, which introduced divorce for insanity should be repealed and that this ground of divorce should be abolished. In the event of this recommendation not being accepted, we submit that Section 1 (1) of the said Act should be amended so as to make it obligatory on the court, instead of discretionary, to refuse decree of divorce if it appears that the petitioner's wilful neglect or misconduct has conduced to the insanity.

VI. Effect of perjury on decrees of divorce

We consider that it is anomalous that it should not be competent to reduce a decree of divorce on the ground that material evidence given at the divorce proof was perjured. We realise, however, in view of the effect on status which a decree of divorce has, that the reduction of such decrees might lead to difficult complications. We therefore recommend that it should be made competent to reduce a decree of divorce on the ground of perjury but that it should be provided that such actions of reduction could only be brought within a certain statutory period from the date of divorce—say, one year.

VII. Divorce after separation for statutory period

We deplore the proposals made in a recent Private Member's Bill and elsewhere that either spouse should have a right to divorce after separation for a statutory period. In effect, this would enable a guilty spouse to convert a decree of separation granted against him by the court into a decree of divorce against the innocent spouse merely by the efflux of time. Divorce by mutual consent is a concept which is and always has been obnoxious to the vast majority of people in this country, and rightly so. The present proposal is, in our opinion, even worse, since, far from resting on the mutual agreement of the parties, it enables the guilty spouse to have the marriage dissolved even against the wishes of the innocent spouse. We also view with alarm the tendency to reduce the statutory period contained in the aforesaid proposal, which started with a period of seven years in the Private Member's Bill, and which has been reduced considerably in subsequent proposals. This is illustrative of the whole modern tendency whereby once a principle is conceded it is pushed to extreme limits with disastrous social consequences.

CONCLUSION

We recognise that the proposals contained in this memorandum would, if implemented, make divorce more difficult by both restricting the grounds of action and making the procedure more onerous. These, however, we regard as desirable reforms in an era in which the tendency is certain quarters is to treat the solemnity of marriage too lightly and to make the dissolution of marriage too easy. Moreover, in certain respects our proposals merely involve a return to the well-established principles of the institutional writers which were accepted in Scotland for centuries. Believing, as we do, that marriage is indissoluble by human agency and that the family is the foundation stone of a healthy and moral society, we consider that, even in a country where the principle of divorce is recognised in the municipal law, every endeavour should be made to strengthen the conception of the sanctity of marriage, to limit the grounds on which marriage may be dissolved and to give the fullest opportunity for reconciliatory factors to operate before allowing people to take the step of terminating a marriage. We consider that our proposals will further these ends and help to provide a better standard of morality and responsibility among our people.

Should it be desired, we are prepared to submit oral evidence in supplementation of this memorandum.

(Received 16th January, 1952.)

EXAMINATION OF WITNESS

(MR. D. W. R. BRAND, representing the Scottish Committee of the Catholic Union of Great Britain; called and examined.)

5441. (Chairman): We have before us, as representing the Scottish Committee of the Catholic Union of Great Britain Mr. D. W. R. Brand. Mr. Brand, you are an advocate and are the Secretary to the Scottish Committee?—(Mr. Brand): That is so, my Lord.

5442. Before I ask any questions, is there anything that you would like to add orally to this memorandum?—There are three points which, if I may, I would like to mention. The first is that after my colleagues in London

had given their evidence on behalf of the Catholic Union they were a little disturbed to discover that apparently some members of the public had interpreted a portion of their evidence as meaning that we, as Catholics, might possibly agree to or approve of divorce on certain grounds. I apologise for mentioning perhaps rather an obvious point before the Royal Commission, but I think it is right that I should take this opportunity to make it quite clear that we can never agree to nor approve of divorce on any ground whatever.

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5443. The memorandum that we had before us in London made that perfectly plain, but of course, not everything in the memorandum goes into any press report, otherwise a great deal of space would be taken up—I appreciate that, my Lord. The second point I would like to mention is that it might fairly be said of the Scottish Committee's memorandum that it is rather a legalistic document. But nevertheless marriage and divorce are for us primarily moral and not legal questions. The reason why our memorandum has taken the form that it has taken is because we took the view that it was only by dealing with the law as it is and making recommendations in connection with the present law that we could make any practical contribution to the work of the Royal Commission.

5444. I am sure we quite follow that. As you say in the first paragraph of your memorandum:—

"... we could only recognise a right to dissolve marriage based on divine authority and in our view there is no such authority for the exercise of this power by the civil courts."

—Yes.

5445. But, recognising as you do that the civil courts do grant divorce on certain grounds, you thought it right to make such suggestions as occurred to you with a view to improving so far as you could the procedure which in fact exists?—That is our position, my Lord. The third point which I would like to mention is that certain other bodies have, I think, made recommendations that welfare officers should be appointed to courts in Scotland that deal with domestic disputes including divorce. We have not mentioned this matter in our memorandum, but I would like to take this opportunity of saying that we wholeheartedly concur in these recommendations which have been made by other bodies, and also in the recommendation that the courts, that is, all courts dealing with domestic disputes, the Court of Session and the Sheriff Courts, should have the power to sit or to continue a case to enable the welfare officer to take such steps as may be possible with a view to bringing about a reconciliation between the parties.

5446. We are obliged, because that does not appear in your memorandum and it is of course a very important matter. Turning to your memorandum, you do at the outset of the introduction make it clear that your Church does not think that there should be any divorce at all?—Yes, my Lord.

5447. You then go on to trace the history of the present divorce laws, and you end the introductory portion by saying:—

"Although actions of divorce have been entertained by the Scottish courts since the sixteenth century, it was not until the present century that actions of divorce in substantial numbers were raised in this country. The numbers have now become so large that we believe that the time is appropriate to consider whether divorce has not become too easy to obtain and whether, instead of extending the present grounds of divorce, as is being advocated in certain quarters, the existing grounds of divorce should be restricted and the machinery for obtaining divorce reviewed. With many others we believe that the family is the basis of a sound and healthy society and we consider that all responsible persons must be seriously concerned with the rising tide of divorce, not only on account of the welfare of the spouses themselves, but also on account of the effect on the children of broken homes, on the rising generation in general and for the future of the country. Against this background..."

and I have read the preceding portion in order to show the background—

"... we consider that it might be helpful to the Royal Commission if we put forward certain detailed proposals based on broad moral principles which, we feel, should be acceptable to anyone who realises that the family is the fundamental unit of society and that all laws affecting marriage and the family should have some moral basis. Although we put forward these proposals, we wish to make it quite clear that we are not in any way departing from our standpoint as Catholics that no human authority has power to dissolve the bond of matrimony."

You then come to proposals as to the contracting of marriage. I have no questions on that matter. You pass in paragraph II to divorce generally and the first heading is "Restriction of divorce during early years of marriage". You recommend that there should be statutory provision to the effect that no action of divorce may be instituted within three years of the date of a marriage. I expect that you are familiar with the English law on that subject contained in the Matrimonial Causes Act, 1950?—Yes, my Lord.

5448. You will remember that the Section in question, which is Section 2, provides that no petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage. Then there is a proviso:—

"Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent..."

Would your Committee, assuming that a similar provision was brought into force in Scotland, consider that it ought to be qualified by that proviso, or would they wish to have it unqualified in any way?—It is a little difficult for me to answer that question without a detailed knowledge of the manner in which the proviso has in fact been applied by the courts in England, but I think we would prefer that the provision should be applied absolutely without any proviso.

5449. Of course there might be, for example, exceptional hardship. Supposing that a husband went away with some other woman and went abroad, leaving his wife deserted with a child there or on the way. These, I imagine, might be circumstances of exceptional hardship and possibly also exceptional depravity—but I see that Mr. Justice Pearce doubts if even these circumstances would come within the proviso. However, you would prefer the three years unqualified?—But I would say in the example which your Lordship has given, although the departure of the husband with another woman might be a cause of extreme hardship to the wife, his departure need not necessarily be irrevocable, so that if our provision were accepted there would still be the possibility of reconciliation between the spouses.

5450. Coming to the second of your sub-paragraphs, under the heading "Divorce generally", which is headed "Evidence and procedure in undefended actions of divorce", you recommend:—

"As every broken marriage has its effect, not only on the parties, but also on their children and on the State and the country, we recommend that in all undefended actions of divorce the Lord Advocate for the public interest should be represented by counsel."

I shall ask Lord Keith later to deal with this suggestion if he desires to ask questions on it, because it is rather for him than for me, but was your suggestion that that should be done at the public expense or at the expense of the unsuccessful litigant?—I do not think that we went into the question of who was to bear the expense of this proposal if it were implemented, but I think it would probably be fair to say that we assumed that the expense would be borne by the State in the same way as the expense of all proceedings taken at the instance of the Crown in Scotland is borne by the State.

5451. If it were otherwise it would greatly increase the cost to the petitioner in an undefended action of divorce?—Certainly, my Lord, yes.

5452. Then you pass, in sub-paragraph (3), to the welfare of children and custody and your concrete suggestion is:—

"... that in all actions of divorce where there are children of the marriage the court should be required, having heard evidence regarding the grounds of divorce, to continue the cause..."

that is to say, as we would say in England, to adjourn the case—

"... pending a report on the arrangements made for the care of the children and that, after consideration of the said report and any further evidence which the court deems desirable, decree of divorce should

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only be pronounced if the court is satisfied that the ferocious arrangements provide adequately for the moral and material well-being of the children."

Of course I fully appreciate the reasons for which that suggestion is put forward, but this occurs to me: until the court has made up its mind as to whether there should or should not be a divorce, and until—if it is a defended case—it has seen the parties in the witness box, is it not a little difficult for the court to make any decision as to what is the best arrangement for the children?—Certainly, but what we had in mind here was that the court would hear the evidence relating to the merits of the divorce but would not thereupon pronounce decree of divorce but would continue the case until it had been satisfied as to the arrangements made for the children.

5453. I see, they would hear all the evidence, see the parties if they both appeared in the witness box, and then adjourn the case. I will pass to sub-paragraph (4), "Actions of divorce at the instance of persons who have themselves been guilty of matrimonial offences". You say:—

"We consider that no person who has himself been guilty of a matrimonial offence should be entitled to ask the court to pronounce decree of divorce in his favour, whatever be his ground of action, without asking the court to exercise a discretion in his favour. For instance, it seems to us unjustifiable that a husband who has committed adultery many times should have an indisputable right to divorce on the ground of an isolated act of adultery by his wife."

That is, in effect, a suggestion that there should be applied in Scotland the rule which at present applies in England?—That is so, my Lord.

5454. In the English Act there is this proviso:—

"Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery . . ."

That is, as I understand it, what you suggest should be the position in Scotland?—Yes, I think we would put it a little stronger than that, my Lord. I understand that, in terms of the statute which your Lordship has just read, the tendency in the English court would be for decree of divorce to be granted unless the court were satisfied on account of the conduct of the petitioner that it should be refused. We would rather put the onus the other way, that if a pursuer had committed a matrimonial offence, then it would be for him or her to satisfy the court that, notwithstanding that she or he had committed that offence, there were good reasons why a discretion should be exercised in his or her favour.

(Chairman): I shall ask Mr. Justice Pearce, who is thoroughly acquainted with these matters, to explain what the position is.

5455. (Mr. Justice Pearce): The occasions when discretion is refused are now rare.—So I understand, yes, Sir.

5456. It used to be the other way; that does not depend on the statute but on the way in which the cases are dealt with.—Yes.

5457. (Chairman): As far as the statute goes, there is an absolute discretion; the court may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery. That, I think, is exactly what you have suggested, apart from the way it is administered by the court, because what you say here is:—

" . . . no person who has himself been guilty of a matrimonial offence should be entitled to ask the court to pronounce decree of divorce in his favour, whatever be his ground of action, without asking the court to exercise a discretion in his favour."

—Yes.

5458. I shall pass to "Divorce for cruelty", which is discussed in paragraph III of your memorandum, where you say:—

"On the assumption that this ground of divorce is to be retained we believe that the testing of evidence by cross-examination is particularly necessary in actions of divorce on the ground of cruelty and that at present many undefended actions of divorce for cruelty are

successful when the true facts with regard to the relations between the parties could not support a decree of divorce. This demonstrates the need for the adoption of a measure such as we have suggested under paragraph II (2) *supra*."

That is the suggestion that in all undefended actions of divorce the Lord Advocate should be represented by counsel?—That is so, my Lord.

5459. The view that you put forward there is that many actions of divorce undefended on the ground of cruelty are in fact collusive?—I prefer, I think, to keep clear of the term "collusive".

5460. I will quote your exact words:—

" . . . as present many undefended actions of divorce for cruelty are successful when the true facts with regard to the relations between the parties could not support a decree of divorce."

What exactly do you mean by that?—What we mean by that is that the standard of *avein* which the law requires in cruelty cases before the pursuer is entitled to decree of divorce, although formally supported by evidence, would be found not to exist if the evidence could be tested by cross-examination.

5461. (Lord Keltie): What you mean is that in an undefended cruelty case the pursuer tends to exaggerate the cruelty or the acts which he or she says amount to cruelty, and you want that tested by cross-examination?—That is so, my Lord.

5462. Cruelty, of course, is the one type of divorce action in which collusion is least likely to be present?—I would agree with that, my Lord.

5463. (Chairman): Supposing the Lord Advocate were brought in in an undefended case, what material would he have for cross-examination?—We have not, of course, stated in our memorandum what the machinery would be for implementing this proposal, but the sort of thing we had in mind was that a person raising an action of divorce would be required to supply the Crown Agent with a list of the persons who were to be the witnesses in the cause. It would be then for the Lord Advocate or his deputies to take such steps as they thought fit, or to have such steps taken as they thought fit, to have statements taken from these persons or any other persons with a view to instructing counsel, who could cross-examine the witnesses and possibly adduce other witnesses who were not adduced by the pursuer.

5464. That answers my question very completely. The next heading is "Divorce for desertion", and there you refer to matters of Scottish history, legislation and procedure. I shall not embark on any questions, but leave it to others, if they wish, who are more acquainted with Scottish law. Then, you turn to divorce for insanity and you say this:—

"Without prejudice to our general attitude as explained in the Introduction to this memorandum, we submit that divorce on the ground of insanity can have no possible moral justification. The person against whom an action on this ground is directed has been guilty of no matrimonial offence and we do not see why a spouse should be entitled to divorce simply because his partner has suffered the misfortune of mental illness."

I only want to point out that the difference between insanity and other forms of illness is this, that in the case of insanity the companionship which is such a vital part of marriage is completely gone. Even if the wife is a perpetual invalid confined to bed, companionship still remains. In the case of insanity the companionship is gone. I suggest that possibly that constitutes some reason for the distinction between insanity and other kinds of illness?—I would agree with that, my Lord, but I would like to add this. I am not sure whether it has been proposed before this Royal Commission—but I believe it has been suggested that it should be a ground of divorce that a spouse has been sentenced to imprisonment for a given period or for more than a given period.

5465. Yes, that has been suggested.—There might be some analogy between divorce on that ground and divorce on the ground of insanity, but I think we would regard it as most unfortunate if improvement were ever made a ground for divorce.

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5466. But again there is this distinction, that the insanity has to be found to be incurable, whereas in the case of an imprisonment sentence it is not never-ending?—That is so.

5467. Then, in paragraph VII, you discuss divorce after separation for a statutory period, and you set out your objections to that very clearly. The matter has been discussed before us on several occasions. We know your views and I do not think I have any questions to ask you upon that. Then, your conclusion is set out as follows:—

"... we consider that, even in a country where the principle of divorce is recognised in the municipal law, every endeavour should be made to strengthen the conception of the sanctity of marriage, to limit the grounds on which marriage may be dissolved and to give the fullest opportunity for reconciliatory factors to operate before allowing people to take the step of terminating a marriage."

These, I suppose, are the objects which you had in mind in submitting this memorandum?—That is so, my Lord.

5468. (Lord Keith): Keeping in mind the over-riding attitude of the Catholic Union, I would like to ask one or two questions upon your detailed proposals. On the first proposal, the contracting of marriage, it may be difficult for us to deal with that in view of our terms of reference, but I would like to ask this. At the present time there must be seven days' notice under the Marriage Notice (Scotland) Act, 1878?—Yes, my Lord.

5469. And you are suggesting twenty-one days?—Yes.

5470. Do you think that for practical purposes that could make any great difference?—I do, my Lord; I think that particularly in the case of very young people who might be endeavouring to get married without the knowledge of their parents, in such circumstances a period of twenty-one days would give far greater opportunity for their parents or for older persons, relations or friends, to give them such advice as they might think proper if they discovered this step which they were proposing to take.

5471. What underlies your proposal is that there should be a longer period of notice so that the parents might have a greater opportunity of stepping in?—That is so, my Lord.

5472. You refer to provision being made for the reduction of this period in special circumstances, but only on application to, and with the approval of, the Sheriff; at the present time that is the position, is it not?—Yes, I believe it is.

5473. Under the Marriage (Scotland) Act, 1939, the existing period of notice may be dispensed with on application to the Sheriff?—Yes.

5474. But that is only done in very special circumstances, where cause is shown to the Sheriff as to why the ordinary notice should not be given?—Yes, my Lord.

5475. And that you would propose to continue, so that there would not need to be any alteration of the law in that respect?—Yes.

5476. With regard to the proposed waiting period of three years from the beginning of the marriage before divorce can be instituted, there have been certain criticisms made of this provision in England. I do not know whether you are aware of that, Mr. Brand?—I cannot recollect at the moment the nature of the criticisms which have been made.

5477. I do not want to go into that, but it is not a provision that, even where it exists at the present time, has, as I understand it, the wholehearted approval of the profession or the public. Let me give you an illustration of what might happen. Supposing the rule were as absolute as I understand you wish to make it. It would mean, for instance, that if there were very serious cruelty by a husband to his wife within the first three years of marriage, so serious as to make it quite impossible to contemplate that the wife should ever be put into a position of danger of living with her husband, she should not get a decree of divorce until she has waited for three years?—Yes.

5478. That would be one case where it would be extremely hard and, to a large extent, unnecessary to impose that waiting period?—My answer to that, my

Lord, would be this: that although we propose that there should be no divorce during the first three years we do not propose that there should be no protection for an injured wife, for example. Our proposal would not take away from her the right to a decree of separation and aliment.

5479. You would give her a separation for, say, two-and-a-half years with a right to a divorce after that?—But, of course, while the period of separation was continuing there would always be the possibility of reconciliation. There is always the possibility in a cruelty case of the reformation of the offending spouse.

5480. I can recognise that in many cases. But I can conceive of cases, Mr. Brand, where it would be quite impossible to contemplate a wife being asked to resume cohabitation with her husband, and I am assuming that she is not prepared to undertake that risk?—Your Lordship will perhaps recollect a recent case in which there was remarkable evidence of the reformation of the husband's character, and for that reason the decree of divorce was refused.

5481. That was a case of drunkenness?—Yes.

5482. That is rather a special case. I can see that there might be the possibility of reformation or cure in drunkenness, assuming that could be clearly established, but I am not thinking of that type of case at all. I am thinking of the type of case where it is perfectly plain that it would be to the grave risk of the wife that she should be asked to resume cohabitation with her husband and she herself does not wish to do so; why should she have to wait two-and-a-half years?—The state of mind of spouses is not necessarily permanent. The fact that a wife at one particular time may say, "I cannot possibly return to my husband and I do not intend to do so because I am terrified of him", does not necessarily mean that she will not change her mind at a later date and the parties might resume cohabitation without danger to anyone.

5483. Take another case. Supposing a husband turns his wife out of the house and takes a mistress to live in the house with him, do you say in that case also that the wife should have to wait for three years?—I still say, my Lord, that the situation is not beyond repair. The fact that a husband might take a mistress even into the marital home and put his wife out, does not mean that he is going to keep the mistress for the rest of his days: in fact, one might almost say that perhaps in the majority of cases there is no degree of permanence about such associations.

5484. But, of course, you are only going to apply this for the first three years of marriage?—That is so, my Lord, because we feel that there are difficulties which young spouses encounter during the early years of marriage which they might overcome if they realised that they could not free themselves from the bond during that period.

5485. Will you turn to the next paragraph, where you propose the introduction of the Lord Advocate into all undefended cases of divorce? That means that the Lord Advocate will have to employ counsel in every case?—Yes, my Lord.

5486. And have you taken into account, Mr. Brand, the expense, the delay and the congestion of the courts, if a proposal of that kind were carried out?—Yes, my Lord.

5487. It would be very great indeed, would it not?—I do not think, my Lord, that the expense would be out of proportion when you consider the amount of money which the State is nowadays prepared to devote to other purposes, even in connection with litigation.

5488. Then what do you say about delay and congestion?—In connection with the delay, it might be necessary to increase the number of judges in order to avoid undue delay.

5489. You would have to augment them very considerably, would you not?—It is difficult to calculate in advance precisely what this proposal would involve.

5490. It may be difficult, but one could have a pretty general idea. Take the list of undefended cases at the present time. Assume that every one of those undefended cases is to be defended by counsel, appearing for the Lord Advocate, and cross-examining witnesses, and probably putting in witnesses; that would entail an enormous increase of the work of the court, would it not?—It would, my Lord, but I do not anticipate that the implementation

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of this proposal would mean that every undefended divorce, as we know them at present, would take as long as the normal defended divorce. There would be some cases, in fact there would be many, where, when the papers had been examined by counsel for the Lord Advocate, he would be satisfied that there could be no question of an unsatisfactory case being put forward, and in such circumstances the proof might take no longer than it does at present. Counsel for the Lord Advocate might merely have what you might call a watching brief, and there might be no cross-examination of witnesses by him. For example, where the husband was pursuing an action of divorce on the ground of his wife's adultery, and there was clear evidence of the birth of an illegitimate child, in such a case once the counsel for the Lord Advocate was satisfied that the birth of the illegitimate child was properly proved, there would be no need for him to take any active part in the proof at all.

5491. That is a pretty clear case, but you would have all the desertion cases and all the cruelty cases, and you would have a large proportion of the adultery cases?—That is so, my Lord.

5492. You would agree that there would have to be a considerable augmentation of the judges?—Yes.

5493. You would also have to augment the clerical staff, the clerks of court?—Yes.

5494. You would have to get accommodation for the judges?—Yes.

5495. You know that at the present time there is not the accommodation for the existing staff of judges?—Yes, my Lord.

5496. And the Lord Advocate would probably have to augment his staff of deputies if there were to be all this enquiry; he presumably would have to find extra accommodation for the deputies. It is difficult to see where we would stop in the matter of increase of cost?—My Lord, there are two observations I should like to make on that. First, the introduction of this proposal might well lead to a diminution in the number of divorce actions being raised. Secondly, even supposing that the implementation of the proposal would involve all the things which have been mentioned, then I would still say that such a procedure would be worth while. At the present time litigants are prepared to spend a great amount of money, either their own or the State's, on litigation in actions of damages and various other forms of litigation. We cannot regard any other form of civil action as being of as great importance as an action of divorce, because no matter how serious a claim for damages a person may have, it can never have so far-reaching an effect as a decree of divorce, which terminates a marriage and breaks up a home.

5497. Coming to your next paragraph, in which you deal with the welfare and custody of children, if you are going to require an examination into the situation in every case in which there are children, and I suppose that again would be done by the Lord Advocate and his deputies . . . ?—No, my Lord, we did not have in mind that the Lord Advocate would intervene on the question of custody.

5498. But the Lord Advocate has intervened already. Are you suggesting that when the question of custody comes up the Lord Advocate should disappear?—One of our main proposals on the question of custody is that enquiry relating to custody should be for the most part by remit to a reporter.

5499. I appreciate that, and then there would be, I suppose, a certain amount of argument on the reporter's report. Are you contemplating that the Lord Advocate or his deputy would take no part in that?—We are not contemplating that he would take any part.

5500. He drops out when it comes to the custody question?—Yes.

5501. I think I understand the proposal there, and as we have heard a good deal of evidence on this matter I do not wish to take up your time further on it. Then in sub-paragraph (4) of paragraph II, you deal with what is called the doctrine of noninterference, which, of course, has never existed in Scotland?—No, my Lord.

5502. The position in Scotland is that if each party has been guilty of adultery or other matrimonial offence cross-actions of divorce can be raised?—Yes.

5503. Would you turn to paragraph IV, in which you deal with divorce for desertion? What you wish to do is to revert to the pre-1861 position?—Yes, my Lord.

5504. For the benefit of some members of the Commission, Mr. Brand, who are not fully familiar with this aspect of the matter, you would agree that before 1861 a person who wished to get a decree of divorce for desertion had first of all to bring an action of adherence?—Yes, my Lord.

5505. And an action of adherence would in England be known as an action for restitution of conjugal rights?—Yes, my Lord.

5506. Then if the decree of adherence was not implemented, that is to say, if the wife or the husband remained contumacious and refused to come back to the spouse who held the decree, that spouse could then proceed with an action of divorce. That was the way it worked before 1861?—Yes.

5507. And you wish to go back to that?—Yes, my Lord.

5508. Do you recognise that as society is constituted today there would be almost no case where a decree of adherence would be implemented? What spouse is going to obey the decree of adherence, in your view?—I do not think that we were so much looking at it from that angle as from the point of view of the difficulty which is now arising—and I think it is fairly widely recognised in connection with proof in actions for divorce for desertion.

5509. (Chairman): Do you mean the proof that the pursuer was willing to adhere during the three years?—That is so, my Lord. We also had in mind that where a wife was deserted, if she then raised an action of adherence against her husband it would be an action of adherence and aliment, and so there would be a financial element which might in some cases have a beneficial effect in encouraging a reconciliation.

5510. (Lord Keith): But at the present time if a wife wishes her husband to adhere, yet does not wish a divorce for desertion, she can bring an action of adherence and aliment against her husband. That is in fact what she will do today?—Yes, my Lord.

5511. What would be the point of asking her to bring an action of adherence against her husband if she is set in her mind on obtaining a decree of divorce?—That, of course, is the situation which we are trying to meet, my Lord. You may have a spouse who is determined to get an action of divorce for desertion before the expiry of the triennium and, in such circumstances, according to the present law, he or she is not entitled to decree of divorce, but it is difficult for the court to ascertain the true facts in the course of the proof.

5512. Will the court get any more light on this, Mr. Brand, by the fact that either husband or wife has brought an action of adherence beforehand?—We took the view that an action of adherence would be the best proof of the willingness to adhere.

5513. I do not know whether you are aware of this: that in New Zealand, where it is possible to obtain a divorce for refusal to obey a decree of adherence, there are a very large number of divorces obtained simply by the expedient of getting a decree of adherence against the other spouse. The other spouse refuses to obey it, as was probably recognised all along, and divorce immediately follows. That, I think I am right in saying, forms if not the major, at least one of the major, categories of divorce in New Zealand. Does not that indicate that the idea of reverting to the requirement of a decree of adherence would be ineffective as things are at the present day?—I do not say, my Lord, that our proposal would necessarily cure the present difficulty in relation to divorce for desertion, but I think it might improve the situation. A decree of adherence would be a useful admixture of evidence, as indeed in some cases it is an admixture of evidence in a consequent action of divorce.

5514. It would be an additional impediment in the way of a spouse wishing to bring an action for divorce?—That is so.

5515. In paragraph VI, your suggestion is that it should be competent to reduce a decree of divorce on the ground of perjury within one year?—Yes, my Lord.

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5516. You are referring there to both defended and undefended actions?—Yes, my Lord.

5517. Have you really considered whether this is not perhaps a relaxation of the present position, in that at the present moment in an undefended action of divorce an action of reduction may be brought at a much longer period than one year after the decree?—As I understand it, my Lord, the law is rather uncertain on this point.

5518. You want to make it certain, at any rate to the extent of one year?—We say one year, not because we have got any particular attachment to that period, but because we do feel that it would probably be necessary to set some time limit beyond which the decree could not be reduced, because otherwise very difficult complications might arise if there have been subsequent marriages and births of children.

5519. And if at the present time the legal position is that an undefended decree could be reduced within twenty years you would reduce that to one?—No, my Lord. Taking the law as it is expressed in the latest edition of *Wolton on Husband and Wife*, the view, I think, is that a decree of divorce can only be reduced on the ground of subornation of perjury, and not on the ground of perjury simpliciter.

5520. (Mr. Justice Pearce): In sub-paragraph (3) of paragraph II, you suggest that there should be a report on children in undefended as well as defended cases. As a matter of convenience would not your purpose be better served if there were a report before the case comes on for trial, so as to avoid an adjournment or, as you would say, a continuance, which causes delay, causes expense in the sense that the matter has to be revived again and has the inconvenience that when it is revived the judge will have to go through the whole matter again if he is going to deal with the matrimonial case in the light of the children's custody?—I would say this: that if that procedure were followed there would be an investigation into a matter which might never become relevant, because if the court were not satisfied on the merits of the case that there should be divorce at all, then the question of the custody of the children might never arise.

5521. You are envisaging that the undefended case might be unsuccessful?—That is so.

5522. You are running the risk of unnecessary work to the extent that an undefended case has a chance of failure?—Of course, this proposal is not directed simply towards the undefended case, it is also directed towards all actions of divorce.

5523. I understand that; I was only suggesting that your desires would be equally met if the court had a report available with regard to the children during the hearing of the case?—Certainly.

5524. So that whether it be defended, and therefore with a reasonable chance of failure, or undefended with a less chance of failure, in any event it would be convenient possibly for the court to know what the situation is about the children?—Certainly, we would be perfectly satisfied at whatever stage the report were made.

5525. (Mrs. Jones-Roberts): In paragraph VII you refer to the recent Bill that was introduced into Parliament to make divorce possible after separation for a statutory period. You are referring there to Mrs. White's Bill, are you not?—Yes.

5526. It would be within your knowledge that at the time the debate took place in the House of Commons figures were adduced showing the number of extra-marital unions that exist as the result of the situation which this Bill takes cognisance of?—Yes.

5527. And the underlying purport of the Bill was not so much to effect easy divorce, but to try to regularise and legitimise these subsequent unions. You would agree that that was the underlying purpose of the Bill?—Yes.

5528. I wonder how you view the situation that exists because it is not possible in these circumstances for a divorce to be effected. You know, no doubt, from your own experience of unions which have existed for years, where there are children and where the parties lead perfectly respectable lives but with this one blot upon their characters. I wonder how you look upon that?—It

depends, in what way do you mean we look upon it? Do you mean from a moral or theological point of view or from a legal point of view?

5529. Morally, legally and socially. I am sure that you would agree that the children, at any rate, are in a very unhappy position in unions of this kind. I feel sure that you would look with considerable mercy on a situation of that kind?—Certainly, the children of the illicit union are no doubt in a very unfortunate situation, but then the legitimate children who may have been born before this illicit union commenced, before one of the parties to it, say, left his or her husband or wife, are also in a very unfortunate situation. We would take the view, quite apart from the moral principles involved, that it would be socially bad to do anything to encourage or to regularise these illicit unions, which can only have an adverse effect on the legitimate children, and therefore people should be discouraged from entering into such unions.

5530. It is problematic, of course, whether any extension of the grounds for divorce in this direction would lead to any greater number. You would probably agree to that?—That is a matter of speculation.

5531. Because such unions exist as a matter of fact anyway, and the social condition is not altered because the facilities are there or because the facilities will be there?—But we do not take the view that the law should be altered to meet the convenience of people whose conduct one cannot approve of. I think I might put it in that way.

5532. I had no doubt what your view was, but I think it is our duty to ascertain quite clearly and unequivocally your attitude to that particular question.—With regard to the children, although it is true that if certain proposals were implemented you would be possibly legitimating illegitimate children, and you would not be bastardising legitimate children, strictly speaking, nevertheless, I think that in effect and in practice you would be going a long way possibly to bastardising legitimate children.

5533. (Mr. Mace): Would you help me with regard to reconciliation? Is it your view that reconciliation should be voluntary or compulsory?—Voluntary, Sir.

5534. By an officer appointed by the court or by a voluntary organisation?—I think that there is a need for both. There are situations where, for one reason or another, the parties themselves have not seen fit to go and consult a voluntary organisation, but, in spite of that, when they find themselves in court, having joined issue either in a divorce action or in some other form of litigation, there are situations where, if the court had the power to sit the case, and if there were an official of the court available, then something might be done towards bringing about a reconciliation.

5535. Do you know about the court welfare officer who at present sits in the High Court in England?—I am afraid that I have only a rather vague knowledge of that.

5536. Assume that reconciliation starts at an early stage—you agree with me that that is the ideal?—The earlier the better.

5537. If the trouble can be found out through the children's officer, the education authority or the church or some other agency, the sooner the reconciliation officer gets to work the better?—Yes.

5538. Would you agree with me that his task is never finished until the final decree is made?—I would agree.

5539. Assume that a reconciliation officer is involved in a case, is it going to assist him to have the Lord Advocate's representatives investigating the evidence, as you suggest they should?—I do not know that it is either going to assist him or impede him. I do not see why it should have either effect. I think possibly it might be said that it would assist because the more that is known about the true facts of the case then the better chance the reconciliation officer has of meeting with success in his task.

5540. I ask you that point for this reason. I could envisage that possibly where parties refused to have anything to do with a welfare officer or reconciliation officer, then there might be a case for an investigation by the Lord Advocate's department.—Yes.

5541. But where the parties were in the hands of a welfare officer, is not further investigation by the Lord Advocate's department going to make things worse?—

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[Continued]

We do not anticipate that any investigation made by or on behalf of the Lord Advocate could amount in any sense to an interference in the private lives of the parties. It would mean rather an investigation of the evidence which was available in the particular case. It might mean getting statements taken from persons who were to be witnesses in the case, but I do not see that that should have any adverse effect on the question of reconciliation between the parties.

5542. The witnesses would have originally given statements to some solicitor or agent?—Yes.

5543. The Lord Advocate could only go to see the witnesses to test the truth of those statements?—That is so, yes.

5544. You suggest that in every case the position of the children be reported?—Yes.

5545. What benefit do you think the court would get from every case being investigated where there has been an agreement between the spouses as to who is to have the child?—That is exactly one of the situations which this proposal is designed to meet, because we feel that in some cases there is agreement between the parties with regard to the children, and the agreement is to some degree a bargaining counter in relation to the question of divorce. We feel that if this proposal is implemented, so that the question of children is going to be investigated in every case, whether the parties like it or not, and where the court is going to do what is best for the children in every case, then they cannot then be used as a bargaining counter in a divorce action, so that an action will go through undefended, which would not go through undefended if there was a conclusion for custody.

5546. (Mr. Macdocks): You are, I gather, a member of the Bar?—That is so.

5547. Would you mind if I ask you a hypothetical question? It has been asked of two witnesses, one yesterday and the other this morning, and it has produced two contrary answers, and I should like your view on it. The hypothetical question is this. There is an application for the custody of a child before the court. The wife, who is fond of the child, says she wants the custody. The husband says that he does not want the custody of the child, and that he could not possibly look after it. The reporter, who, you suggest, should report to the court in such cases, states that in his view, the mother is an unsuitable person to have the custody of the child. If you were sitting as magistrate or judge, to whom would you give the custody of that child?—I would like to be quite clear that I have understood you. The position is that the father does not desire the custody of the child?

5548. The father does not want the custody of the child and could not take it on.—And the mother seeks the custody?

5549. Yes, and is fond of the child, but the reporter says, perhaps by reason of her morals, perhaps by reason of her home, that she is an unsuitable person to have the custody of the child. To whom would you give the custody of that child?—Personally, and of course this is only a personal opinion, I would say that there could be no question but that the mother must have the custody.

5550. (Mr. Young): You are familiar with the practice of remit to a reporter in custody petitions in the Inner House and also in adoption cases. According to our present practice the cost of that is borne by the party?—Yes, Sir.

5551. Is your proposal to continue that practice, that is to say, that if there is this remit in all divorce actions, it will be part of the expense of the action to be borne by the party, or do you envisage that in these cases that cost should be borne by the State?—I must frankly say that we have not gone into the question of expenses in connection with this matter, but I should perhaps say this, that I think it is generally agreed that the expenses involved in a remit to a reporter are generally less than the expenses involved in bringing witnesses to the court.

5552. I would agree with that, but what I am interested in is whether in this proposal you want the party to pay or the State to pay, because there is a big distinction?—Of course of the present time in consistorial cases the State does now pay in a large proportion of cases, and if it were found that this proposal would involve any financial hardship on the parties, then I would say that

this is an expense which might very well be borne by the State because it may be regarded in the same category as the expense of marriage guidance councils. It is expenditure for the welfare of the children.

5553. So that it comes to this, you would ask the State to pay for it either through legal aid, or otherwise in non-legal aid cases . . . ?—But I think that probably the matter is fairly well provided for already, because those who have not got adequate means are assisted by the present Legal Aid Scheme and those who do not qualify for legal aid have presumably adequate means to pay for these things themselves.

5554. May I remind you that the Report of the Law Society on the operation of the Legal Aid Scheme in Scotland has already pointed out that this is not so, that the means test is, in their opinion, far too low?—That, unless that limit is raised, you would, would you not, be subjecting to this extra expense a great many people who really might not be able to afford to pay it?—I accept what you say about the effect of the financial limit of legal aid, and if that is the case, then I would certainly say that the expense of such procedure as this should be borne by the State.

5555. May I return to your proposed requirement as to actions of adherence? As I understand it, one of your aims is as to the quality of proof which is often led in actions for divorce for desertion?—Yes.

5556. Would not a much simpler way of dealing with the quality of evidence be to introduce a rule that once a spouse is deserted, a presumption is allowed in favour of that spouse that the desertion continues unless the deserting spouse takes adequate steps to alter the position?—My answer to that, Sir, is that you would not be improving the quality of the evidence by such a proposal, you would be altering the substantive law. In other words, you would be altering the definition of desertion. You would be taking the content of willingness to adhere out of desertion. That would mean, in my opinion, adopting divorce after separation for a statutory period.

5557. But I am assuming for the moment that the quality of the evidence which is at present led before the court is bad.—Of course, I cannot agree or disagree with that, because under present practice I do not think that anybody can say with any degree of certainty whether the evidence is good or bad.

5558. I may have misapprehended that, but I thought that this was the point you were making in your memorandum?—I think I would put it this way, Sir, that there is a fairly general feeling at the moment that some of the evidence given, particularly in desertion cases, may not be very reliable. But nobody, as far as I can see, can judge of its reliability. Nobody, certainly no lawyer, would dare to make a categorical or dogmatic statement on the matter.

5559. But the feeling is there, is it not?—The feeling is there.

5560. And you would get rid of that suspicion if you adopted the suggestion I am making, would you not?—I think that in effect it would be rather the same as if one were to say that by putting a guilty man on trial for a criminal offence you are exposing him to the temptation to commit perjury, and since you must not do that, therefore you must alter the law. I could not agree to that proposition.

5561. As I read sub-paragraph (4) of paragraph II, you are saying that in all cases any person who has been guilty of a matrimonial offence should disclose it and ask the court to exercise discretion in his favour?—Certainly.

5562. At the present moment in Scotland we have a rule that if there is adultery within the first three years of desertion then it is a complete bar to divorce for desertion. Would you agree that this rule of yours should also be extended to cover that particular case?—No, Sir, because although we make this recommendation that a person who has committed a matrimonial offence should only be entitled to divorce if the court has exercised discretion in his favour, we do not propose that the definition of desertion should be altered, and as the law at present stands a man or a woman, who has committed adultery, cannot be heard to say that the other spouse is in desertion because, by committing adultery, he or

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[Continued]

she is giving that spouse reasonable cause for refusal to adhere, and therefore that spouse is no longer in desertion.

5563. Was not that the law before 1938? Now it is possible for one spouse to commit adultery every day in the week after the three years' desertion period with no effect as regards his chances of divorce?—After three years, yes.

5564. Do you not think that there is sometimes a temptation for pursuers who wish divorce on the ground of desertion and have in fact committed adultery within three years to commit perjury in order to get a decree?—Certainly.

5565. Is not the existence of such a temptation well-recognised in the legal profession?—Yes.

5566. Have yourself have quite an experience in divorce cases, have you not?—Yes, Sir.

5567. (Mr. Beloe): First, on the question of whether the court should get a report on all custody cases. Are you aware of the method which is adopted by the inferior courts under the Children and Young Persons Act?—In England, Sir?

5568. And in Scotland, I believe, whereby a report is submitted in respect of each child who comes before a juvenile court?—I am not acquainted with that.

5569. I wondered whether you would have thought possibly that that type of report would be suitable to have in respect of every case, leaving the judge to decide whether he wanted further enquiry made?—We are saying, that it would be competent for the court, having received the report, to hear such further evidence as the court deems desirable.

5570. This report of course is not made by a member of the Bar?—Under the present practice, generally, yes.

5571. No, the report to the juvenile court, to which I am referring—I understand then, Sir, that such a report is made by some welfare official.

5572. Yes. Do you consider that a report by such an officer would be preferable to that by a member of the Bar?—Of course, I have no experience of that or of the qualifications of these officials, but it may well be that they would be more competent than members of the Bar to do it.

5573. The other point I have to put is with regard to nullity. There is no mention in your memorandum about nullity?—No, Sir.

5574. Would it be fair to ask you whether you are in agreement with the present grounds for nullity in Scotland?—I am afraid that you have rather taken me unaware on that, I do not profess to be a canon lawyer. Putting the matter shortly, we agree with the grounds of nullity in so far as they are the same as the recognised grounds of nullity in canon law, and I think that the canon law on the matter was summarised in a paper which was submitted by my friends in England to the Royal Commission.

5575. (Chairman): Yes. Are you asking the witness, Mr. Beloe, to give his own view or the view of the Catholic Union? (Mr. Beloe): What I was anxious to do was to find out the view of the Catholic Union with regard to the possibility of making the laws of England and Scotland the same with regard to nullity.—I do not think I could agree with that, Sir, because at the moment there are grounds of nullity in England which are not recognised in Scotland, and which are not grounds of nullity in canon law. Further, we would not regard them as grounds of nullity, as they appear to us rather to be grounds for declaring void a marriage which was in fact valid at the time. For example, the obvious ground of nullity is the ground of impotency. In canon law and in Scots law that is a ground of nullity. There has never been a

marriage at all, and it is referred to as a pretended marriage in the pleadings. But I think that there are grounds of nullity in England that are not based on that principle, and that what is in fact a valid marriage can subsequently be declared to be an invalid marriage.

5576. There is wilful non-consummation for one thing, and there is insanity.—Of course in canon law and Scots law, if a person is insane at the time of the marriage, then there is no marriage, it is a nullity.

5577. And there is also the case where one party is suffering from venereal disease unknown to the other.—Of course, we could not agree to that as a ground of nullity.

5578. You would think, if you were to agree with divorce at all, that that would be a reasonable cause for divorce?—Under the law of Scotland at present it is held so be cruelty if one spouse wilfully infects the other with venereal disease, but it is not a ground of nullity and I must confess that I have difficulty in seeing how in principle it can be a ground of nullity.

5579. (Lord Keith): One of the best illustrations of nullity, Mr. Brand, which exists in the law of England is concealment of pregnancy by another man at the time of the marriage. From the point of view of canon law, you would say that that is rather a ground for divorce. If it is to be a remedy at all, then for nullity?—Yes, my Lord.

5580. (Sir Frederick Burrows): In sub-paragraph (1) of paragraph II, you say:—

"We recommend that there should be statutory provision to the effect that no action of divorce may be instituted within three years of the date of a marriage."

Do you mean that this period will give the parties time for reflection?—Yes, Sir.

5581. Why limit it to three years? Is it not a commonly accepted fact that the dangerous years of marriage are between the third and the sixth years and not between the first and the third? You have the romantic period between the first and the third, and you have the contemplative period between the third and the sixth.—I think that the reason why we decided on three years, Sir, was to make a proposal which might be considered practicable and acceptable to a reasonable number of people. We might have chosen a much longer period, but I think that probably a longer period would be less likely of acceptance.

5582. You do not set any particular store on just the three years?—We do not think that there is anything magical about a three-year period at the beginning of the marriage, but we do think that in a lot of cases, particularly with young people, there may be initial difficulties which they had not anticipated, maybe initial disillusionments, and if they have time to get over these they may settle down to a normal married life.

5583. (Chairman): Would it be fair to say that in your belief you would prefer that there should be no divorce at all?—Certainly, my Lord.

5584. But, recognising that the law does allow divorce, you would say that at least your proposal would give the young people three years to settle down?—That is so, my Lord.

5585. And the longer the period is the better you would be pleased, but I suppose—I am only suggesting this—you had three years in mind because that is the law in England? Is that right, or has it nothing to do with it?—I do not think that it had anything directly to do with it, but perhaps subconsciously it did.

5586. As a period that might possibly be effective?—Yes.

(Chairman): Thank you very much, Mr. Brand, both for your Committee's memorandum and for coming here to help us today.

(The witness withdrew.)

(Adjourned to Friday, 31st October, 1952, at 10.30 a.m.)

MINUTES OF EVIDENCE

24

TAKEN BEFORE THE

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

TWENTY-FOURTH DAY

Friday, 31st October, 1952

WITNESSES

Dr. J. S. Muirhead, D.S.O., M.C., T.D., D.L., M.A. (Oxon.), LL.B., LL.D. Mr. Hamilton Lyons, B.L. Mr. G. B. L. Motherwell, W.S. Mr. Hamish Masson, W.S.	}	representing the Council of the Law Society of Scotland.
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LONDON: HER MAJESTY'S STATIONERY OFFICE
1953

THREE SHILLINGS NET

MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

TWENTY-FOURTH DAY

Friday, 31st October, 1952

PRESENT

THE Rt. Hon. LORD MORTON OF HENRYTON, M.C. (Chairman)

Mrs. MARGARET ALLEN

Dr. MAY BAIRD, B.Sc., M.B., Ch.B.

Mr. R. BELOE, M.A.

Mrs. E. M. BRACE

Lady BRAGO

Sir WALTER RUSSELL BRADY, D.M., F.R.C.P.

Mr. G. C. P. BROWN, M.A.

Mr. H. L. O. FLECKER, C.B.E., M.A.

Mrs. K. W. JONES-ROBERTS, O.B.E.

The Honourable LORD KEITH

Mr. F. G. LAWRENCE, Q.C.

Mr. D. MACE

Mr. H. H. MADDONER, M.C.

The Honourable Mr. JUSTICE PEARCE

The VISCOUNTSSE PORTAL, M.B.E.

Dr. VIOLET ROBERTSON, C.B.E., LL.D.

Mr. THOMAS YOUNG, O.B.E.

Mrs. M. W. DENNIE, C.B.E. (Secretary)

Mr. A. T. P. O'NEILL (Assistant Secretary)

Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 68

MEMORANDUM SUBMITTED BY THE COUNCIL OF
THE LAW SOCIETY OF SCOTLAND

PRELIMINARY

1. This memorandum is submitted to the Royal Commission on Marriage and Divorce by the Council of the Law Society of Scotland.

2. The Law Society of Scotland is a statutory body set up by the Solicitors (Scotland) Act, 1949, and comprises all solicitors practising in Scotland. Its Council consists of thirty-six representative members directly elected on a regional basis.

3. The memorandum deals only with the law of Scotland.

4. In preparing this memorandum the Council has invited and has considered the views of individual members of the Society and also of local and other voluntary legal societies. A very large number of suggestions submitted from these sources was considered. The definite proposals hereinafter contained have the unanimous support of the Council, except where it is indicated that there was found to be a minority opposed to a particular proposal. In addition, there is annexed hereto, in the form of an Appendix, a list of suggestions which were considered by the Council and not adopted but which it was thought might usefully be brought to the notice of the Commission.

5. The Council is willing, if desired, to supplement by oral evidence the evidence which is contained in this memorandum.

6. The Council of the Law Society respectfully submits for the Commission's consideration the following proposals.

THE LAW CONCERNING DIVORCE AND
OTHER MATRIMONIAL CAUSES

I. Divorce

Desertion

1. That the pursuer in an action of divorce on the ground of desertion should not be required to prove willingness to adhere throughout the triennium.

As the law stands at present it is necessary for a person seeking divorce on the grounds of desertion to prove that during the three-year period of desertion he or she has been willing to adhere. The ratio of this rule is the necessity for preserving the distinction between desertion and separation by mutual consent. Cases can be cited where

the operation of this rule gives rise to hardship. One such case was that of *Borland v. Borland*, 1947, S.C. 432, where the husband stated that he was willing to adhere to his wife from the time when she left him until he received information that she had obtained a decree of divorce in the State of Nevada, U.S.A., and that thereafter he was no longer willing to adhere. Decree of divorce was refused on the ground that the pursuer had not shown willingness to adhere throughout the entire three-year period of desertion. There was in that case judicial dicta indicative of concern at the effect in such cases of the existing law. Further, it must be recognised that there have been and will no doubt in future be many cases where a pursuer is willing to avow willingness to adhere merely to comply with the legal requirements and without regard to the truth. Indeed, the existing state of the law might almost be said to present an incitement to perjury. The view of the Council is that, provided the court is satisfied that initially there was desertion in the strict sense of the word and not mutual separation and that the desertion has been persisted in for not less than three years, nothing further should be required.

2. That in an action of divorce on the ground of desertion the adultery of the pursuer during the triennium should not be an absolute bar, except where the adultery is proved to have caused or contributed to the desertion.

The present law is that it is an absolute bar to divorce for desertion that the pursuer has committed adultery during the three-year period of desertion even where the deserting spouse is unaware of the adultery. Cases arise in which it is unreasonable that an isolated act of adultery, not contributing to the desertion but possibly to some extent caused by it, should operate as a bar to divorce. It should be noted that in Scotland it is not a bar to divorce on the ground of adultery that the pursuer has been guilty of adultery.

3. That wilful refusal of marital intercourse *per se* should be declared to be desertion and therefore a ground for divorce.

From the time of the decision in *Goold v. Goold*, 1927, S.C. 177, until 1950, refusal of sexual intercourse *per se* had come to be regarded as sufficient to warrant decree of divorce for desertion. It has now been laid down by the House of Lords in the case of *Lennie v. Lennie*, 1950, S.C. (H.L.) 1, that this is not so. It is submitted that such wilful refusal on the part of one of the spouses strikes at the fundamentals of marriage and consequently

should be a ground for divorce. The effect of the requirement that the refusal should be wilful would be to admit as defences acquiescence and incapacity.

4. That the law should be clarified as to whether conduct of a substantive matrimonial offence by one spouse may be accepted by the court as reasonable cause for the refusal of the other to adhere.

In the case of *Mackenzie v. Mackenzie*, 1895, 22 R. (H.L.) 32, it was stated (*per* Lord Watson) that there was no clear authority for affirming that the grounds open to a wife in an action against her for adultery, and in an action for separation at her instance, were necessarily identical. In the same case both the Lord Chancellor and Lord Watson reserved their opinions as to whether or not the conduct of a spouse which would not in itself entitle the other to a decree of divorce or separation might be successfully set up as a defence to an action at his or her instance. The Lord Chancellor suggested that there might be conduct on the part of a pursuer which, while not affording the other spouse ground for divorce or separation, might be sufficient to bar the pursuer from obtaining divorce. The importance of the question is the greater since cruelty is now a ground for divorce as well as for separation.

Cruelty

5. That the present standard of cruelty as a ground for divorce (or separation) should be modified.

The standard demanded is that the cruelty must be of such a nature as to imperil the life or the health, physical or mental, of the complaining spouse. There are found in practice many instances of conduct on the part of a husband towards his wife and children which (e.g., because of the robust physique and mentality of the wife) does not satisfy the present requirements, but which nevertheless renders married life intolerable for the wife. (It should be noted also that the conduct, however reprehensible, of a husband and father towards his children does not constitute a ground for divorce (or separation) unless the wife can show that her health is thereby imperilled.) It is suggested that there are good grounds for asserting that one spouse should be entitled to divorce (or separation) where the other has been guilty of a course of conduct wilfully persisted in towards the pursuing spouse or towards the children of the marriage of such a nature as in the opinion of the courts shows on the part of the defender an unwarrantable indifference to, or disregard of, the normal obligations of marriage, and renders the married life of the spouses intolerable to the pursuing spouse. As an example of the kind of conduct which would be comprehended within the foregoing general statement there may be cited the case of a father who has been guilty of lewd, indecent and libidinous practices towards his wife or children. It is separately suggested that conduct of this particular kind ought, in any event, to be a ground for divorce (or separation) upon conviction of the guilty party.

(Note.—There is a strongly held minority opinion that no alteration in the present law is necessary or desirable. The bases for this are (1) that the existing powers of the courts, in applying the present standard to any particular case, are adequate; and (2) that the alternative formula suggested above would be difficult, if not impossible, of application by the courts, and that it would be virtually impracticable to propound a formula, generally applicable, which would represent an improvement on the present rule and which would not be open to the same criticisms as that suggested above.)

Insanity

6. That the present definition of incurable insanity for the purposes of divorce should be modified so as to provide that treatment as a voluntary patient may be indicative of incurable insanity.

Section 1 (1) (b) of the Divorce (Scotland) Act, 1938, provides that incurable insanity is a ground for divorce. Section 6 provides that a defender shall not be held to be incurably insane, unless it is proved that he is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person, and where such care and treatment as aforesaid is proved, the defender shall, unless the contrary is shown, be presumed to be incurably insane. Section 6 further provides that a person shall

be deemed to be under care and treatment as an insane person (a) while there is in force an order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Act, 1857 to 1919, and certain other Acts; and (b) while he is under care and treatment (other than treatment as a voluntary patient) under certain orders granted in England. It is believed that circumstances may arise where it may be possible to prove to be incurably insane a person who is under care and treatment as a voluntary patient, and in such cases decree of divorce should be granted. In England such a person may be held to be incurably insane for the purposes of divorce.

7. That the law should be clarified as to whether in actions of divorce on the grounds of insanity the Scottish courts may recognise orders made under the Lunacy laws of Northern Ireland, Isle of Man, and the Channel Islands.

The effect of Section 6 (3) (b) of the Divorce (Scotland) Act, 1938, is that recognition is to be given by the Scottish courts to English orders. By Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1948, provision is made for the recognition by the English courts of orders granted in Scotland, Northern Ireland, Isle of Man, and the Channel Islands. A corresponding provision has not, however, been made applicable to Scotland.

II. Dissolution of marriage on presumption of death

8. That the law should be clarified as to the effect, on a decree of dissolution of marriage granted on account of the disappearance of one of the spouses, of the reappearance of that spouse.

By the Divorce (Scotland) Act, 1938, Section 5, the court is empowered to grant decree of dissolution of a marriage on the ground of the presumed death of one of the spouses where that spouse has disappeared for a period of seven years or upwards. There is no provision to regulate the position which would arise on the reappearance of the person so presumed to be dead. It has been contended that the decree of dissolution would be reducible upon proof of the existence of the person presumed to be dead, since the basis of the decree would then be destroyed. The complications which would result can readily be imagined, especially where the person in whose favour the decree was granted has re-married. The question is by no means academic, as it is understood, it actually arose following on the recent war and may arise again in any future war.

III. Nullity of marriage

9. That it should be made a ground for nullity of marriage that the defender was at the time of the marriage pregnant by some person other than the pursuer; provided (i) that at the time of the marriage the pursuer was ignorant of the fact; (ii) that marital intercourse with the consent of the pursuer has not taken place since the discovery by the pursuer of the fact; and (iii) that the proceedings are instituted within one year from the date of the marriage.

Since the decision by a Court of Seven Judges of the case of *Long v. Long*, 1921, S.C. 44, it has been regarded as settled that it is not a ground for nullity of marriage at the instance of the "husband" that, unknown to him, the "wife" was at the date of the "marriage" pregnant by another man. It is submitted, however, that the nature of the proposed new ground is such that it may be assumed that had the pursuer known of the fact he would not have entered into marriage. In other words, there has been, through fraudulent misrepresentation or concealment, an absence of true consent, which is the essential element in the constitution of marriage. The proposed new ground is new (since 1937) a statutory ground of annulment in England and is recognised in the U.S.A., in France, and other continental countries.

IV. Separation

10. That sodomy and bestiality should be made grounds for separation.

These offences are already grounds for divorce. There does not appear to be any reason why they should not also be grounds for the lesser remedy of separation.

11. That the present standard of cruelty as a ground for separation should be modified.

Reference is made to paragraph 5 of this memorandum.

THE LAW RELATING TO THE PROPERTY RIGHTS OF HUSBAND AND WIFE

12. That the present legal rights in relation to property arising on divorce should be abolished and that there should be substituted therefor provisions to empower a court granting decree of divorce to award to a successful pursuer a sum of capital and/or income to be determined in accordance with the respective financial circumstances of the parties, and also to vary the terms of marriage settlements notwithstanding any contrary agreement between the parties.

Reference is made to the recommendations on this subject contained in the Report of the Committee of Inquiry into the Law of Succession in Scotland, presided over by the Hon. Lord Macdonald. These recommendations are respectfully supported by the Council.

(Note.—There is a strongly held minority opinion against the foregoing proposal, on the grounds (a) that the existing position is well known and adequate; and (b) that the proposal would not effect any improvement on the existing law.)

MATTERS OF ADMINISTRATION

13. That the existing disabilities suffered by certain divorced persons in relation to (a) the disposal of heritable, and (b) marriage with the paramour, should be abolished.

The Act, 1952, C. 11, provides that if any woman who has been divorced for adultery enters into a form of marriage with the person with whom she committed adultery or cohabits with him it shall not be lawful for her to dispose of her heritable property to the prejudice of her heirs. These provisions, though still operative, are archaic and are virtually never invoked. The Act, 1600, C. 26, declares to be null a marriage which is contracted by a divorced spouse with the paramour. This provision is still operative, but is circumvented by the practice of not naming the paramour in the decree of divorce. These statutes should be repealed. (These matters could possibly be regarded as matters of substantive law rather than of administration. They are, however, brought under this heading since the object is virtually to bring the law into line with present-day practice.)

14. That, if the existing legal rights of property on divorce are not abolished, it should be made compulsory, in order to preserve rights of tenor and courtesy, to record a notice of decree of divorce in the Register of Inhibitions and Adjudications.

At present there is no formal or public notice given to the purchaser of heritable property of the fact that the property is burdened with obligations to pay tenor or courtesy to the spouse of any previous owner who may have had decree of divorce granted against him or her. A purchaser in good faith may be substantially prejudiced by the existence of such latent obligations.

15. That, if the existing legal rights of property on divorce are not abolished, the date of ascertainment of such rights should be the date of the institution of the proceedings.

At present the date of ascertainment of such rights is the date of the decree of divorce. Consequently, it is possible for the defender virtually to defeat the legal rights of the pursuer by making dispositions of his property between the date of the institution of the proceedings and the date of the decree.

16. That any decree of court whereby the death of a person is presumed should be effective for all purposes.

It is provided by the Presumption of Life Limitation (Scotland) Act, 1891, Section 3, that any person to whom rights of succession open on the death of another person who has disappeared for seven years may obtain a decree to the effect that the person who has disappeared is to be presumed dead, which decree has the effect of opening up the rights of succession. By the Divorce (Scotland) Act, 1938, Section 5, it is provided that any married

person may, in similar circumstances, obtain a decree to the effect that his or her spouse is dead, which decree has the effect of dissolving the marriage. It happens, with considerable frequency, that separate proceedings have to be taken under these respective statutes, either by the same person or by different persons, for the separate purposes of (a) opening up rights of succession, and (b) dissolving the marriage. There is no reason why, with the addition of any necessary procedural provisions, a decree obtained under either of the Acts should not be effective for both purposes.

THE LAW CONCERNING MARRIAGE WITH CERTAIN RELATIVES

17. That divorce should be deemed to be the equivalent of death for the purpose of enabling certain persons related to one another by affinity to marry each other.

The effect of the Marriage (Prohibited Degrees of Relationship) Acts, 1907 to 1931, is to enable a person whose spouse is dead to marry certain relatives of the deceased spouse. These provisions should be extended so as to apply to divorce as well as to death.

(Dated 25th January, 1952.)

APPENDIX

LIST OF SUGGESTIONS CONSIDERED BUT NOT ADOPTED

THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

Divorce

1. That the present standard of statutory habitual drunkenness as a ground for divorce should be modified.

2. That past cruelty should confer on an innocent spouse a vested right to divorce.

3. That there should be a reduction in the period during which a person must be under care and treatment in order to found an action of divorce on the ground of incurable insanity.

4. That a criminal conviction involving a long term of imprisonment should be a ground for divorce.

Nullity of marriage

5. That, subject to certain provisions, it should be a ground for nullity of marriage that either party was at the time of the marriage a mental defective or subject to recurrent fits of insanity or epilepsy.

Separation

6. That the present standard of habitual drunkenness as a ground for separation should be modified.

7. That the standard of cruelty required as a ground for separation should be lower than that required as a ground for divorce.

POWERS OF COURTS OF INFERIOR JURISDICTION

8. That there should be located in Glasgow one or more of the Lords Ordinary of the Court of Session with power to deal with actions of divorce; or

9. That a Lord Ordinary should go on circuit throughout the principal provincial towns to deal with actions of divorce; or

10. That there should be extended to the Sheriff Courts a concurrent jurisdiction to deal with certain actions of divorce.

MATTERS OF ADMINISTRATION

11. That the duty of enforcing a decree for the payment of aliment should be placed upon the court issuing the decree.

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Mr. HAMILTON LYONS, B.L. and Mr. G. B. L. MOTHERWELL, W.S.

EXAMINATION OF WITNESSES

(Dr. J. S. MUIRHEAD, D.S.O., M.C., T.D., D.L., M.A. (Oxon.), LL.B., LL.D., MR. HAMILTON LYONS, B.L.,
MR. G. B. L. MOTHERWELL, W.S., representing the Council of the Law Society of Scotland; called and examined.)

5587. (Chairman): We have here this morning as representing the Council of the Law Society of Scotland Dr. J. S. Muirhead, President of the Council; Mr. Hamilton Lyons, Bachelor of Law, Solicitor at Greenock; and Mr. G. B. L. Motherwell, Writer to the Signet, Edinburgh. Referring to the preliminary note in the memorandum which the Law Society Council has kindly submitted, we note that the memorandum deals only with the law of Scotland and that:—

"In preparing this memorandum the Council has invited and has considered the views of individual members of the Society and also of local and other voluntary legal societies. A very large number of suggestions submitted from these sources was considered. The definite proposals hereinafter contained have the unanimous support of the Council, except where it is indicated that there was found to be a minority opposed to a particular proposal."

Then in the Appendix there is set out a list of suggestions which were considered but not adopted by the Council, but which it was thought might usefully be brought to the notice of the Commission. I see that there are comparatively few minority suggestions mentioned so there seems to be a pleasing unanimity in the Council. I observe that to a very large extent your proposals are on the same lines as those of the Society of Writers to the Signet and the Society of Solicitors in the Supreme Courts?—(Dr. Muirhead): I should imagine that that is so. Mr. Hamilton Lyons has seen their proposals, but they were not before our Council. I rather expect that there would be a certain unanimity in the profession generally upon these matters. Would you like us to make a short introductory statement first of all?

5588. I would like you to make a statement, indeed I meant to ask you whether you wished to do so.—It might perhaps assist the Commissioners to appreciate our approach to the problem.

May I on behalf of my Council express our sense of indebtedness to the Royal Commission for inviting representatives of the Council to appear today before you? Mr. Hamilton Lyons, who appears with me, was the Convener of the Special Committee set up by my Council to prepare the memorandum of evidence, and Mr. Motherwell was also a member of that Committee. Mr. Lyons practises in Greenock; Mr. Motherwell in Edinburgh. As all actions for divorce are taken in Edinburgh before the Court of Session, in which Court only Edinburgh solicitors practise, the Commission will appreciate that Edinburgh solicitors and, what I may call for convenience, country solicitors, are not necessarily faced with the same problems. (Admittedly Glasgow, which provides, I imagine, the largest number of actions for divorce, can only by a fiction be described as a country or rural area.) The technicalities of Court of Session practice are the special field of the Edinburgh solicitor; the country solicitor may have greater experience in seeing the effects of the law of divorce on the lives of his clients. I would like the Commissioners to appreciate that in any divergence of evidence given by the local societies that point has got to be considered, because there is a certain difference between the opinion of the Edinburgh solicitor dealing with divorce and the country solicitor.

With your permission, I shall after this short preliminary statement ask Mr. Lyons to reply to such questions as the Commissioners may desire to address to us. Mr. Motherwell will also be prepared to answer any queries, particularly with regard to the actual conduct of consistorial actions in the Court of Session. My Council realises that there can be no unanimity among the 3,500 or so members of the Law Society on the questions before the Royal Commission, since as well as being lawyers they are members of the public, and religious, social and economic factors affect them personally as much as ordinary citizens. The Law Society Council accordingly does not urge any particular social reforms but desires to draw the attention of the Royal Commission to what are considered to be anomalies, inequalities and archaisms in the present law.

It will be noted that the Council's memorandum contains two proposals in relation to which it is indicated that there is a strongly held minority opinion in the Council and among our members generally. These are the present standard of cruelty as a ground for divorce, and the suggestion that the present legal rights in relation to property, arising on divorce, should be abolished. It will be noted, further, that there have been drawn to the attention of the Commission certain proposals, which, though not adopted by the Council, appeared at least to merit notice. With reference to any proposals of a technical legal nature which may have been made to the Commission from other sources, but which are not referred to in the Council's memorandum, it may be inferred either that they have been considered and rejected on the ground of their having received no substantial body of support among our members or, alternatively, that the points have not been submitted to the Council for consideration, in which case it may be assumed that there is no great demand among lawyers for any change in the existing law.

With reference to the general question of the desirability of assimilating the laws of Scotland and England, the attitude of the Council is that there may be a substantial advantage to be derived from such assimilation but that it is necessary also to have due regard to the differing trends of the social and legal history of the two countries. This attitude may be expressed in the words of Lord President Inglis, who gave evidence to a previous Royal Commission on the marriage law in the following terms:—

"I am not in disfavour of the value of uniformity of the marriage law in all parts of the United Kingdom, provided that object could be attained at no more than an adequate cost. But there are some things more valuable than such uniformity. It is of paramount importance that a law so closely interwoven with the social and domestic relations of a people as the law of marriage, should be not merely agreeable to the population at large, but should command their cordial sympathy and respect."

Consequently, the Council, though not in favour of assimilation for its own sake, is always ready to recommend borrowings from the law of England where it appears that the law of Scotland would thereby be brought more closely into line with the outlook of the people of Scotland. It will be observed that some of the proposals contained in the Law Society's memorandum are in effect proposals for the importation of rules of the existing English law. I do not presume to comment on the law of England except to say that the assimilation of the Scottish and English law of marriage and divorce effected in recent years has by no means been one-sided. We believe that the Scots law of divorce was for many centuries in advance of the law of England, and that, in so far as English law has in recent years adopted rules long in force north of the Border, it has been improved. In this matter, accordingly, as Scots lawyers where we recognise particular excellences in English law we do so in an eclectic spirit, being sufficiently well satisfied with the general framework of our own law.

5589. That makes the position very clear. There is no doubt that England has borrowed from Scotland in the past, and it may be that there are useful things which each country can borrow from the other.—That was the background of our suggestions.

5590. The question is really what is the best law for each country. If it happened to be the same in each case great convenience would thereby be achieved.—We do [see] that there is a difference of social and economic and religious background in this country that makes it not inadvisable that there may still be certain differences.

5591. We quite appreciate that. Will you please turn to paragraph 3? Mr. Mason, I think, suggested that wilful refusal of marital intercourse *per se* should only be declared to be desertion if there had been no issue of the marriage. Was that suggestion made to your Council, or not?—(Mr. Lyons): That suggestion was not made in terms to my Council, my Lord, but I should say that the

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attitude of my Council would be that in this respect there is no distinction to be drawn between this particular form of ground for divorce and any other. One must appreciate that the matter of divorce is a different thing depending on whether or not there are children, but there seems to be no speciality in this particular ground which requires the attachment to it of the condition suggested.

5592. Paragraph 4 deals with a matter of Scottish law and procedure which I shall leave to others, and I would only say this. No doubt the Council is aware that in England there has been developed the principle of what is called constructive desertion, so that if one spouse makes life so difficult for the other as to justify the other spouse in leaving the home, it is considered that it is the spouse whose objectionable conduct has led to this situation who is in desertion, and not the spouse who has been driven from the home. So far, that doctrine finds no place in the law of Scotland.—That is so, my Lord, and it is appreciated that an affirmative answer to the question here posed might lead by implication to the English doctrine of constructive desertion.

5593. It might, or it might not go so far. It might be held that conduct short of a matrimonial offence might be accepted as reasonable cause for the refusal of the other to adhere, but it is a further step if it is accepted as being desertion on the part of the spouse who has so conducted himself. Is not that a further step?—That would be a further step, but it is a logical one, and we might therefore find ourselves committed to the doctrine of constructive desertion—I say, "might".

5594. Turning to paragraph 5, in which you deal with cruelty as a ground of divorce, your suggestion is as follows:—

"It is suggested that there are good grounds for asserting that one spouse should be entitled to divorce (or separation) where the other has been guilty of a course of conduct wilfully persisted in towards the pursuing spouse or towards the children of the marriage of such a nature as in the opinion of the courts shows on the part of the defender an unwarrantable indifference to, or disregard of, the normal obligations of marriage, and renders the married life of the spouses intolerable to the pursuing spouse."

You go on to give an example of the kind of conduct you have in mind, but the difficulty I feel about that suggestion is, if I may say so with respect, that it is rather vague, and a very difficult one for the courts to administer. What do you say as to that?—I should say that this feeling finds a measure of agreement, my Lord, within my Council, and that is the basis for the objection stated in the sub-head (2) of the note at the end of paragraph 5.

5595. Yes, that is quite true. Coming to the example, you say:—

"As an example of the kind of conduct which would be comprehended within the foregoing general statement there may be cited the case of a father who has been guilty of lewd, indecent and libidinous practices towards his wife or children. It is separately suggested that conduct of this particular kind ought, in any event, to be a ground for divorce (or separation) upon conviction of the guilty party."

I confess that mainly as a matter of first impression, I thought that it might be more logical and more convenient, assuming that your suggestion were adopted, if that were made a separate ground for divorce or separation, instead of trying to bring it in under the heading of cruelty to the wife. What would you say to that?—I should say, my Lord, that there is something to be said in favour of making it a separate ground of divorce. On the other hand, if the general suggestion here were adopted, there would be no need to make it a separate ground for divorce, because it would fall within the general description of conduct indicative of "an unwarrantable indifference to, or disregard of, the normal obligations of marriage", and it could almost certainly be said to render life "intolerable" for the pursuing spouse.

5596. Arising out of that, you refer to the fact that:—

"There are found in practice many instances of conduct on the part of a husband towards his wife and

children which (e.g., because of the robust physique and mentality of the wife) does not satisfy the present requirements, but which nevertheless renders married life intolerable for the wife."

Was it the view of your Council that you should take into consideration the effect upon the health of the individual or the nature of the conduct? Let me give you an example. Conduct on the part of the husband might in the case of a wife who was very highly strung and delicate have an effect on her health, whereas similar conduct in the case of a robust wife might merely lead to her saying, "Don't be silly". You appreciate what I mean?—Yes.

5597. Would you have regard to the sort of conduct, or simply to its effect on the particular wife in question?—That particular point was not considered by my Council, but it is, I think, generally regarded as settled in the law of Scotland that a person must take his or her spouse as he finds her or him, and that the nature of the individual may be taken into account in determining the effect to be given to a particular line of conduct.

5598. And you are not suggesting a change is that?—No, my Lord.

5599. On the question of insanity, you know that Section 1 (2) (d) of the Matrimonial Causes Act, 1950, says that for the purposes of that Section a person of unsound mind shall be deemed to be under care and treatment "while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, or under any such law as is mentioned in paragraph (c) of this subsection, being treatment which follows without any interval a period during which he was detained as mentioned in paragraph (a), paragraph (b) or paragraph (c) of this subsection". That is to say, treatment as a voluntary patient does count towards the five years if, but only if, it follows on treatment under one of the other headings. Would your Council wish to adopt the law of England on that point, or would you simply wish your law to provide that treatment as a voluntary patient, whether preceded or not by other kinds of treatment, should be taken into account?—The latter, my Lord, that treatment as a voluntary patient, whether preceded or not by detention, should be a ground, and to that extent the last sentence of the argument submitted in our memorandum in support of this proposal might be modified so as to make that clear.

5600. Then we come to paragraph 8, which deals with dissolution of marriage on presumption of death. The suggestion there is:—

"That the law should be clarified as to the effect, on a decree of dissolution of marriage granted on account of the disappearance of one of the spouses, of the reappearance of that spouse."

Although you do not say so in terms, I gather that the suggestion is that if there is a decree of dissolution of marriage on that ground, and the spouse afterwards reappears, the dissolution of marriage should nevertheless hold good?—No, my Lord, I should say that that is begging the question which is raised here. The present position is that while the Divorce (Scotland) Act, 1938, Section 5, introduced this form of proceeding, no provision was made for the eventuality here envisaged, and consequently the law of Scotland is at the moment unsettled as to the effect of the reappearance of the spouse who has been presumed dead.

5601. It is the uncertainty?—The uncertainty.

5602. It seems to me that there might be two possible answers to the difficulty. One would be that, as regards the dissolution of the marriage, it should hold good even if the spouse should reappear, because in the meantime the other spouse might have re-married, but that, on the other hand, it should have no effect upon the man's property since he has been alive all the time. Would that strike you as a practical solution?—The question hardly arises, my Lord, in this respect, that a decree pronounced under Section 5 of the 1938 Act has no effect legally on property rights. To produce an effect on property rights, separate proceedings under the Presumption of Life Limitation Act, 1891, must be taken. In that particular connection, I would refer your Lordship to paragraph 16 of our memorandum.

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5603. I have a note that these two are very much linked together.—That is so, but the two proceedings are designed to meet different purposes. One relates to the dissolution of the marriage, and the other relates to property rights, in each case exclusively so.

5604. Then the suggestion in paragraph 16 is that if you once presume the death of a man—even if he is in fact, alive all the time, possibly marooned on a desert island—when he comes back he will have no claim at all to his own property? Is that the effect?—No, my Lord, the effect of the Presumption of Life Limitation Act is that if the person who has been presumed dead reappears within thirteen years of the taking of possession of property in terms of a decree granted under the Act, the person so returning is entitled to recover his property.

5605. Will you now turn to paragraph 9, which deals with nullity of marriage? I think that the suggestion which you make might have been borrowed from English law?—Yes. It is substantially correct to say that, as the law of Scotland stands at the moment, but it is, on the other hand, right that I should point out that there was a decision by the Court of Session in 1914 in the case of *Steele v. Steele*, 1914, S.C. 903, which had the contrary effect of that in *Lang v. Lang*.

5606. You have misunderstood me. I was not venturing upon Scottish law, I was saying that it seems to me that this provision which you suggest is identical with the English law as it now stands.—It is identical, my Lord, but not necessarily a borrowing from it.

5607. There is one thing I want to ask you on that. It is suggested that it should be a condition, as indeed it happens to be under English law, that the proceedings in question are instituted within one year from the date of the marriage. It has been suggested by witnesses in England that that period is too short. It is said that the discovery that the defendant was at the time of marriage pregnant by some person other than the pursuer might not be made for some months after the marriage, and then it might be difficult for the pursuer to get proceedings started within the year. Would your Council think that a longer period was desirable, or do you think that one year is long enough?—If indeed it could be established that any difficulty could arise in instituting proceedings within the year, then my Council would be in favour of an extension.

5608. May I just give an example? Supposing the husband is overseas at the time and does not discover the facts until after a year or so. What would you say should be done in that case?—That would represent a difficulty which ought to be provided for, and that might be provided for by a modification of condition (ii) in the sense that the proceedings might have to be raised within a certain period of the knowledge coming to the proposed pursuer. I may say that our attitude towards these conditions, my Lord, which are, of course, borrowings from the English law, was that they did not appear to us to suffer from any very great defect, and they were simply adopted as they stand in the English Matrimonial Causes Act.

5609. Then, as regards the law relating to the property rights of husband and wife, you suggest in paragraph 12:—

"That the present legal rights in relation to property arising on divorce should be abolished and that there should be substituted therefor provisions to empower a court granting decree of divorce to award to a successful pursuer a sum of capital and/or income to be determined in accordance with the respective financial circumstances of the parties, and also to vary the terms of marriage settlements notwithstanding any contrary agreement between the parties."

You indicate that you support the recommendations of Lord Macintosh's Committee. Then you say, and this is the only point on which I want to ask a question:—

"There is a strongly held minority opinion against the foregoing proposal, on the grounds (a) that the existing penalties are well known and adequate; and (b) that the proposal would not effect any improvement on the existing law."

I had myself thought that the existing provisions were not so much in the nature of a penalty as in the nature of a provision for the innocent party, and that the object of the change in the law was rather because the existing provisions did not enable adequate provision to be made for the wife in many cases. Is not that the basis of the Macintosh Committee's recommendations?—That is perfectly correct, my Lord.

5610. Because it is no good having a third of the property of the man who is getting a weekly wage and has no capital at all.—That is so. I should explain that the word "penalties" appeared in this note in this way—that, in order to do exact justice to the views of the dissenters, the exact wording that they themselves had used was inserted. I should have preferred to have used the word "consequences" in place of "penalties".

5611. It is not, of course, the language of the Council, but the language of the minority which puzzled me. My last question concerns the law relating to marriage with certain relatives. In paragraph 17 you say:—

"That divorce should be deemed to be the equivalent of death for the purpose of enabling certain persons related to one another by affinity to marry each other."

I apprehend that here, as in England, the point which was mostly in mind was whether a man should be allowed to marry his divorced wife's sister and a woman should be allowed to marry her divorced husband's brother. I see that you are in favour of that change. I will put to you very briefly the contrary view, which has been put to us here, and in England. It is said that if a man may marry his divorced wife's sister, that introduces some emotional disturbance into the family circle. If a man knows from the start that there can be no question of marrying his sister-in-law while his wife is alive, they have a very intimate, friendly and natural relationship, which might be adversely affected if it were possible for a man, having divorced his wife, to marry his sister-in-law. What do you say as to that?—I should say that I have yet to learn that emotions can be incited by legislation, particularly by legislation which is no more than permissive.

5612. There is one limitation which has been suggested on this new law if it were brought in, namely, that if the sister were the co-respondent in the divorce proceedings brought by the wife, the husband should not be allowed to marry the sister under those conditions. Have you anything to say on that?—That is a social, personal and intimate question on which I do not think that my Council would wish me to bind them. But I should say personally, and I can only add that a great many of my colleagues would take the same view, that it ought not necessarily to matter. I have before me an excerpt from the Report of the Royal Commission of 1844. It deals with the question of the right of a man to marry his deceased wife's sister, but I would invite the Commission to apply what is here stated to the case of a man who finds himself deserted by his wife, either in or outwith adulterous circumstances, and left with young children. The Commission of 1844 stated:—

"It is evident that the strongest motives exist to induce the husband to desire the assistance of the sister of the deceased wife for the management of his household and the care of his children. Such assistance will appear to him more or less necessary according to circumstances, but in all cases where there are children of a tender age there is a vacancy made by the death of the wife which her sister appears above all persons qualified to supply."

I submit that the same may be said of desertion, and that so far as the particular question which your Lordship raised is concerned, I do not think that, by introducing permissive legislation of the kind here proposed, you are going to hold out an inducement to a man to have improper relations with his sister-in-law. Incidentally, I think it may have been suggested to the Commission that such a relationship would be incestuous.

5613. I do not think that has been suggested in any of the memoranda.—The point there, my Lord, is that it is statutorily declared in Section 13 of the Criminal Procedure (Scotland) Act, 1938, that such a relationship is not incestuous. (*Dr. Markens*): One small matter on this question of the prohibition of marriage in certain circumstances. One must remember the experience in our

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own law in relation to the old rule about marriage with a paramour named in a decree of divorce. That has been a dead letter in Scotland for very many years. In practice the name is never mentioned, but unless the Act of 1600 is found to be in desuetude it is still the law that it is not possible to marry a named paramour. That suggests that any attempt to impose restrictions of this sort by Act of Parliament is likely to prove a dead letter. This matter is referred to in paragraph 13 of our memorandum.

5614. Of course you all appreciate that any of the views that any member of the Commission puts to you, including myself, are not necessarily views held by the Commission. —And the same thing with your witnesses, my Lord. I was merely drawing attention to the fact that it is our experience that a restriction of this sort imposed in the sixteenth century has not worked out.

5615. (Lord Keith): May I return to paragraph 1 of the memorandum? There you are recommending the abolition of the requisite of willingness to adhere?—(Mr. Lyons): That is so.

5616. We have heard a good deal about that, and I think that the Commission is fairly well versed in the matter, but it might be useful if I asked you some general questions on this topic. First, do you agree that this is a relic of the old law of divorce for desertion?—No, my Lord.

5617. Why?—Because of the broad terms of the Divorce (Scotland) Act, 1938, and in this connection, my Lord, I would like to make one alteration in the wording of our argument. In the last sentence of the supporting argument, where the word "desertion" appears for the second time, I should like to alter it to "non-adherence". If I might refer to the terms of the 1938 Act, Section 1 (1) (a) provides that it will be grounds for divorce that the defender:—

"has willfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years;"

It seems to me that the word "desertion", where it appears for the second time, that is to say, in the reference to persisting in the desertion for the period of three years, implies quite clearly that the present law of Scotland is that willingness to adhere must be overruled. I am aware that to that extent I am differing from the opinion expressed by your Lordship in the case of *Borland v. Borland*, and consequently I submit that point with the greatest respect.

5618. You are in agreement really with the majority of the court, Mr. Lyons.—That is entirely fortuitous, my Lord.

5619. I am not quite sure if you appreciated my question. What I said was that the necessity for that requisite of willingness to adhere was a relic of the old law of divorce for desertion in Scotland. Perhaps you do not like the word "relic". It is derived from the old law of divorce for desertion.—It is so derived, my Lord, but it is to my mind re-enacted by the 1938 Act in the use of the word "desertion".

5620. That was exactly the next question I was going to come to. Is it not the case that many people thought—I agree there is room for difference of view—that when the 1938 Act was passed the necessity for willingness to adhere during the whole of the three years had disappeared?—That is so.

5621. That was a view taken by at any rate a large number of members of the legal profession?—That is so.

5622. And there was a case decided in the court very soon after the 1938 Act—the case of *Macaskill*—which decided that it was still necessary to aver willingness to adhere?—That is so.

5623. And I think that there has been a great deal of dubiety as to whether that was a sound decision?—That is correct.

5624. It has been suggested many times that the matter might be reviewed in the House of Lords?—That is so, and such a suggestion was actually made in the case of *Borland v. Borland*.

5625. Am I right in saying that after the 1938 Act the doctrine of adherence was resurrected, to some extent accidentally, by legal decision, or perhaps you do not like that?—No, my Lord, I am unable to assent to that

proposition, standing my view as to the meaning of, and the effect to be given to, the word "desertion", where it is used in the Act in relation to the persistence.

5626. I fully appreciate your view on the interpretation of the statute, Mr. Lyons. But, in any event, you and your Society are of the view that the requirement should now be abolished?—That is so.

5627. With regard to the question of adultery during the tritennium, you are proposing that that should no longer be an absolute bar, as it is at present?—Yes. In relation to that, my Lord, I should beg leave to delete the word "absolute".

5628. That it should not be a bar?—I think that the use of the word "absolute" could possibly import into our suggestion some idea that there ought to be a discretion, and that is not intended.

5629. (Chairman): I certainly so read it. You do not intend that there should be a discretion of the court?—No, my Lord.

5630. (Lord Keith): I rather thought that that was what you had intended, Mr. Lyons, and I am glad that that point has been cleared up. In effect, the Society is there adopting the view of the minority of the House of Lords in the case of *Wilkinson*?—That is correct.

5631. And that was a case where the House of Lords decided by a narrow majority of three to two that adultery was a bar to divorce for desertion?—That is so.

5632. The judges in the minority thought otherwise, they thought it should be no bar?—That is so.

5633. May I turn to paragraph 4? I would like to clarify my own mind as to just where this is taking us. There are a number of matrimonial offences which at the present moment are grounds for divorce, but, so far as separation is concerned, there are only the two grounds, adultery and cruelty?—That is so.

5634. And it has been a matter of some doubt in Scotland for a very long time as to whether conduct less than cruelty might justify a spouse in saying, "I am no longer willing to live with you"?—That is so.

5635. I am not quite clear how you propose to relate your proposal to divorce for desertion. Are you proposing to make any conduct that would give a reasonable ground for refusal to adhere a ground for divorce?—No, my Lord, in relation to this we adopt a rather cautious attitude and our proposal is directed only towards the necessity for clarification of the law. The reason for that is that within the time allowed, my Council was not able to have a full discussion as to the relative merits and demerits of the affirmative and the negative answer to the question here posed, and the most that we could do in the discharge of what we considered to be our duty to the Commission was to draw attention to the present uncertainty in the law. The proposal is not directed in one direction or the other.

5636. That raises the difficulty that was in my mind. Have you any idea as to how the law should be clarified? One would need some kind of definition, I suppose, of what would amount to conduct that would justify a refusal to adhere. How do you propose to clarify it?—I can state to the Commission what the alternatives might be. The first alternative is to give a negative answer to the question posed in this particular passage, and to say that nothing short of a substantive matrimonial offence shall justify non-adherence. That is the first alternative, and it is the one which is more easily capable of application, and to that extent would satisfy the narrower interests of the legal profession, particularly the solicitor branch of it.

5637. Permitting for a moment before you go further, the narrower view, or the negative view, that you have put forward would mean that the only grounds would be adultery and cruelty?—That is so.

5638. What about the grounds that are in the existing Divorce Act, namely, sodomy and bestiality?—It will be observed, my Lord, that we recommend that sodomy and bestiality also be made grounds for separation.

5639. Then these would be grounds for non-adherence, too?—Yes.

5640. That would cover that point. I appreciate the negative attitude that the non-adherence grounds should be strictly limited. What would your next proposal be?—The positive answer to the question is that it ought to

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be permissible to accept as sufficient ground for non-adherence something less than a substantive matrimonial offence. In relation to that I would draw the Commission's attention to our recommendation in paragraph 1, and I would suggest that the recognition by my Council of the hardship in the *Borland* case almost commits us to the second of the two possible answers to the question posed in paragraph 4. But further, I would refer the Commission to the proposal in relation to nullity of marriage, in paragraph 9, and to the fact that we recommend that the decision in *Long v. Long* be overturned. In that connection, I would refer also to the case of *Hastings v. Hastings*, in 1941 *Scotts Law Times*, where it was held that premarital pregnancy by the wife to a man other than her husband was a good ground for the husband's refusal to adhere. It might be inferred from the fact that we recognize the basis of the grounds for complaint in the *Borland* case and the *Hastings* case that we are committed to the view that something short of a substantive matrimonial offence should be admitted as grounds for refusal to adhere. My own difficulty in relation to that view of the matter is that it does seem a very short step from that position to the importation of the doctrine of constructive desertion, and as that doctrine seems to have been expanded in England it seems to be one which is not free from difficulty. Frankly, my Lord, I regard the question raised in paragraph 4 as being the most difficult in our memorandum.

5641. I share your difficulties. First of all, might I just say this, on this broader view that you are now developing, there is the difficulty of definition of the matrimonial conduct that will justify non-adherence?—That is so.

5642. If one could get a definition the problem might become rather easier.—I would suggest that your Lordship has already proposed a definition in your Lordship's opinion in the case of *Borland v. Borland*.

5643. I endeavoured to do so, but whether it was a satisfactory definition or not is another matter. That is really the best that you can go to on the matter of definition?—I cannot think of a better, but I do indeed share your Lordship's view that whatever test is to be adopted it must be capable of being applied within certain ascertainable limits.

5644. You have not got the definition there?—The definition which your Lordship proposed in the case of *Borland v. Borland*, applying this to the question with which we are concerned, is that any conduct on the part of a spouse which renders it *contra bonos mores*, or against the conscience of mankind, to insist on the adherence of the other spouse, might be regarded as sufficient for the purpose of this proposal.

5645. (Chairman): Is that a verbatim quotation from Lord Keith? (Lord Keith): It is very near it, it is near enough.—The essentials are there.

5646. And, of course, that would then be a matter for interpretation by the court in the circumstances of each individual case?—That is quite correct.

5647. Have you something further to say, because I was going to come to another question?—I think that your Lordship has in mind the necessity for a clearly defined standard.

5648. Yes, I appreciate that.—That is particularly important from the point of view of solicitors who are called upon to advise clients as to their rights and duties.

5649. The solicitors would not have a great deal of guidance when all they knew was that it was to be *contra bonos mores* and unconscionable, because then the court would have to decide in the circumstances of each case. It is almost impossible to give a precise definition unless you just give a list of categories of conduct.—My objection to the latter course is that it could not be all-embracing.

5650. This is a point I was going to ask you about. Assuming one adopted the positive view that you have put forward, would you make this new type of matrimonial misconduct a ground of divorce for desertion?—I should not like to commit my Council to that.

5651. I will tell you why I asked that. You would have this difficulty if it were only ground for non-adherence and not ground of divorce for desertion—you would get a husband whose wife, say, had gone away on one of these minor grounds of misconduct, shall I call them that, and he could not get a divorce for desertion because she has got a good ground for non-adherence. And she could not get a divorce for desertion because the misconduct is not ground for divorce for desertion, and therefore you would just get a broken marriage with no solution either way.—That is not an uncommon thing in the law as it stands.

5652. But it is an unfortunate thing, is it not?—Most unfortunate.

5653. Particularly where there is matrimonial misconduct, or bad matrimonial conduct, shall I say?—That is so.

5654. And do you not think that it would be a much better solution, if you were going to take this positive view which you have put forward on the question of grounds for non-adherence, that these extended grounds should just be made grounds of divorce on the ground of matrimonial misconduct equivalent to cruelty?—If I correctly understand your Lordship's suggestion, it would amount to this, that it should be ground for divorce that the defender has been guilty of such conduct as is *contra bonos mores*.

5655. Of such conduct as would justify a spouse in refusing to adhere.—If, my Lord, you accept the standard laid down, or suggested, by your Lordship in the *Borland* case, it would imply this, that it should be good grounds for divorce that the defender has been guilty of such conduct as renders it *contra bonos mores*, or against the conscience of mankind, that a decree of divorce should be refused. And that would be a very, very wide proposition.

5656. It might be, but if you are going to make it a ground for non-adherence it does not seem to me to be a very big step to say that it shall also be a ground for divorce.—That is our difficulty, my Lord, that we might appear to some extent to be committed to the positive view and yet we are not quite sure as to how far the adoption of the positive view would take us into uncharted realms. (Lord Keith): It looks as though you would have to leave it to us. (Chairman): Might I just say this arising out of that most interesting discussion? In England it was, I think, felt that in a case where the husband, for example, has so conducted himself that the wife is justified in leaving him but he has not committed a substantive matrimonial offence, the logical solution would be this. These persons are living apart. They are not living apart by agreement. It must be desertion by one or the other. Who has deserted the other? The view that was taken—I think I am stating this correctly—was that the person who had rendered it impossible for the other person to live with him or her was the party who was, in fact, in desertion.

5657. (Mr. Justice Pearce): That is perfectly right, because it was laid down years ago that desertion is not desertion from a place but from a state of affairs. In other words, it is immaterial which of the parties left the home. The question is who broke up the home.—Yes.

5658. And judges have always posed themselves this question: could any reasonable spouse so treated by an unreasonable spouse be expected to maintain the marriage? And if the answer is in the negative, then the unreasonable spouse is the one who broke it up and deserted.—Do I understand, my Lord, that what is looked to is the responsibility for the original break-up of the cohabitation?—(Mr. Justice Pearce): That is so, it has nothing to do with the geographical location.

5659. (Lord Keith): Now would you turn to the last sentence of paragraph 4, where it is said:—

"The importance of the question is the greater since cruelty is now a ground for divorce as well as for separation."

I was not quite clear what the relevance of that observation was?—To be perfectly honest, my Lord, I cannot quite recall the relevance of it myself. I feel sure, my Lord, that we had something in mind, but I cannot quite recall it at the moment. It is pure narrative anyway.

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5660. Let us turn to paragraph 5, which deals with the question of cruelty. You are really recommending a new definition of cruelty?—Yes.

5661. It has perhaps the merits, and perhaps also the demerits, of the definition that was attempted in *Borland* in the matter of grounds for non-adherence?—Yes, my Lord.

5662. If it were enacted as legislation, its interpretation would have to be left to the court in the circumstances of any individual case?—That is correct.

5663. And really the sum and substance of it is intolerable conduct by one spouse to another?—That is correct.

5664. And you regard that as sufficiently clear in its conception as to indicate what should be treated as cruelty as a ground of divorce?—As representing the Council of the Law Society that is so, but I should perhaps say that I was one of those holding the views expressed in the note of dissent. And what we have done in the recommendation is to take the formula in the exact words in which it was proposed.

5665. Turning to the question of insanity, which is dealt with in paragraph 6, may I ask you this? Did the Law Society consider whether it was necessary to have a period of five years either as a certified or voluntary patient before divorce proceedings could be taken?—Yes, my Lord, and I would refer your Lordship to proposition 3 of the Appendix.

5666. That there should be a reduction in the period. That was put forward as a suggestion, but was not adopted by the Society?—That is so, my Lord. The reason for its not being adopted was that the real substantial ground for divorce under this heading is incurable insanity. And it seems to us to be a question over which our province whether incurable insanity could be either presumed or satisfactorily proved in a period of less than five years. It is a medical question.

5667. On the question of dissolution of marriage on presumption of death, dealt with in paragraph 8, I quite see the necessity of having the position cleared up. Have you any view as to how it should be cleared up—do you wish to make the decree irrevocable, or do you propose that it should be reduced on certain conditions?—Here again, my Lord, my Council did not have the benefit of a full discussion as to what particular answer ought to be given to the question here posed, and the most I can do is to indicate for the benefit of the members of the Commission what the alternatives would be.

5668. I would like you to do so.—The first alternative is that the decree should be reducible at the instance of either of the parties to the marriage, and the second is that the decree should be irrevocable. The third alternative is that the decree should be reducible at the instance of one or other but not either of the parties to the original marriage—one might contemplate in the first place at the instance of the holder of the decree. It is obvious that, whatever answer is given to this very difficult question, it is going to cause hardship to some persons, one or more. Let us contemplate a case where the husband is a prisoner of war, these being perhaps the circumstances in which this problem would arise most frequently. The wife takes a decree of dissolution of marriage and then re-marries. One, and possibly two, of the three persons concerned are going to be under some hardship. And if we accept the principle that the law ought to provide the greatest good for the greatest number, then we should endeavour in answering this question to limit the hardship, if possible, to at most one individual. There is no fault on anybody's part which assists us in finding a just answer. If the option were given to the wife in the case which I have posed, she being the holder of the decree, it would amount to this, that she will be in the position of exercising a choice as between two husbands—if I may use that phrase in inverted commas—and that is going to have at least this merit, that she will be satisfied and the dissatisfaction will be limited to one or other of the two men in the triangle. Now to hold that the decree was annulled on the reappearance of the returning husband or should be annulled on the reappearance of the returning husband, might produce this, that the woman who has conceived a

genuine affection for her second husband would against her wishes be obliged to discontinue that second association, and in law at least to resume cohabitation with her original husband. That is possibly going to give some small satisfaction to the original husband. I suggest that it would be very small.

5669. It would be very small indeed if she did not resume cohabitation with him and did not wish to.—It might be even smaller if she did. So I suggest, my Lord, and I put this forward very tentatively, as being no more than an expression of a personal opinion, that possibly the hardship could best be limited by giving an option to the holder of the decree. (Lord Keith: You put the position very clearly, Mr. Lyons, and you have expressed the difficulties that were in my mind, and I am sure the Commission is very much obliged.)

5670. (Chairman: Certainly we are. I did not gather, perhaps intentionally Mr. Lyons did not commit himself, whether he thought it was better that the decree should be irrevocable or reducible at the instance of the holder.—I cannot commit my Council to one or the other. I should suggest, my Lord, that in any event there ought to be a time limit to the exercise of any option.)

5671. Yes, after the return of the person who has disappeared. In the last sentence of the paragraph you say that "the question is by no means academic". You say that it actually arose "following on the recent war". I do not want names, but can you illustrate the case that you refer to there?—Yes, I can, and the only illustration which I can give is of a case of a man who returned in these circumstances, and the difficulty was solved there by his stealing quietly away into the night.

5672. He went away into the darkness. The wife had re-married?—Yes. And the first husband simply accepted the position.

5673. (Lord Keith: May we pass to the next matter, nullity, which is dealt with in paragraph 9? I think that you did assent to the view that it would be better to say "from the date of the discovery of the grounds of nullity" rather than "from the date of the marriage". That would be a better and more equitable condition?—Then our third condition as stated in the memorandum.)

5674. Have you any views as to whether this should be a ground of divorce rather than a ground of nullity? In the case of *Sieff* and in the case of *Long* am I not right in thinking that it was a divorce that was sought?—My recollection is that it was a nullity.

5675. You may be right, I could not recall. Have you any views upon it? Which do you prefer?—Quite clearly, such a ground is appropriate to nullity and not to divorce, on the ground that the basis for it is a want of true consent.

5676. It is rather that it is a consent induced by misrepresentation?—It is the appearance of consent induced by misrepresentation. (Lord Keith: And in other branches of the law that is taken rather as a ground for regarding the contract as voidable and for rescinding it.)

5677. You have not adopted the other grounds of nullity that are found in the English statutory code?—No, my Lord.

5678. I believe that some of these were advanced in the suggestions put before the Society. They are mentioned in proposition 5 of the Appendix to your memorandum.—That is so, my Lord.

5679. You cannot express any view as to whether these other grounds should be adopted?—I can indicate the reasons for which the Society discarded them.

5680. That might be useful.—As I understand the other statutory grounds of nullity in England, there is, first, that there has been no consummation of the marriage.

5681. Wilful refusal to consummate.—I submit, my Lord, that that type of case is simply provided for by our recommendation in paragraph 3.

5682. Refusal of marital intercourse?—In relation to the English code there does not appear, so far as I have been able to discover, any time limit. The next group of grounds consists of insanity in addition to . . .

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5683. The ground that is set out in proposition 5 of the Appendix?—Yes, except, my Lord, that we do not include in our Appendix the ground that the defender was of unsound mind. We rejected that out of hand because it is already the law of Scotland.

5684. Why did you reject mental deficiency or recurrent fits of insanity or epilepsy?—It seems to us that the English Act takes no account of whether or not the mental deficiency or the epilepsy affected the consent which apparently was given at the time when the marriage was celebrated. Recurrent fits of epilepsy, for example, are included, but apparently it is not necessary to show that at the time when the marriage was celebrated the defender, or one of the parties, was then in a fit of epilepsy.

5685. On the other hand, how do you distinguish it from concealment of pregnancy, if there was concealment of this state, and if the other spouse would not have entered into the marriage if he had known of this recurrent epilepsy or mental deficiency?—We distinguish it in this way, that an illness of any kind, mental or physical, should not be grounds for qualifying a marriage, not being of the essence of marriage, and therefore not necessarily affecting the question of consent. Pregnancy is to be distinguished on the ground that it is a question of an essential condition in such a way as cannot be said of epilepsy, mental deficiency or any other form of illness.

5686. You would agree that consent might have been obtained by concealment of these facts, and that it would not have been obtained if they had been disclosed?—The law of Scotland is well suited as to the conditions under which concealment or fraud or anything of that kind gives rise to a decree of nullity.

5687. Of nullity, but you could get a rescission of contract that had been entered into under misrepresentation?—The rules which apply to a commercial contract have been held not to apply to the status of marriage.

5688. I see that, but what we are considering is whether that should not apply in these special circumstances to marriage?—The attitude of my Council is that there is no call for any alteration in the present law relating to that. Our attitude in relation to pre-marital pregnancy is that it goes to the root of the matter in a way that these other items do not.

5689. I follow the distinction which you are drawing. Would you take the same view about concealment of venereal disease?—Yes. And I would add that it is already a ground for divorce.

5690. After marriage, yes.—As a species of cruelty when the defender has recklessly communicated it to the other party.

5691. Might I pass to paragraph 12, which deals with the question of property rights? Are you proposing to retain the legal rights, that is to say, the rights of husband and wife as at death, if circumstances arise in which these could be exercised and the innocent party wished to take legal rights of divorce; or are you abolishing the legal rights of divorce altogether?—Abolishing them altogether.

5692. Simply leaving it to the court, with an option to make a capital payment or aliment, or the two combined?—Yes, my Lord.

5693. It is entirely within the discretion of the court?—That is so, my Lord.

5694. I note that there was a difference of opinion upon this matter. Can you indicate how strong the minority was? That is to say, was the majority a narrow one, or how was the division of opinion on your Council?—It is very difficult to answer that, my Lord, because the suggestion came from a representative body outside my Society, or rather from the Council of that body, and consequently it might be held to represent the opinion of the majority of members of that other Council. (Dr. Muirhead): I think it would be fair to say that it is a very strong minority opinion. I would not like to say that the profession is divided fifty-fifty, but there was a strong feeling. I would not like to deny that. Quite a strong feeling that the present provision, which has been traditional, works pretty well. (Mr. Lyons): We might add, my Lord, that any weakness numerically is made up in the

quality. (Dr. Muirhead): You have to remember this, that a great many of the persons that get divorce have no property, and that is a strong argument in favour of the change recommended.

5695. Am I putting forward the view correctly when I say that one of the views that is held is that it is much better when divorce takes place that there should be a clean cut and that the husband or the wife should not be put under obligations after the marriage relationship has been severed?—(Mr. Lyons): That is so. (Dr. Muirhead): That is one of the views. There is a clean cut and there is no continuing strain. On the other hand, of course, unfortunately the present law does lead itself to the possibility of the innocent spouse getting nothing.

5696. You get inequity. If the parties are wealthy the innocent spouse gets something, but if the parties are poor the innocent wife would get nothing. This proposal, of course, is confined to the innocent party, that is to say, it is only the innocent party who is going to get these financial benefits?—(Mr. Lyons): That is so, my Lord.

5697. May I refer to paragraph 14, which deals with matters of administration? There you deal with a very technical matter and, of course, your proposal rests upon the assumption that the existing legal rights in respect of property arising on divorce are to be retained?—That is so, my Lord.

5698. And it is merely in such a case that notice should be given to the public that divorce has been obtained and that that affects the property of the divorced spouse?—That is so, my Lord, but in relation to that it is our suggestion that not every decree of divorce should be recorded in the Register of Inhibitions and Adjudications, but that it should be in the option of the holder of such a decree to register it in order to protect and vindicate his or her legal rights. The suggestion has, I think, been made that all decrees should be so registered; that is not our suggestion.

5699. I do not think that that qualification appears in your memorandum, does it, Mr. Lyons?—It is implied. I suggest, in the words, "In order to preserve rights of force and courtesy." "In order to" might be read "For the purpose of".

5700. So that if the party does not record the decree of divorce and the property is sold by the husband, let us say, then the wife loses her rights because the divorce has not been recorded?—That is correct, my Lord, and in that sense a time limit would require to be adjusted.

5701. (Chairman): I must confess that I read it in the other sense, as meaning that you are recommending that all decrees of divorce should be registered.—I appreciate, my Lord, that it is possible to read it in that sense and I wanted to make our position quite clear. It would be an intolerable waste of time and administrative expense if all decrees were recorded.

5702. (Lord Keith): Does the same difficulty not arise in the case of legal rights on death?—Not so sharply, my Lord, because the death of a party who is the holder of heritable property appears from an examination of the progress of the title. It is therefore quite easy to detect the cases where rights of force and courtesy emerge, or might have emerged, on death, and enquiry can then be directed towards the question whether or not these rights have in fact emerged in such a way as to affect the title to the property. But divorce is a thing which is concealed and which does not appear on the face of the title. Incidentally, my Lord, I should say that if our recommendation in paragraph 15 is adopted, that is, that the date of ascertainment of such rights should be the date of institution of the proceedings rather than the date of the decree of divorce, then rather than recording the notice of decree, or possibly in addition to recording the notice of decree, one would require also to record a notice of summons. Because one can imagine that, in the course of divorce proceedings, heritable property might be disposed of and, if nothing goes on the record but the notice of decree, and if the date of ascertainment of the rights is the institution of the proceedings, then anybody purchasing property between these two dates could be seriously prejudiced.

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at the date of the proceedings. You will appreciate the distinction, my Lord, that in Scotland there is at the moment no such thing as a vested right to divorce arising through cruel conduct, and that the law of Scotland as it stands at the moment looks to the need for protecting a spouse against cruel conduct. Therefore it looks not so much to the past as to the future, to the past only for obtaining an indication of what the future is likely to be.

5721. That would not fit conveniently into the scheme that I am putting forward, which happens to be part of the English law. I am not saying that that is a reason for its excellence, but I suggest that it does work pretty well.—It does, and I merely mention the possibility that there may be some objection arising out of that difference between English and Scottish law, to which I have referred. But I am unable just at a moment's notice to visualize it.

5722. Then you would really think that that was an improvement on your proposal? I think that one must take it that desertion and cruelty are really part of a scheme of giving matrimonial relief, and they should not be considered entirely separately.—I would assent to that proposition, my Lord. I have not had the opportunity of looking into the way in which the doctrine of constructive desertion has been applied in England, but I do know that there has been a welter of cases on the subject.

5723. Of course, you are bound, in cruelty and constructive desertion cases, to get the border-line cases—the cases where a judge of the first instance may take a view that the Court of Appeal does not uphold. And you have to remember that that law has been evolved. That is not quite the statutory framework which I have been putting to you, but something which is more than the statute.—Quite so.

5724. You make no suggestion that it does not work, only that it has produced a number of cases?—That is so. My attitude is that, as I see it at the moment, there is no objection, on purely legal grounds, to the formula which your Lordship has put forward.

5725. There is one further point, the last point I should like to put to you, though you have not raised it. Do you think that the Scots law, whereby once the three-year period of desertion has run, then the deserted spouse has a vested right to divorce on the ground of desertion, is as good as the English statutory law of desertion, whereby the desertion period must immediately precede the presentation of the petition? The practical effect is of this importance, that in Scotland, I understand, if you were deserted on the first day of 1946, then up to the first day of 1949 you must be willing to adhere?—That is so.

5726. But on the second day of 1949 the deserted spouse is entitled, however bitter the regrets of the other spouse, and however sincerely contrite he or she is, to turn away the other spouse from the home?—That is so.

5727. And yet two or three years later the deserted spouse can bring an action for divorce based on the ground of desertion?—That is so. I personally think that the English rule has more to commend it than the present Scottish rule.

5728. (Mr. Russell Brain): May I ask one question on intimacy as a ground of divorce? In 1933, the situation was such that time was really the only test of incurability, and if a patient had remained in a mental hospital for five years it was extremely unlikely that the patient would recover. With the progress of medical treatment, if it were accepted by medical experts that this could be decided in a shorter period, such as two years, for example, would you feel that the period might then safely be reduced?—I should say that the attitude of the Law Society in relation to that would be purely negative. The Law Society of Scotland would have no observations to make on a subject of that kind.

5729. With regard to the distinction between voluntary and certified patients, is it your view that if the criterion is incurability, then it is really irrelevant whether that depends on a voluntary stay or a compulsory stay in a mental hospital?—That is our view, Sir.

5730. On the question of nullity, I understand the distinction which you make between the husband who finds his wife pregnant by another man and the other categories. Is that distinction based upon a principle of existing law?—Yes, that is based on a principle of law.

5731. But, nevertheless, if it were regarded as a great hardship that a marriage should persist, or, at any rate, that it would be reasonable to give one of the parties permission if necessary to have it annulled, then that introduces other considerations, and I do not quite follow your objection to that in the case of mental deficiency, for example?—That would introduce other considerations, Sir, but what effect ought to be given to these other considerations is another matter. I do not think that the Law Society of Scotland could commit itself to the attitude that principles ought to be discarded to meet individual cases of hardship.

5732. I wondered whether it would not be a case of introducing another principle. If a man, for example, is entangled into marrying a mentally defective woman and, by the concealment of the fact that she has been in a home for mental defectives, he is then tied for life, unless he is relieved, to a person who is permanently of unsound mind in the sense that she is mentally defective, could not that be regarded on humanitarian grounds as an adequate reason for giving him permission to have the marriage annulled?—It is according to the common law of Scotland, Sir, a ground for nullity if at the time of the marriage one of the parties was of unsound mind.

5733. (Lord Keith): But that would not apply to mental deficiency.—If the unsoundness of mind is such as to nullify the apparent consent, then that should be a ground for nullity quite properly, but if the suggestion is that owing to some illness existing at the time of the marriage the marriage ought to be annulled, then there is no foundation for that in Scottish law unless it affects the consent which was given.

5734. (Mr. Russell Brain): I appreciate that, but we were considering rather the desirability of introducing such a law.—I am not clear as to the type of action which this ground ought to found. Is it envisaged as founding an action of divorce or an action of nullity?

5735. An action of nullity on the ground that there has been concealment of recurrent mental illness, for example, in the past.—My Council could not approve of that suggestion unless it were related to a principle, and the difficulty there is that if you are going to allow mental deficiency or some form of mental illness as a ground for nullifying marriage, the same might be said of many other forms of illness which might be concealed at the time of the marriage, and there is no justification, as I see it, for singling out any particular form of illness.

5736. I appreciate that difficulty, but it could be urged on the other side that the state of mind has a peculiar relationship in marriage which does not exist in the case of other illnesses.—One might say the same, of course, about the state of the body because marriage has been described as a physical union.

5737. You feel at any rate that you could not accept that?—I could not accept that.

5738. (Mr. Mace): In paragraph 3 you suggest that wilful refusal of marital intercourse should be deemed to be desertion. Have you considered applying an age limit in respect of this ground? What I have in mind is that if the wife is past child-bearing age should not that be taken into account?—Yes, such a principle is recognized in the law of Scotland at the moment in relation to impotency as a ground of nullity. Where, for example, persons of advanced age marry, impotency becoming apparent after the marriage would not necessarily found an action of nullity, as it would in the case of persons of what one might call more marriageable age.

5739. (Chairman): I am sorry, I did not quite follow the answer. Would you, or would you not, approve of some limitation of age being applied? For example, that wilful refusal of marital intercourse by a man or woman of a named age should not come within the definition of desertion?—My answer to that is that the existing law is capable of being applied to meet the circumstances in such a way as to ensure that there is no hardship. Apart from age, it will be noted from the last sentence of the supporting argument that the effect of the request that the refusal should be wilful would be to admit as defences acquiescence and incapacity.

5740. (Mr. Mace): I am not suggesting that there was incapacity or that the other spouse had acquiesced. What I am suggesting is that consideration might be given to

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a wife, past child-bearing age, who, because she was reluctant to permit intercourse, might thus be giving her husband a ground for divorce when he had found the attraction of a younger woman.—That is a very personal matter, on which I do not think that the Law Society of Scotland would have any observations to make. I do not think that there would be any objection to such a case being provided for. (Dr. Murhead): We do think that at present the common law is sufficient to cover such a case without a special provision, that is all. We have no objection to such a provision, but we think that the law as at present existing would cover it.

(At this stage the Commission adjourned for a short period.)

5741. (Mr. Mace): May I refer to paragraph 5, in which you deal with cruelty as a ground of divorce? In order that I may understand your suggested new definition of cruelty, I propose to put four cases to you and ask you to say whether upon your suggestion there would be grounds for a divorce. In each case the family consists of a husband and wife and children, and in each case you may assume that the cruelty is such as to be genuine cruelty. In the first case, the cruelty is directed against the wife, who is of a timid nature and therefore the cruelty affects her health. The children are strong children, strong in health and in resistance to the cruelty, and there is no evidence that the cruelty affects their health. Would you say that that would provide grounds for a divorce?—(Mr. Lyons): That would give rise to the remedy.

5742. My second case is that the cruelty is directed against the wife, but her character is of such strength that the cruelty does not affect her health, although it does affect the health of the children.—That would give rise to the remedy under our proposed new ground.

5743. (Chairman): But not, as I understand it, under the existing law?—That is so, my Lord.

5744. (Mr. Mace): In the next two cases, the same conduct is present but it is not directed against the wife, it is directed against the children. In the first case, the wife is timid and it affects her health. The children are strong and resist it, and there is no evidence that the cruelty directed against them does affect their health. Would there be a remedy?—That would give rise to the remedy.

5745. The last case, the same conduct directed against the children, and not against the wife. The wife is strong and the children are weak and it does affect their health.—That would give rise to the remedy on the assumption that the conduct was such as to render married life intolerable to the wife, or, alternatively, that the conduct was such as to indicate on the part of the husband an unwarrantable indifference to, or disregard of, the normal obligations of marriage.

5746. Now may we have the answers on the existing law in Scotland? The first case was conduct to the wife, the wife being weak and the children strong, that is, the wife being affected and the children not affected.—That would give rise to the remedy on the assumption that the wife being weak, her health would be affected.

5747. And she was continuously in fear of danger, under the present Scottish law?—In danger, or the reasonable apprehension of it, to her life or health.

5748. The second case is where the wife is strong and the children weak and the children are affected.—That would probably not give rise to the remedy in respect that there would be no element of danger to the wife's health.

5749. Now, conduct directed to the children, the wife being of weak character and the children of strong character.—That would give rise to the remedy on the assumption that conduct of the kind contemplated directed towards the children would be likely to affect the wife in her health.

5750. And the fourth case is where the wife is strong and the children are weak and the conduct is directed against the children.—The remedy would not arise for the converse of the reason previously given.

5751. In your suggestion you say:—

"... where the other has been guilty of a course of conduct wilfully persisted in towards the pursuing spouse or towards the children of the marriage of such a nature as in the opinion of the courts shows on the part of the defender an unwarrantable indifference to, or disregard of, the normal obligations of marriage, and renders the married life of the spouses intolerable to the pursuing spouse."

Have you considered adding any words which would include "intolerable to the children in the home"?—No, Sir.

5752. You would be against it?—My childhood life was rendered intolerable on very frequent occasions by what I regarded as injustices on the part of one or other of my parents but, on reflection, the element of injustice does not now appear so strongly. In other words, it amounts to this, that one cannot give to a child the right to say that any particular conduct on the part of his parents is or is not intolerable.

5753. (Chairman): Nor give a right to the child to say that his parents should be divorced?—Exactly.

5754. (Dr. Robertson): I have one question arising from paragraph 5, with regard to offences against children. Would the witnesses agree that there may be a larger number of such cases known to the local authorities than is known to the Law Society? For example, a large local authority like Glasgow has invariably such cases in care, including a certain number of incest cases, and these facts are frequently withheld from the court by the mother. Would the witnesses agree that that is probably the case?—That could quite possibly be the case and indeed it is likely to be the case. The experience of the legal profession is to some extent satisfied, and that of the courts even more so.

5755. (Chairman): That conduct would be the kind of conduct that you think should be included within the definition of cruelty, whether the lewd, indecent and filthy practices are directed towards the wife or the children?—What was envisaged here was such practices directed towards the children.

5756. And these, you think, should be a ground for divorce whether they are brought under the heading of cruelty or under a fresh heading?—That is so, my Lord.

5757. (Lord Keith): That would mean that there would be a ground for divorce at the instance of the wife?—That is so.

5758. And of course if the wife brought an action of divorce on these grounds it would be because she objected to this conduct?—That is so, my Lord.

5759. (Mr. Macdowell): I would like to ask some purely practical questions on a matter which is not mentioned in your memorandum. In Scotland if a poor woman is deserted, is left with nothing, goes on to national assistance and wants to obtain an order against her husband, what does she do?—Leaving aside the legal aid procedure, as to which I imagine the Commission may already have been informed. . . .

5760. I do not know anything about your legal aid procedure unless it is such legal aid as is provided by the Legal Aid and Advice Act. I believe that in Scotland you have some legal aid procedure outside that Act, have you not?—We have, but it is not applicable to civil cases. The only legal aid procedure which we have in Scotland applicable to civil cases is that contained in an Act similar to the English Legal Aid Act.

5761. Does that apply to courts of summary jurisdiction?—Yes.

5762. It does not in England.—It does not in England, but we are more fortunate in Scotland.

5763. What would the wife do? She is deserted, she has nothing, she is on national assistance. As a practical matter, what would she do?—I might embrace in my answer the legal aid procedure, for the benefit of the members of the Commission. She would submit an application through a solicitor, who would be either selected

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by her or assigned to her by the Legal Aid Committee. The Legal Aid Committee would consider the application in the light of whether or not there is reasonable cause for her taking action. The action, incidentally, would be an action for adherence and aliment. The legal aid certificate would be duly granted. The solicitor would take an action in the Sheriff Court of the residence of the defender, assuming that he was resident in Scotland. The solicitor would in due course obtain a decree from the Sheriff Court, the effect of which is that the defender is called upon to adhere to the pursuer, and, failing his adherence, to pay to the pursuer a weekly sum of aliment which would be fixed by the court, having regard to the respective means of the parties.

5764. (Chairman): May I ask on that point—is he given a certain time within which to adhere?—No, the effect of a decree is immediate. Immediate adherence is called for. Pending the course of the proceedings, it is possible for the wife to make an incidental application for what is called interim aliment and, unless there is exceptional cause, such an award would be made. That would give protection to her during the time that the proceedings are pending. Following the issue of the ultimate decree, if there was no sign of the defender obtempering the decree, the procedure would be that the pursuer would enforce it by one or more of three methods—by the attachment and sale of moveable effects belonging to the defender, by the arrestment of his wages in the hands of his employers, or by having the defender committed to prison on account of his failure to obtemper, or to conform to, the order of the court. The last alternative is a means of compulsion only, and has no direct result in the giving of effect to the decree for aliment.

5765. (Mr. Maddocks): How long does it take, as a practical matter, for a woman to get her decree?—It is difficult to put a limit on that because various factors have to be taken into consideration. First, the question of whether or not the action is defended, because the action can be defended on one or other of two grounds. The first is that the decree for adherence ought not to be granted, for a variety of possible reasons, for example, because the pursuer, the wife, is not herself genuinely anxious for adherence, and that her claim for adherence is therefore not bona fide; or that there is reasonable excuse for the defender in his refusal to adhere, or for some other such reason. Alternatively, the action might be defended on the amount of aliment, the husband contending that the amount of aliment sued for is excessive having regard to the financial circumstances of the parties. If the action is contested it is hardly possible to place upon it any definite time limit. Many such actions, however, are not contested—and, in so far as they might be contested with reference to the question of aliment, an arrangement is sometimes come to extra-judicially, which is given effect to in the decree—and such cases can be disposed of in a period, I should say, of two months.

5766. Two months from the time of issue of the process?—Yes. And interim aliment runs during that period. An application for interim aliment can be made at any stage in the proceedings. The two months, of course, is again variable, depending on whether or not the court is in session. Interim aliment could be granted within a week to two weeks of the lodging of the original application for a decree.

5767. Is there means then in the Sheriff Court, where I understand that cases of this type come for decision, of knowing before the return day of what we would call the summons, whether it is going to be defended or whether it is not?—Yes. It is necessary in such a case for the defender to enter in appearance and that must be done before the first calling of the action in court.

5768. So that in a defended case if it goes through the same procedure as, I gather, obtains in the Court of Session and like the High Court in England, a woman might have to wait before she get her decree perhaps six months?—That is perfectly true, during which time, unless there are exceptional circumstances, she will get interim aliment.

5769. Would you tell me more about enforcement? The woman has got her decree, the husband pays, let us say, for six weeks. Then he stops paying and the woman is again left without money or means of subsistence; what

does she do in order to enforce her decree?—Normally what happens in practice is that, the woman being meantime ordered for by national assistance, the sum due under the decree is allowed to accumulate for a period of weeks. Assuming that the nature of the man's occupation renders it permissible, an arrestment of his wages is lodged in the hands of his employers concluding for the payment direct to the creditor in the decree of the amount of the arrears.

5770. Forgive me, I know that; what I wanted to know is what does she do when she suddenly finds herself left without money? Does she have to go to a solicitor and get legal aid again before she can go to the court for arrestment, or whatever it may be?—The original legal aid certificate includes the doing of diligence to enforce compliance with the decree.

5771. She can go back to the same solicitor and say, "My husband is not paying, please take proceedings either to arrest his wages or to make him pay"?—That is quite true.

5772. Everything in Scotland with regard to orders of this kind, which in England would be done in a magistrates' court, has to be done through a solicitor?—That is so.

5773. A woman cannot act in person at all?—Yes. Any one can do for himself or herself what they might otherwise have to employ a solicitor to do, provided they know how to do it but, although constructively a woman can do this herself, in practice she cannot, because she does not know the procedure. Consequently she has to go to a solicitor in order to get the necessary assistance and, as can readily be imagined, there are no funds out of which a solicitor can get anything like adequate remuneration for his trouble. That is why I indicated in answer to an earlier question that this is an obligation of which the legal profession, from a personal point of view, would be happy to be rid.

5774. Who actually assigns the money for court fees and things of that kind?—Under the Legal Aid Act that is provided now by the Legal Aid Fund.

5775. Does the cash come out of the solicitor's pocket and does he get reimbursement from the Fund?—That is so, subject to this: that there is provision for a solicitor making an application for payment to account of his fees, including disbursements, out of the Legal Aid Fund. In other words, if it becomes apparent that he is going to have substantial disbursements, he can recover these immediately from the Legal Aid Fund, and no hardship arises to the solicitor in that respect.

5776. Are you at all familiar with the procedure in the English magistrates' courts?—Not exactly, only to this extent, that I am aware that the duty of enforcing maintenance orders is conferred on an officer of court.

5777. I would like to ask you whether you do not think that the system in magistrates' courts in England is perhaps the better? In England, a woman who is deserted walks to the local police court. Having got past the officer at the door, who directs her to the probation officer first of all, she goes and gets the summons for nothing, the summons is served by the warrant officer for nothing. On the return day of the summons, if the husband does not turn up, he may be required to attend on warrant. The case eventually comes on and he will be there either on warrant or in answer to the summons, and he will be there at no cost to anyone. If the order is made the husband has it served on him for nothing, and if he does not pay, at the end of a fortnight he can be arrested and the order can be enforced against him for nothing, and it can all be done in six weeks.—All of that seems to presuppose that there are no reasonable grounds for the refusal to adhere.

5778. That is what prompted my first question. The court does not know until the man appears whether he is defending the case or not. If he appears and disputes it, then of course it is heard there and then on that day. Do you not think that, at any rate from the poor person's point of view, that is much better?—It has the advantage of sudden death, but it seems to me that the enquiry into what may be substantial questions might quite well be very sketchy under such a procedure.

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5779. (Dr. Baird): I would like to know the reasons for the Society's rejection of certain proposals, referred to in the Appendix, with regard to the powers of courts of inferior jurisdiction. I gather that your Society represents solicitors from all over Scotland?—That is true.

5780. Therefore you will be aware that we have had some evidence in support of the proposals, and I would like to hear your reasons for rejecting them?—The reasons for the Law Society rejecting these proposals are very substantially those which have already been given to the Commission by the Lord President. Further, it is to be noted that there was an inquiry into this matter before a Royal Commission, sitting under Lord Clyde, which reported in 1927, and everything, I think, which could be said in favour of this proposal was said in 1927, and that Commission reported against the extension of jurisdiction. My Council is not aware of any circumstances which have arisen since 1927 which would alter the basis of the Clyde Report of that year. Perhaps I might deal with any particular points that you have in mind?

5781. What I am concerned to find out is whether any hardship is caused by the fact that litigants and witnesses have at present to be brought to Edinburgh?—If by hardship you mean—is anybody denied by the present procedure a remedy which they would otherwise be able to obtain, then the answer is no.

5782. (Chairman): I have been asked by one of the Commissioners to ask this question. We observe that the only two legal societies that took the other view were those of Greenock and Paisley, and one of the Commissioners has suggested that possibly country solicitors, using the word in the sense in which Dr. Murhead used it, are more in favour of the devolution of this jurisdiction to the Sheriff Courts than the solicitors in Edinburgh. Would you agree with that, or is there nothing in that suggestion?—I should say, without hazarding any definite opinion as to the mind of country solicitors, that it would not surprise me to learn that that was so.

5783. I see that there are thirty-three legal societies in Scotland, and of those only two took the view that divorce jurisdiction should go to the Sheriff Courts. Of those thirty-three, I suppose that a large number would be what might be described as country solicitors' organisations?—Almost entirely. (Dr. Muirhead): If I may be allowed to intervene, I think that Glasgow and Edinburgh account for practically half, a little less than half, of all the solicitors in Scotland. You may take it that of the 3,500 members of our Society, there are about 700 in Edinburgh, and the remainder are outside Edinburgh. From that point of view they are country solicitors.

5784. I see, but I was rather directing my mind to the number of separate legal societies who had to consider this matter and express their views. How many societies of that kind are there (a) in Edinburgh, (b) in Glasgow, and (c) in the rest of Scotland?—Two in Edinburgh, one in Glasgow, one in Aberdeen, and one in Dundee. Generally speaking, the others are societies formed under an old Act of 1863, the Procurators in each Sheriffdom. Paisley is another city society you may say, but I think that you may take it that the opinion of the great bulk of country solicitors agrees with ours.

5785. It would appear so, because I understand that the vast majority of the thirty-three bodies which have been discussing this proposal are bodies of country solicitors, and of these bodies, only two desire the devolution of jurisdiction to the Sheriff Courts?—(Mr. Lyons): Yes, my Lord. I think that it would be probably in point for me to explain that these two societies were the only societies which recommended positively in favour of the change. There were at most two of the local societies which recommended against the change, that is over and above the Society of Writers to the Signet and the Society of Solicitors in the Supreme Courts, which were probably included in the number of thirty-three. But the large bulk of local societies made no recommendation on the question in one direction or the other.

5786. I think it is possibly not an unfair inference that if they had desired the change they would have put us a memorandum?—Indolence apart. (Dr. Muirhead): I think that it would be fair to say that the Royal Faculty of Procurators of Glasgow, which is the largest of the

societies outside Edinburgh, would not at all support the suggestion that the Sheriff Courts should have jurisdiction; we would certainly be opposed to it.

5787. You would be opposed to the jurisdiction going outside the Court of Session?—For the reasons which Lord Cooper put before the Commission, and others. (Mr. Lyons): It is perfectly correct, my Lord, that the absence of any positive proposal in favour of this extension is indicative of no great demand for it.

5788. (Mr. Brown): I would like to ask a very general question from the point of view of the interests of children. Is there any aspect of Scottish divorce law or administration where you think that these interests are not adequately safeguarded, any feature that has given you personally perturbation, or any point in connection with children that you think is worthy of particular examination by the Commission?—No, Sir, I think that the substantive law of Scotland takes due account of the interests of children in such matters as matrimonial causes, and I am not aware of any procedural alterations which might be made which would have the effect of safeguarding further than they are at the moment the interests of children. It is expressly provided in the Guardianship of Infants Act, 1925, which applies to both Scotland and England, that in proceedings such as matrimonial causes where questions of custody of and access to children fall to be decided, the paramount consideration is the welfare of the child, and any question of the respective rights of the parents takes what I might describe as a very poor second place to that paramount consideration.

5789. (Chairman): In that respect, then, the laws of Scotland and England are identical?—Exactly.

5790. (Mr. Young): First of all, Mr. Lyons, I want to clarify the position about actions of legal rights. You cannot in Scotland raise an action for divorce and for legal rights at the same time?—No, Sir, these are separate questions which are dealt with in separate processes.

5791. Is your suggestion this, that in a change of the law such as you have suggested, you should procedurally be entitled to raise an action for divorce and for legal rights at the same time, in the event of the divorce being granted?—That could follow.

5792. It seems to me that it would follow, because if you want to apply the inhibition at the beginning of the divorce, you would have to change the present procedure in Scotland by allowing this double action, which is not competent at the moment?—Not necessarily, Sir. If the pursuer in an action of divorce, who intends in due course to follow that action of divorce with an action of enforcement of legal rights, gives notice to the public by the recording of the summons of divorce in the Personal Registers, then the requirements of our proposal would be fulfilled regardless of whether action for legal rights is assimilated into the action for divorce or not. But it seems that, since the court would have to exercise a discretion in relation to legal rights or any similar provision which might be made, the best opportunity for doing that would be in the divorce proceedings.

5793. You would have an alteration of procedure by allowing a notice in the original action of divorce, which at the moment cannot be done?—That is quite correct.

5794. In considering Scottish law, which does not allow aliment after divorce, reference has been made to two classes of case, the very poor person who does not get anything, and the rich person out of whose estate a wife gets legal rights. Is there not a third class where this rule operates rather unfairly? That is the man who has no capital but who, nevertheless, has quite a big income and who, when divorced, pays nothing? Does not that represent a third class?—Assuming that the large income is derived from earnings, that would represent a third class.

5795. Out of your experience can you say whether as the result of that rule there are actions of separation brought which would be actions of divorce if this right to aliment after divorce was introduced in Scotland?—(Dr. Muirhead): I think that that is probably quite a reasonable assumption. There must be, and I think that it is the common experience of all of us. There must be

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some cases where a wife is deterred from taking an action of divorce simply by the fact that she knows that financially she cannot afford it. (Mr. LYONS): I can go so far as to say that it is not only a reasonable assumption but that it is an undoubted fact.

5796. May I refer to paragraph 2 of your memorandum? You are dealing with desertion and you say that adultery within the three years should not be an absolute bar, and you add, "except where the adultery is proved to have caused or contributed to the desertion". Is your proposal that that should merely be a defence to the action?—Not necessarily limited to a defence, properly so called, but rather I should say that it would be *per se* *judicial* to notice the existence of such an objection to the granting of a divorce.

5797. Has the pursuer in such an action of divorce for desertion to come into the court under this new procedure, and disclose his adultery, and then leave it to the court to decide whether that has caused or contributed to the desertion?—I should say so, yes.

5798. So you would in that case introduce discretion to the court?—The discretion of the court would be limited to the consideration of the question whether or not the adultery is proved to have caused or contributed to the desertion.

5799. (Chairman): With respect, surely that is not a matter of discretion, that is a matter of fact, and I should have thought that the defence to the action would be not only that the pursuer committed adultery but that the pursuer committed adultery and that adultery caused or contributed to the desertion.—It is not strictly speaking, my Lord, a discretion. The word "discretion" was actually used by Mr. Young in his question and I did not take exception to it. But it amounts to this simply, that the question of interpretation by the court is limited to interpretation of the question whether the desertion can be attributed to the adultery. It is not strictly speaking a discretion, my Lord, but it is something which the judge has to decide.

5800. (Mr. Young): It seems to me that you are putting rather a difficult burden on the court, because the defender would be the person who would be best able to say whether the adultery had caused or contributed to the desertion, and in ninety-five per cent. of the cases he will not be present in court.—Of course, the percentage might vary, according to what effect is given to our suggestion that the present legal rights should be abolished and that some other financial provisions should apply.

5801. Let us take the present percentage. The bulk of divorce cases are undefended, are they not?—That is so, and in the bulk of divorce cases the pursuer's legal rights are valuable.

5802. We are dealing with desertion at the moment, and I am trying to ascertain how the court is to know whether the adultery has caused or contributed to the desertion, when the only person before it is the pursuer, who has in fact committed adultery?—I am suggesting, Sir, that if it appears to the court in the course of the enquiry, which must in any event be made, that an act of adultery, notice of which is given to the court, might have or is proved to have caused or contributed to the desertion, then the court would be bound to take notice of it. But, in the absence of proof, the court is justified, in accordance with our proposal, in ignoring it.

5803. May I refer to what Mr. Middlecks was saying earlier? Do you not think that there is some merit in the English system of obtaining aliment and, equally important, varying aliment, in particular, in the speed with which it is done in England in comparison with Scotland?—In so far as that might be said to relate to actions of adherence and aliment, I believe that there is something to be said for it. In so far as it might relate to actions of separation and aliment, then I think that any delay that might be involved is a very necessary safeguard for the due determination of the difficult and far-reaching questions which are involved.

5804. What would you think of a compromise between the system operating in England and the present Scottish system, by adapting the procedure which we have at present in the small debt court for actions of aliment?—I should say that the summarising of the procedure for actions of aliment by adopting a procedure analogous to

that in the small debt court would not be so disadvantageous. I am not quite so convinced that the cutting off of rights of appeal in the same way as is provided for in relation to small debt cases would be an improvement on the present law.

5805. If the right of appeal were allowed, do you think that a procedure on those lines would be advantageous?—I believe that it would.

5806. May I turn to paragraph 16 of your memorandum, where you deal with decrees of presumption of death? You say that such a decree should be effective "for all purposes". I do not think you mean that. When you say "for all purposes", do you mean for the purpose of divorce and for the purpose of the Presumption of Life Limitation Act only? You really do not mean for all purposes?—I mean for all purposes which are germane to the questions which are before the Commission.

5807. I was going to refer to one type of case which was quite common during the war. In that type of case, questions of a widow's right to a war pension might arise if this proposal were acceded to.—No, it is not intended that this proposal should necessarily be related to such administrative matters.

5808. May I come now to paragraph 4, in which you discuss the question of having different grounds for non-adherence, as distinct from grounds of divorce? Would it not simplify matters, particularly in relation to solicitors advising clients, if you had as grounds of non-adherence only those grounds which were substantive grounds for divorce?—Undoubtedly, Sir.

5809. And if the law was clear on that point, then difficulties, such as have been created by the case of *Hastings*, would disappear?—I am not quite clear as to what you mean by the difficulties created by the case of *Hastings*.

5810. Putting it shortly, it is far better for the law to be certain than uncertain?—That is so.

5811. (Lord Keith): I do not think, if I might intervene, that all of the Commissioners know what the law of *Hastings* is.—If I might explain what is meant by the law of *Hastings*, it amounts to this: *Hastings v. Hastings* was a case, decided in 1941, to the effect that pre-marital intercourse, resulting in pregnancy on the part of a woman with a man other than the man whom she ultimately married, was good ground for his failure to adhere. The suggestion, as I understand it, which Mr. Young was making, is that the decision in the case of *Hastings* creates a difficulty.

5812. (Mr. Young): Has not the case of *Hastings* created difficulty in the law of Scotland in this respect, that it has been suggested that there may be grounds for non-adherence which are not grounds of divorce?—That suggestion was made in the case of *Mackenzie v. Mackenzie* as long ago as 1895, and consequently I do not think that the difficulty could be said to arise out of the decision in *Hastings v. Hastings*.

5813. Shall I say that the difficulty is perpetuated in *Hastings*?—I appreciate the point, but the Law Society of Scotland is in effect giving recognition to the injustice which would have arisen in the case of *Hastings v. Hastings* if due account had not been taken of this misconduct. We have done that in suggesting as we do, that such conduct should be grounds for nullity of marriage.

5814. I appreciate that.—And, further, we are giving recognition to the hardship which would otherwise arise when we suggest that legislation be introduced to overcome the difficulty which arose in the case of *Boydell v. Boydell*. Each of these cases dealt with acts on the part of the guilty spouse, as it were, which did not amount to substantive matrimonial misconduct. And, while it is certainly the simplest way, from the point of view of giving advice, to say shortly that nothing short of matrimonial misconduct may be grounds for non-adherence, one cannot escape the conclusion that such a hard and fast rule would give rise to cases of injustice in the future. In that connection, I might refer again to the type of circumstances which were referred to by Lord Keith as being *contra bonos mores*, or against the conscience of mankind.

31 October, 1952] Dr. J. S. MURHEAD, D.S.O., M.C., T.D., D.L., M.A. (Oxon.), LL.B., LL.D.,
Mr. HAMILTON LYONS, B.L. and Mr. G. B. L. MOTHERWELL, W.S.

[Continued]

5815. If your suggestion with regard to cruelty is not adopted, have you any view as to whether the consideration of danger of return should be retained in the cruelty case?—By "danger of return" I take it that you mean—should the pursuer in such an action acquire a vested right to divorce regardless of what may or may not happen in the future?

5816. Yes.—The attitude of my Council is relation to that is that the remedy on the ground of cruelty at the present time properly looks to the protection of the injured spouse, and it is therefore desirable that the present state should be maintained in that the law should look to the future rather than exclusively to the past.

5817. I think that the members of the Commission would be very interested to learn of the experience of any of the witnesses as to the effect of arrestment of wages. Have you any observations to make on that?—I can say that in my own experience the effect of the arrestment of a man's wages has been adverse to the ultimate interests of the wife, the creditor in a decree of aliment, in this respect, that the lodgement of an arrestment of wages frequently is the indirect or possibly the direct cause of the termination of a man's employment.

5818. (Chairman): Might I put the question in an even simpler form? Do you think that on the whole it is, or is not, a good thing to have a law under which wages can be arrested for the payment of aliment?—I think that it is a good thing that the law should be retained, because there are circumstances in which that particular provision can be operated most effectively, without disadvantage to the creditor in the decree.

5819. You think that on balance it is better to retain it?—I am quite definitely of that opinion.

5820. I am afraid that, for the benefit of those of us who are not Scottish lawyers, I must ask one question arising out of what Mr. Young has put to you. Would you turn again to paragraph 2, which deals with adultery as an absolute bar to desertion? There you suggest that in an action of divorce on the ground of desertion the adultery of the pursuer during the trimumus should not be a bar, except where the adultery is proved to have caused or contributed to the desertion. As a matter of pleading, I want to see just how that would operate. First, is it the duty of the pursuer who has committed adultery during the trimumus to reveal that fact in the original statement of claim or petition?—If this proposal were adopted, it would be.

5821. It would be the pursuer's duty to disclose it?—Yes.

5822. That being so, unless the defender appears and alleges that the adultery has caused or contributed to the desertion, that question would never arise, would it? Is it not for the defender to allege and prove that the adultery caused or contributed to the desertion?—At the present moment, my Lord, there is a quite definite obligation on a pursuer in an action of divorce based on desertion to disclose to the court an act of adultery committed during the trimumus, and this proposal would involve no departure from the present procedure in that particular respect.

5823. That I follow.—And the only difference which would be imported into the present procedure by this provision would be that it would then be for the court, after due enquiry into the effect of the act of adultery on the desertion, to say either that it was proved or that it was not proved to have caused or contributed to the desertion. Our proposition is put positively in such a way that if there are no circumstances before the court which justify the court in making a positive finding, then the court would overlook the act of adultery.

5824. But I am not thinking of a case where the defender is there and makes the allegation, I am thinking of the case where the defender does not appear. If he does not appear and the pursuer rightly discloses his or her adultery, will the court take up the matter of whether the adultery caused or contributed to the desertion, although no one has come forward to allege that it did?—The pursuer in going forward with such an action will aver, in relation to the adultery, that it did not cause or contribute to the desertion and, unless the court finds facts which are inconsistent with that averment, then the court would overlook the adultery.

5825. That answers my question. It is for the pursuer to allege the negative and it is for the defender to come forward and allege the positive, if he or she thinks fit?—Yes, Sir, but I should not go so far as to say that the onus of proof is on the defender.

5826. (Lord Keith): Might I clear up a point, Mr. Lyons, in case there is some misapprehension? At the present time, in the present state of the law, if adultery takes place during the trimumus that is an absolute bar whether it caused to the desertion or not?—That is so, my Lord.

5827. (Mr. Lawrence): May I put to you what I conceive to be the present English practice on this matter, and see how far, if at all, it differs from what your Society has in mind? As you know, in England we have the system that a petitioner, or pursuer, as you call him, has to disclose by way of the discretion statement any adultery committed by him during the marriage.—That is so.

5828. In the case that we are discussing I gather that your Society would require the pursuer equally to disclose his or her adultery on the face of the pleading?—That is so.

5829. So that so far we run parallel. The practice, as I understand it, in these cases in England is that the pursuer in those circumstances has to satisfy the court that there was an act of desertion on the part of the defender, disclose his or her own adultery, and then go on affirmatively to satisfy the court that that adultery neither caused nor contributed to the desertion. If the court is satisfied upon those matters, then ordinarily a decree follows, but if it is not satisfied that the adultery did not cause or contribute to the desertion, then ordinarily a decree is refused. Is that very far away from what you have in mind?—The only distinction, Sir, is that I should not require it to be affirmatively proved by the pursuer that the act of adultery did not cause or contribute to the desertion.

5830. You would allow the pursuer to remain silent upon that even in an undefended suit?—I should expect an averment that that was so, but I should not expect that that averment should be satisfied by full proof because it amounts to setting a pursuer in such a case to proving a negative. He has to prove a negative state of mind on the part of someone who is not before the court, and I should not think that it would be just to expect full proof of such a state of affairs.

5831. (Lord Keith): Not full proof, Mr. Lyons, but would you expect the pursuer to affirm or to swear to that averment in evidence?—Yes, my Lord, and with reference to the oath of calumny.

5832. (Chairman): So to that extent the burden would be upon the pursuer?—To that extent, yes. But what I am anxious to point out is that since we are dealing with a negative a full corroborated proof such as is required according to the law of Scotland in relation to any fact would not necessarily be demanded.

5833. (Mr. Lawrence): But, of course, as it was an undefended matter, the court ordinarily would be satisfied with the averment of the pursuer?—Coupled with evidence on oath.

5834. That is what happens in England; it is commonly, of course, done by swearing that the adultery was committed outside the knowledge of the defender.—It would appear then that in practice this rule would be in harmony with the existing English rule.

5835. (Lord Keith): I should like to explain again.—I do not want a misunderstanding; in England I understand that the court will accept the evidence of one witness?—That is so.

5836. In Scotland any material fact must be proved either by at least two witnesses, or by a witness plus facts and circumstances, and in this case what you are saying is that the court in an undefended case can be satisfied by the sworn evidence of one witness, namely, the pursuer?—That is correct, my Lord.

(Chairman): We are very greatly obliged to you for your Society's memorandum and for all the help you have given us here today.

(The witnesses withdrew.)

PAPER No. 69

FIRST MEMORANDUM SUBMITTED BY MR. HAMISH MASSON, W.S.

1. My qualifications for giving evidence are as follows. I am a Scottish solicitor and a Writer to His Majesty's Signet. I am Secretary of the Legal Aid Central Committee of the Law Society of Scotland. I am a Director of the Edinburgh Legal Dispensary. From 1942 until 1945 I was the R.A.F. Officer attached to the Legal Aid Section of Scottish Command. In 1945 I transferred to the Army and was in charge of the Legal Aid Section of Scottish Command, latterly in the rank of Lieutenant-Colonel, until the Summer of 1949. Between 1942 and 1949 I was concerned either directly or indirectly with between 20,000 and 25,000 matrimonial disputes in Service cases. The Law Society of Scotland and the War Office have authorized me to give evidence before the Commission as an individual, but *it must be clearly understood that any views which I may express are my own and do not necessarily represent the views of either the Law Society of Scotland or the War Office.*

2. My reasons for giving evidence may be summarized thus:—

(a) I am a happily married man, aged forty-five, with two sons aged seven and five, and I hold strong views regarding the importance of the family as a unit.

(b) The unique opportunity which I was given between 1942 and 1949 of dealing with the domestic problems of both Scottish and English Service personnel has led me to the conclusion that the legal system of both countries could usefully borrow from each other as regards the law of husband and wife. I deplore the parochial outlook of many members of the legal profession in Scotland, who are prepared to oppose any innovation in the law merely because it emanates from England.

(c) There are certain anachronisms and anomalies in the Scottish law of divorce which I consider should be remedied.

3. The Royal Commission has indicated that it is prepared to receive memoranda on all or any of the following questions:—

(a) What, if any, changes should be made (i) in the law of England or (ii) in the law of Scotland, concerning divorce and other matrimonial causes?

(b) What, if any, changes should be made in the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife (i) in England or (ii) in Scotland?

(c) What, if any, changes should be made in the law relating to the property rights of husband and wife (i) in England, (ii) in Scotland, either during marriage or after its termination otherwise than by death?

(d) What, if any, changes should be made in the administration of the law relating to any of the above subjects?

(e) What, if any, changes should be made in the law prohibiting marriage with certain relations by kindred or affinity?

I shall deal with these questions in turn.

A. CHANGES IN THE LAW OF SCOTLAND CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

Divorce for desertion

4. (a) "*Willingness to adhere*". Under Scots law it is necessary to prove not only that the defender has wilfully deserted the pursuer without reasonable cause and has persisted in that desertion for not less than three years but that also throughout the whole triennium the pursuer would have been willing to have the defender back. The necessity for proving "*willingness to adhere*" throughout the whole triennium is a relic of the old essential of "*privity admission*", as laid down by the Act of 1573, c. 55, which was repealed by the Divorce (Scotland) Act, 1938, and would appear to rest on the judicial authority of *Marshall*, 1939, S.C. 187. The Divorce (Scotland) Act, 1938, Section 1, merely states that it is competent for the court to grant decree of divorce

on the ground, *inter alia*, that the defender has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years. There is no mention of willingness to adhere. In my experience the necessity for proving willingness to adhere throughout the whole triennium inflicts great hardship on the honest pursuer and is a fruitful source of perjury and perjury. I can recollect scores of cases in which the pursuer was in the first instance genuinely willing and anxious for the defender to return but, as the months went by and hope faded and other considerations arose, the pursuer could not aver or prove at the end of the three years that he or she would all along have been willing to have the defender back. Possibly the best example of this situation is the reported case of *Borland*, 1947, S.C. 432 in which the pursuer was not prepared to say that after the defender had deserted him in Nevada, U.S.A., on the ground of alleged mental cruelty, he would have been willing to have her back. The court, although sympathetic, and with Lord Kerth dissenting, felt obliged to refuse decree of divorce. I see no reason why, provided initial desertion is proved and persisted in for three years, it should be necessary for the pursuer to aver and prove willingness to adhere throughout the whole triennium.

(b) *Pursuer's adultery bar to action*. In Scotland, any adultery by the pursuer within the triennium of the defender's desertion is an absolute bar to divorce proceedings based on desertion whether the defender is aware of the adultery or not. The Scottish courts, unlike those in England, have no discretionary power to overlook the offence. According to a ruling of the Council of the Law Society of Scotland there is no duty on the part of a solicitor acting for a pursuer to satisfy himself that his client has not been guilty of adultery; the solicitor's duty on this point is at an end once he has explained the law to his client. The solicitor is only guilty of professional misconduct if, knowing that his client has been guilty of misconduct, he then proceeds with the action. What happens in actual practice is that a pursuer, being advised by one solicitor that he or she has no case on account of his or her own adultery, consults another solicitor and does not disclose the adultery. I feel that this procedure begs the law into contempt and that the problem would partially be overcome by giving the Scottish court a discretionary power to overlook a pursuer's adultery provided it has not contributed to or influenced the defender's desertion. I have come across too many cases in which the pursuer's adultery was the direct consequence of the defender's desertion and where I have had to advise the pursuer that he or she had no case.

(c) *Refusal of marital intercourse*. It was decided in the case of *Goold v. Goold*, 1927, S.C. 177 that refusal of sexual intercourse over a period of three years was in itself desertion justifying decree of divorce. This decision stood for twenty-three years but was overturned by the House of Lords in the recent case of *Lennie v. Lennie*, 1950, S.C. (H.L.) 1. I consider that the effect of *Lennie* is to create hardship in a certain number of cases where the marriage has become a mockery and I would be in favour of amending legislation to have it declared specifically that, provided there is no child of the marriage, refusal of marital intercourse *per se* shall be a ground of divorce. The difficulty of proving this type of case is well known to every Scottish divorce practitioner and I feel that the Scottish law of evidence would be a sufficient safeguard against trumped-up cases. I have heard it suggested that refusal of procreative intercourse should be a ground of divorce but leaving aside the difficulties of proof, I am not in favour of it. Where a spouse's health is suffering as a result of colour interference or other method of birth control, his or her remedy is an action of divorce based on cruelty.

(d) *Conduct short of substantive matrimonial offence sufficient excuse for non-adherence by defender*. The normal defences to an action of divorce based on desertion, apart from willingness to adhere on the part of the defender, are that the pursuer has been guilty of adultery, cruelty or sodomy. I feel that the law is somewhat stringent here and that something short of a substantive

matrimonial offence should be a sufficient excuse for non-adherence on the part of a defender. As illustrations I would give the case of the wife who leaves her husband on account of his continued neglect or his filthy personal habits or the husband who leaves his wife on account of her continual nagging. The defenders in both cases would be unsuccessful in their defence. I am in favour of giving the court a discretionary power to judge each case on its merits and accept as sufficient reason for non-adherence by the defender conduct on the part of the pursuer short of a substantive matrimonial offence. It may be argued that this will lead to uncertainty in the law, but I am not impressed by this argument, as it would only be a question of time before there were sufficient reported decisions to give the profession a yardstick to work on.

Recommendations

I recommend with regard to the law of divorce for desertion that the Divorce (Scotland) Act, 1938, should be amended to the effect:—

- (a) that the court may grant decree of divorce on the ground of desertion if satisfied that the parties did not separate by mutual consent and that it shall not be necessary for the pursuer to aver or prove willingness to adhere throughout the tritium;
- (b) that the adultery of the pursuer during the tritium shall only operate as a discretionary bar;
- (c) that refusal of marital intercourse *per se* persisted in for three years shall, provided there is no child of the marriage, be desertion justifying decree of divorce;
- (d) that conduct by the pursuer short of a substantive matrimonial offence shall, in the discretion of the court, be a sufficient reason for non-adherence by a defender.

Divorce for adultery

5. *Defence that conduct of pursuer conducal to defender's adultery.* Connivance, or imbecility, is a good defence to an action of divorce based on adultery. The defender avers that the pursuer connived at his or her adultery. It is an essential of this defence, however, that there must have been active connivance on the part of the pursuer. See *Gallacher v. Gallacher*, 1928, S.C. 586 and *Hannah v. Hannah*, 1931, S.C. 275. In England, a petitioner may be guilty of passive connivance. See *Moorosi v. Moorosi* (1782) 3 Hag. Rep. 87 at p. 107. Furthermore, under English law it is open to a respondent to plead that although the conduct of the petitioner was not connivance, it was the treatment of the petitioner that convinced the respondent's adultery. I have frequently come across cases where the callous or neglectful treatment of the defender by the pursuer drove the defender to seek solace elsewhere. I consider that the doctrine of "conduct conducal" might usefully be assimilated into the law of Scotland as I do not think it is right that a pursuer should benefit as a result of his or her own misbehaviour.

Recommendation

I recommend with regard to the law of divorce for adultery that the Divorce (Scotland) Act, 1938, be amended to the effect that the court shall not grant decree of divorce in a defended action if satisfied that the conduct of the pursuer conducal the defender's adultery.

Divorce for cruelty

6. (a) *Standard of cruelty.* The Divorce (Scotland) Act, 1938, enacts that it shall be competent to the court to grant decree of divorce on the ground "that the defender has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of this Act, the granting of a decree of separation *à mensa et thoro*". The test of cruelty is always whether the pursuer can with safety to life and health resume cohabitation with the defender. See *Graham v. Graham*, 1878, 5 R. 1095 and *McDonald v. McDonald*, 1939, S.C. 173. The Scottish courts will decline to pronounce decree of divorce, even although considerable violence may have been used by the defender, if they are satisfied that there is no serious risk of its repetition. Here, I think the law lays even more than usual behind public opinion and, while I would deprecate the standard of cruelty being lowered to the absurdities of certain trans-Atlantic courts, I feel that the "life and health" standard is too high. I would be in favour of each case being

judged on its own merits, leaving it for the court to decide whether the conduct of the defender amounts to cruelty or not. I see no reason for drawing any distinction between physical and mental cruelty. The objection to removing the "life and health" standard is that it provides a convenient yardstick and that without it there would be varying standards of cruelty depending on the idiosyncrasies of individual judges. I do not think this is a sound objection; no two judges can ever be alike and there are always the appeal courts. In a short space of time the co-ordinating effect of the Inner House and the House of Lords would create a fresh yardstick of reported decisions.

(b) *Vested right to divorce.* English law differs from Scots law on the question of divorce for cruelty. In terms of the Matrimonial Causes Act, 1937, Section 2, repeated in the Matrimonial Causes Act, 1950, a petition for divorce may be presented on the ground, *inter alia*, that the respondent "has since the celebration of the marriage treated the petitioner with cruelty". The court is not concerned, as in Scotland, with whether the cruelty is likely to be repeated; all it has to determine is whether or not there has been cruelty. I think that the law of Scotland should be assimilated to that of England in this respect and that provided cruelty is proved, the pursuer should have a vested right to divorce without reference to the defender's subsequent conduct. This would reverse the decision in *Dunlop v. Dunlop*, 1920, S.C. 227.

Recommendation

I recommend that the Divorce (Scotland) Act, 1938, be amended:—

- (a) to make the standard of cruelty in an action of divorce for cruelty not the present standard of cruelty in an action of separation *à mensa et thoro* but such cruelty as in the opinion of the presiding judge entitles the pursuer to decree of divorce;
- (b) to give the pursuer a vested right to divorce provided cruelty by the defender is proved.

I would further recommend that these innovations be applied by statute to actions of judicial separation on the ground of cruelty.

Divorce for insanity

7. (a) *Voluntary patients.* Divorce for incurable insanity was introduced by the Divorce (Scotland) Act, 1938, Section 1 (1) (b). In England, a person who is receiving mental treatment as a voluntary patient may be held to be incurably insane for the purpose of divorce whereas such persons are expressly excluded under Section 6 (3) (b) of the Scottish Act. I am not in favour of assimilating the law here as I feel that the Scottish decision is the right one. I can think of nothing more pathetic than a spouse, realising his or her condition, voluntarily submitting to incarceration, and then after five years receiving a summons for divorce.

(b) *Clarification of certain statutes.* Section 6 (3) (b) of the Divorce (Scotland) Act, 1938, brings within its scope persons who are detained in England in pursuance of any order or injunction under the English Acts enumerated in the Matrimonial Causes Act, 1957. Provision has now been made by the Law Reform (Miscellaneous Provisions) Act, 1949, for the recognition by the English courts of orders pronounced under the Scottish Lunacy code, and also under that of Northern Ireland, the Isle of Man, and the Channel Islands. Section 3 of that Act is not expressly made applicable to Scotland but on the other hand Scotland is not expressly excluded from the operation of that Act as a whole and it is not clear whether it was the intention of the legislature that all the sections of that Act which may relevantly be applied in Scotland should take effect here. I think that they should be.

Recommendation

I recommend that the Divorce (Scotland) Act, 1938, and the Law Reform (Miscellaneous Provisions) Act, 1949, should be amended to make it clear that the Court of Session is now bound to recognise as incurably insane for the purpose of divorce, persons who satisfy the provisions of Section 6 (2) of the Divorce (Scotland) Act, 1938, while detained in pursuance of orders for their detention under the laws of Northern Ireland, the Isle of Man and the Channel Islands in terms of Section 3 (b) of the Law Reform (Miscellaneous Provisions) Act, 1949.

Divorce following on decree of judicial separation

8. A successful pursuer in an action of separation can generally convert the decree of separation into a decree of divorce by utilizing the evidence in the action of separation for the purposes of an action of divorce. It is my experience that the majority of wives aged, say, forty and over, raise an action of separation and aliment rather than an action of divorce, which would completely free the defender from the marriage tie. The reasons for this are sometimes vindictive but more usually economic. In Scotland, a wife on divorce (except in the case of an insane defender) does not receive any award of aliment for herself. She is only entitled to her legal rights of terce and *jus relictæ* out of her husband's estate as if he were dead. As these are rights of capital it is obvious that it does not pay a wife of past re-marriageable age to divorce her husband, unless he is a man of substantial means. I am not impressed by the argument that a wife on divorce should be no better off than if her husband were dead. Death is a misfortune; adultery, desertion or cruelty is a matrimonial offence and a husband should not be able to benefit by his own misconduct. At the same time I have been impressed by the amount of hardship that is caused to innocent third parties, i.e., the children of illicit unions, by the unwillingness or inability of wives to divorce their husbands and vice versa and I feel that there should be a compromise solution. I do not contend for one minute that the innocent spouse should be forced to divorce the guilty one but I do think that generally speaking an innocent wife should be no worse off after divorce than after judicial separation. I also think that after a period of, say, five years' judicial separation the guilty spouse should, subject to specified conditions to safeguard the interests of the children of the marriage, be entitled to apply to the Court of Session to have the decree of separation converted into a decree of divorce which would entitle him or her to re-marry.

There is a strong body of legal opinion in Scotland which is averse to the introduction into Scotland of anything of the nature of permanent maintenance to a wife after divorce, as in England. The reasons for this are partly parochial nationalism, partly a fear of the "gold-digging" wife. With the first objection I have no sympathy: the second objection is based on sounder grounds. I would be inclined to award aliment to a wife on divorce but only in the discretion of the court and having regard to the behaviour, age and responsibilities of the wife in the particular case. The award of aliment would be in lieu of the wife's legal rights on divorce.

Recommendations

I recommend that the Divorce (Scotland) Act, 1938, should be amended to have it declared that after five years' judicial separation it shall be competent for the Court of Session at the request of the defender to convert a decree of separation into a decree of divorce, subject to suitable financial provision being made for the pursuer and the children of the marriage. I also recommend that legislation be introduced to give the court a discretionary power to award a successful wife permanent aliment for herself on divorce, such award to be in lieu of the pursuer's legal rights.

Additional grounds of nullity

9. In England, in terms of Section 7 of the Matrimonial Causes Act, 1937, the following are grounds in addition to impotency on which a marriage may be annulled:—

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;

(b) that either party was at the time of the marriage of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy;

(c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form;

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

In Scotland, wilful refusal to consummate the marriage, as distinct from absolute physical incapacity or a mental state equivalent thereto, is not a ground of annulment. Neither are heads (b) and (d). For a husband wilfully

and knowingly to communicate venereal disease to his wife is cruelty justifying decree of divorce but this is not as wide a provision as head (c). I consider that the laws of the two countries should be assimilated.

Recommendation

I recommend that legislation be introduced to have it declared that the grounds of nullity specified in Section 7 of the Matrimonial Causes Act, 1937, should also be grounds of nullity in Scotland.

Act of 1600, C. 20

10. The old Scots Act of 1600, C. 20, declares all marriages null which are contracted by a divorced spouse with the person with whom they are "declairt be the sentence of the ordinar judge" to have committed adultery. The Act is probably in desuetude and it is the inevitable practice for the name of the pursuer to be omitted from the decree of divorce but, for the removal of doubt, I think the statute should be formally repealed.

Recommendation

I recommend that the Statute of 1600, C. 20, should be formally repealed.

3. CHANGES IN THE POWERS OF COURTS OF INTERIOR JURISDICTION IN MATTERS AFFECTING RELATIONS BETWEEN HUSBAND AND WIFE IN SCOTLAND**Hearing of divorce proofs outside of Edinburgh**

11. It has been suggested that because of the appointment of divorce commissioners in England similar provision should be made in Scotland for the hearing of divorce proofs outside of the Court of Session in Edinburgh by the Sheriff Substitute. I am opposed to the idea and I am not aware of any popular demand in Scotland for its introduction.

Recommendation

I have no recommendation to make under this head.

Summary disposal of aliment cases

12. In England, questions of maintenance are dealt with summarily in the magistrates' courts. In Scotland, if a wife wishes maintenance for herself and her children she requires to raise an action of separation and aliment alleging that her husband has been guilty of adultery or cruelty, or, if her husband has deserted her, an action of adherence and aliment. Although the bulk of these actions are raised in the Sheriff Courts, the actual procedure is as formal as a divorce in the Court of Session and the cost four or five times greater than an action in the English magistrates' courts. This was very forcibly brought to my notice between 1942 and 1949, when I was with Scottish Command Legal Aid Section, in relation to compulsory stoppages from soldiers' and airmen's pay following on court awards. An English soldier would only be mulcted in a few pounds of costs while his Scottish counterpart in exactly similar circumstances would be faced with his wife's expenses of £25 upwards. I would be strongly in favour of these aliment cases (including affiliation and aliment, which is outside the scope of the Royal Commission's terms of reference) being dealt with by the Sheriff Substitute in a summary court analogous to the small debt court where the expenses are trifling. As in small debt cases I would make the decision of the Sheriff Substitute final.

Recommendation

I recommend that all actions of aliment should be dealt with summarily by the Sheriff Substitutes in a court analogous to the small debt court and that the decision of the Sheriff Substitute in these cases shall be final.

C. CHANGES IN THE LAW RELATING TO THE PROPERTY RIGHTS OF HUSBAND AND WIFE IN SCOTLAND EITHER DURING MARRIAGE OR AFTER ITS TERMINATION OTHERWISE THAN BY DEATH**Aliment to wife who has obtained decree of divorce**

13. I have nothing to add to what I have said already under paragraph 8 in relation to divorce following on a decree of judicial separation, except to draw attention to the Report of the Committee of Inquiry into the Law of Succession presided over by the Hon. Lord

Mackintosh, submitted to the Secretary of State for Scotland on 9th December, 1950—Cmd. 8144. Substantially, I respectfully concur in the recommendation of the Committee in relation to property rights on divorce.

"Housekeeping money"

14. There is a strong agitation among certain feminist organisations, and fostered by the Press, that any money saved by a wife out of the allowance given to her by her husband for the purpose of meeting household expenses, should be her own property. Apart from the general observation that any wife who manages to save anything out of the household money these days must be a financial genius, I feel that this is a short-sighted policy. The average decent husband does not expect anything back from the housekeeping money; the not-so-decent husband if he suspects that the wife is saving at his expense cuts down her allowances and in the long run she is the loser.

Recommendations

I have no recommendations to make under this head.

D. CHANGES IN THE ADMINISTRATION OF THE LAW RELATING TO MARRIAGE AND DIVORCE

Publication of decrees of divorce

15. As the law stands at present, a property may be burdened by a wife's right to divorce, i.e., a life-rent of one-third of her husband's heritable estate, following on a decree of divorce in her favour. There is, however, no record of the divorce either in the Property or Personal Registers for the information of a purchaser's solicitor, who is bound to see that his client gets a clear marketable title.

Recommendation

I recommend that legislation be introduced whereby it shall be incumbent on the Principal Clerk of Session to intimate every decree of divorce in favour of a wife to the Keeper of the Registers who shall insert a notice in the Register of Inhibitions.

Date of ascertainment of tere

16. As the law stands at present, tere due to a wife on divorce is ascertained as at the date of the divorce. If tere on divorce, along with other legal rights, is not abolished in terms of the Mackintosh Committee's recommendations, I would be in favour of it being ascertained as at the date of signing of the summons of divorce. I understand that there have been instances of an unscrupulous husband disposing of his heritable estate in the interval after receiving intimation of the summons of divorce, with the sole object of defeating his wife's claim to tere on divorce.

Recommendation

I recommend that statutory provision be made for the date of ascertainment of a wife's tere on divorce to be the date of signing of the summons of divorce.

Presumption of Life Limitation (Scotland) Act, 1891

17. A finding of death made under the provisions of the Presumption of Life Limitation (Scotland) Act, 1891, has no effect upon marriage and a second marriage contracted thereafter by the surviving spouses would be null and void. See *Brady v. Murray* (O.H.), 1933, S.L.T. 534. I feel that this is a hardship. It is true that very often the petition under the Act is at the instance of some party other than the surviving spouse but I do not think this is an insuperable difficulty. Rather than the surviving spouse should have to petition the court in terms of Section 2 of the Divorce (Scotland) Act, 1938, for dissolution of the marriage and lead the evidence over again, I suggest that it would be sufficient if a simpler form of petition were introduced. The petitioner would take the oath de calumnia and give evidence in the ordinary way and would ask the court to hold the evidence under the earlier petition as sufficient evidence to entitle him or her to decree.

Recommendation

I recommend that Section 2 of the Divorce (Scotland) Act, 1938, should be amended to enable the court to accept as sufficient evidence for the purposes of that Section, the evidence in an earlier petition under the Presumption of Life Limitation (Scotland) Act, 1891.

Machinery for recovery of alimony

18. (a) In Scotland, alimony due to a successful wife pursuer for herself or children is recovered by means of the recognised methods of diligence (enforcement). These consist of arrestment of the husband's wages, poinding (attachment) of his moveable effects and civil imprisonment. The wife is, however, very much in the hands of her solicitor, as the work involved in pressing an unwilling husband for payment is out of all proportion to the remuneration, if any, which the solicitor receives. Only a practising solicitor can appreciate the trouble that is involved in collecting weekly instalments of alimony with the husband periodically defaulting. When I was with Scottish Command Legal Aid Section I was struck by the fact that in England the collection of arrears of maintenance payments would appear to be the task of the magistrates' clerk as collecting officer and not that of the wife's solicitor. If a husband defaults in his payments a judgment summons is issued by the court. Failing a reasonable excuse for non-payment, the court commits the husband to prison. I consider that such a system could advantageously be introduced into Scotland, but looking to the number of additional Sheriff Clerks Depute that would be required, I can well imagine the reaction of the Treasury to the suggestion.

(b) In the Dominions and Colonies. The Maintenance Orders (Facilities for Enforcement) Act, 1920, provides facilities for the reciprocal enforcement of orders for maintenance between England and those Dominions, Colonies, and Protectorates to which the Act has been extended by Order in Council. No such facilities have so far been provided for Scotland, due, it is alleged, to certain practical differences between the laws of England and Scotland. I consider that this anomaly should be rectified as soon as possible.

Recommendations

I recommend that legislation be introduced:—

(a) to place the onus of collection of arrears of alimony on the court through the medium of the Sheriff Clerks;

(b) to provide for Scotland similar facilities to those in England under the Maintenance Orders (Facilities for Enforcement) Act, 1920.

E. CHANGES IN THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

Exceptions to Statute 1567, C. 15

19. In terms of the Deceased Wife's Sister's Marriage Act, 1907, as amended by the Deceased Brother's Widow's Marriage Act, 1921, and the Marriage (Prohibited Degrees of Relationship) Act, 1931, there are ten statutory exceptions to the Statute 1567, C. 15, which details the persons related to each other by consanguinity or affinity within certain degrees who by the law of Scotland are unable to marry. All these exceptions relate to the dissolution of a marriage by death and it has been suggested that they should be extended to the dissolution of a marriage by divorce. I am totally opposed to this suggestion, which I consider would be an encouragement to incestuous relations before a marriage was dissolved.

Recommendation

I have no recommendation to make under this head.

General observations

20. I am prepared to give evidence in person before the Royal Commission. I have confined my observations in this memorandum to purely legal aspects but I would like to have an opportunity of stating my views on the causes of divorce and the value of efforts at reconciliation.

(Dated 13th December, 1951.)

PAPER No. 70

SECOND MEMORANDUM SUBMITTED BY MR. HAMISH MASSON, W.S.

In my principal memorandum I have dealt with some of the legal aspects of marriage and divorce and, with one or two exceptions, the recommendations which I have made follow along the same lines as those that I would expect to be put forward by the main legal societies in Scotland. I would like, however, to say a few words from the sociological angle on the causes of divorce and the value of efforts at reconciliation, principally as seen through the eyes of "a lawyer in uniform" at Scottish Command between 1942 and 1945.

1. Causes of divorce

During the war years and immediately thereafter there were certain causes of divorce that are no longer present to the same extent. The enforced separation of husbands and wives, the presence in this country of foreign allied troops and the uncertainty of the future, all contributed to broken marriages. Leaving aside these "baffle casualties", I feel that there are certain fundamental causes of divorce which are worthy of examination and in the hope that it may assist the Commission I shall endeavour to list the main heads.

(a) *The lowering sanction of public opinion.*—A very small percentage of the population held the view that marriage is a sacrament and as such is indissoluble. There is now very little stigma attached to divorce and "What will the neighbours think?" has no longer the same deterrent effect. In four out of five of the cases which I handled between 1942 and 1945 the defender was just as anxious as the pursuer for the divorce to go through and saw nothing wrong in the marriage he was dissolving. The law does not permit divorce by consent in as many words, but, short of collusion, there is nothing to prevent the nominally guilty party from being as co-operative as possible, and the difficulty is surmounted in this way.

I feel that this disregard of the marriage vows is symptomatic of the age and is due to the decline in the authority of the Church. Largely due to the Industrial Revolution and the concentration of the population in large towns, the Church is no longer the focal centre of the community. The Church has to compete with the synthetic attractions of the cinema, the radio, the dance hall and the football pool and it is losing heavily. The present generation does not draw its values from the Bible but from Hollywood and the rewards of the flesh. The insidious spreading of dilettante-materialism is, I think, the most sinister feature of our age, and I am not referring so much to the deliberate propagation of the works of Marx and Lenin as to their unconscious acceptance. Too many people have discarded the doctrines of Christianity without even substituting a code of ethics in their place. This is a problem to which the Church must find the answer. If the Church does not assert itself it will soon find marriage reduced to a mere status arising from a contract in a civil registrar's office.

(b) *The complexity of modern life.*—I do not think it can be denied that this generation lives more on its nerves than the generations before, say, 1914. We live in an atmosphere of noise and bustle. We have higher standards of material necessities. With the atomic bomb in the offing we are uncertain as to what the future holds for us. The typical disease of the age is the dualistic stress—caused by worry. Under these conditions I would expect a higher divorce rate than in, say, a placid pastoral-agricultural civilization. When nerves are frayed, tempers are short. Molehills get magnified into mountains, husband goes off to the local to drown his sorrows, while wife goes back to mother and another divorce is on the way.

Another effect of our complicated urban mode of life is the premature ageing of so many women, especially those with large families. I can recall several instances where the principal cause of the breakdown of the marriage was the fact that the wife, slaving as a household drudge, had lost her good looks and the husband had become attracted to a younger and more glamorous woman.

(c) *Sensit incompatibility.*—I have found this to be a very frequent cause of broken marriages and I have the feeling that in many other cases although not ostensibly the cause it was the root of the trouble. The difficulty usually arises from abysmal ignorance on the part of one or other of the parties. A typical example is the first approach by the husband in a manner akin to rape. Of course of sexual perversion I have come across very few but I am not inclined to lay great stress on this as in some cases a ground of divorce was already apparent and I did not question too closely.

On this aspect I may say that I am strongly in favour of facilities for pre-marriage guidance provided the guidance is given by someone competent to give it. The ideal instructor would be the family doctor of the old school but in these enlightened days where the general practitioner is being reduced to the status of a filter for the hospitals and is too busy filling up forms to attend to his patients, I fear this is too much to expect.

(d) *Happy marriages.*—Especially during the war years I found that far too many marriages were contracted without the parties knowing each other sufficiently. The sole basis of the marriage was sexual attraction—very often under conditions which were the antithesis of the life which the parties eventually had to lead. As the months went on the parties realised that they had absolutely nothing in common. I think there is something to be said for the Continental system of the formal betrothal which enables the parties to get to know one another before taking the final step. I would also be in favour of extending to Scotland the law in England whereby minors are not permitted to marry without parental consent or that of the court.

I might mention that in my experience the fact that a child is expected is not a good reason for marriage unless both parties wish it. Whether it be William Shakespeare and Anne Hathaway in 1582, or John Smith and Mary Brown in 1952, the forced marriage is not likely to be successful.

(e) *Housing conditions.*—I have been struck by the number of cases in which the marriage has broken down due to the conditions under which the parties had to live. A marriage does not have a chance if during the formative years the parties have to live with "in laws" or under alien conditions. This is especially so in Scotland where the housing shortage is even worse than that in England. I remember several cases in which the wife, from England, returned to her parents as she could not face the over-crowding of a Glasgow tenement. In fairness to many mothers-in-law I must say that the friction in many cases was due to the wife, who either would not pull her weight or did not have the tact to defer to the older woman. Until more houses are built, over-crowding will be a fruitful cause of divorce.

2. Value of efforts at reconciliation

The idea behind marriage guidance councils, welfare officers and the like is a sound one, but I think it suffers from two inconvertible defects. In the first place, unless an element of compulsion is introduced I do not see more than a fraction of unhappy couples taking advantage of reconciliation machinery and, in the second place, I do not think there are enough people sufficiently qualified to give the guidance. Let me deal with these two aspects.

(a) *Willingness to seek advice.*—The average person is unwilling to discuss the intricacies of marriage with strangers and usually prefers to suffer in silence. It is true that in these days the State controls our activities from womb to tomb but I doubt whether the people of the British Isles would countenance the intrusion of the State even into the marriage bed. Reconciliation presupposes two parties at least willing to negotiate, not just one, and unless an element of compulsion is introduced it will be found in the majority of cases that while one party is willing to submit to arbitration, the other regards any third party interference as an unwarrantable impertinence.

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(b) *Qualifications for marriage guidance.*—The ideal marriage guidance counsellor would be a combination of doctor, minister, lawyer and man of the world. He would also require the wisdom of Solomon, the guidance of Job and the hide of a rhinoceros. Unfortunately the number of persons who combine these attributes is limited. A doctor is probably the best suited to the task especially if he has more than the average knowledge of gynaecology. A minister is handicapped because he has always a sacramental axe to grind while a lawyer is handicapped by his lack of medical knowledge.

I was struck during the war years at the number of welfare officers who were unfitted for the task of reconciliation between husbands and wives. A retired colonel or the wife of the laird of "the big house" did not make an ideal marriage guidance counsellor. They did their best but they just did not have the qualifications. Their efforts would sometimes go through the welfare records as a reconciliation but it would have been interesting to

know how many of these reconciliations were of a permanent nature. Judging by the number of men who used to return for further legal advice after being referred for welfare guidance, I am inclined to be rather sceptical.

There is one aspect of reconciliation on which I hold very definite views and that is that reconciliation forms no part of the functions of either party's solicitor. A solicitor's primary duty is to his client and he must not prejudice his client's case. If, for example, he advises his client to "give his wife another chance", he must explain to his client that by so doing he condones his wife's adultery and thereby leaves himself without any ground of action if the reconciliation does not prove a success. This is an aspect of reconciliation which I found was not explained to soldiers and airmen by many welfare officers who were well aware of the legal implications of their advice.

(Dated 15th January, 1952)

EXAMINATION OF WITNESS

(MR. HAMISH MASSON, W.S.; called and examined.)

5837. (Chairman): Mr. Masson, you are a Writer to the Signet. Before we put questions to you, is there anything that you wish to add to your memoranda?—(Mr. Masson): With your permission, I would like to make a preliminary statement. As mentioned in my first memorandum, I am giving evidence today as an individual, although I am an official of the Law Society. Any evidence which I am giving does not necessarily represent the views of the Law Society. Similarly, I am also speaking from experience based on the time when I was an officer with Scottish Command Legal Aid Section, and any evidence which I give is not necessarily the views of either the War Office or the Air Ministry. I wish that to be perfectly clear.

Secondly, in my memoranda I am afraid that at times I have verged on the facetious. My apology for that is I have found from experience that occasionally a little humour drives a point home, but I can assure you that anything I have said in my memoranda is said with all sincerity.

Thirdly, at Scottish Command my experience was confined principally to the non-property-owning class, and I would ask the indulgence of the Commission not to press me on questions of legal rights. They just did not arise from my experience, and while I have certain views I do not think that any evidence that I can give on that point is of value.

Finally, there is one point which occurred to me after I had submitted my memoranda, and that is the question of legitimization by subsequent marriage. At present it is the common law of Scotland that for legitimization by subsequent marriage to operate it is necessary for the parties to have been free to marry as at the date of the conception of the child. I would remove that condition. As I see it, all that it does is to bastardize children unnecessarily. I may be old-fashioned, but I do not like seeing the sins of the fathers visited on the children.

5838. I only wish to say this as regards your last point, that I have grave doubts whether it comes within the terms of reference of this Commission.—That was initially why I left it out. I am in your hands entirely.

(Chairman): Your qualifications and your reasons for giving evidence are set out in paragraphs 1 and 2 of your first memorandum. I will ask Lord Keith to put to you any questions that he wishes to put.

5839. (Lord Keith): Mr. Masson, have you heard all the evidence given by the Law Society of Scotland this morning?—Not all of it, Sir.

5840. You have heard most of it?—Yes.

5841. Turning to paragraph 4 of your first memorandum, I think I can pass over that because I think that you and the Law Society are in agreement with regard to the abolition of the requisite of willingness to adhere?—That is correct.

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5842. (Chairman): May I ask if you have read the Law Society's memorandum to the Commission?—I was Secretary of the Committee which prepared it.

5843. (Lord Keith): You are also Deputy Secretary to the Society?—Yes.

5844. With regard to paragraph 4 (b), concerning the pursuer's adultery during the tritium, again you are in agreement, are you not, with the Law Society?—Yes, but the pursuer's adultery should merely operate as a discretionary bar.

5845. You call it a discretionary bar. That was not quite the way in which the Law Society dealt with it. You were here, Mr. Masson, when the last few passages of evidence were given?—Yes.

5846. Do you differ from the view that was expressed by Mr. Lyons that it really was a matter of proof by the pursuer that the adultery did not conduce to the desertion, and if the pursuer in an undefended action swore to that and that was accepted by the court that should be sufficient?—I agree with that.

5847. To that extent it really is not a discretionary matter for the court at all?—No.

5848. In paragraph 4 (c), you recommended that refusal of marital intercourse, continued for three years, should be recognised as desertion in the law of Scotland. You have a qualification there which I would like you to deal with because here you differ from the Law Society. You say that it should amount to desertion provided that there is no child of the marriage. Would you explain that view? First, could you tell us why the existence of a child of the marriage should make a difference?—I have the feeling, my Lord, that if there has been a child of the marriage the purpose of the marriage has, to a certain extent, been fulfilled. I am very reluctant to dissolve a marriage where there is a child or children. My reason may be illogical, but it is just the natural disinclination of dissolving a marriage where there are children.

5849. I think we can all appreciate that point of view, Mr. Masson, but take this case. Supposing there has been one child of the marriage born, say, about a year after the marriage, and thereafter there has been persistent refusal of sexual intercourse. Would you say there that the birth of that one child should be a bar to this remedy?—I would adhere to my view. If the refusal of intercourse persisted after the birth of the first child, and resulted in injury to the health of the other spouse, I would leave the other spouse's remedy to be an action for divorce on the grounds of cruelty.

5850. I think we have had very full evidence from the Law Society with regard to this question of a matrimonial offence less than such as would warrant a divorce for cruelty or adultery being sufficient excuse for non-adherence by the defender. You deal with that in paragraph 4 (d) of your memorandum. Do you feel you can add anything to that?—I do not think that I can usefully add anything, my Lord.

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[Continued]

5851. Turning to paragraph 5, you suggest there something which, I think, is new. You recognise, of course, that connivance in Scotland is an absolute defence to an action of divorce on the ground of adultery?—Yes, my Lord.

5852. But you wish to carry the matter either further and say that such conduct as would not amount to connivance in Scotland, but might be thought to have conduced to the adultery, should be regarded as a defence?—Yes, my Lord.

5853. Apart from what may be said about English law—with which I am not really very familiar—on this matter, it is a little like looking for an excuse for adultery, is it not?—I agree, my Lord.

5854. But you still think that that is an innovation that should be introduced into our law?—On a question of general morality. I really cannot put it any stronger than that.

5855. Can you give me some indication of what you would regard as conduct which would not amount to connivance in the law of Scotland? If a husband deserted his wife and left her without any adequate means of support, and the wife committed adultery, would you say that was conduct of the husband concurring to adultery?—Depending on the circumstances.

5856. I am assuming that he left her without any means of support and went away. Another man comes along, she may perhaps take him as a lodger, and adultery follows. Would you say that that was conduct on the husband's part concurring to adultery?—I would. (Lord Keith): One can see that, broadly speaking, it could be so said. There are so many things, it seems to me, that could be treated as conduct concurring to adultery. I am not very clear where we are going to begin and end.

(Chairman): I wonder if it would be of benefit at this point for Mr. Justice Pearce to say something about the law in England.

(Lord Keith): I would very much like it.

(Mr. Justice Pearce): Conduct concurring is a discretionary bar. It has never been laid down with exactitude what it is, because, in one sense, you may say that every bad act by the one party has conduced to the other party's adultery in that it has weakened that party's resistance against temptation. But in actual practice such cases are very rarely found to have been proved, for in the end the lesser acts of matrimonial misbehaviour put forward as evidence by a guilty party are generally found not to have amounted to conduct concurring. If conduct concurring is proved, as it is a discretionary bar, a judge may exercise his discretion and give a decree in spite of it. Such conduct is, however, relevant when deciding matters like the financial arrangements, where the conduct of the parties has to be considered. In England I think that we find the provision a useful one.

5857. (Lord Keith): In the light of the explanation, Mr. Masson, this is your quite definite view as to what you would like introduced into the law?—It is my very definite view.

5858. For the benefit of the lay members of the Commission, perhaps you would explain what connivance or, as it is also called, *lascivium*, is under the law of Scotland.—Connivance is the active encouragement by the pursuer of the defender to commit adultery.

5859. That is practically the language I was going to suggest to you. Now may I pass to paragraph 6? Here you are suggesting that in the present law of cruelty the law of Scotland lags behind public opinion, and you say that the "life and health" standard is too high, and that there is no reason for drawing a distinction between physical and mental cruelty. All this is a little vague, Mr. Masson, and I am not sure that you are not underestimating the commonsense of the court and its capacity to deal with every kind of circumstance that comes before it under the present law.—Far be it from me to criticise the Senators of the College of Justice, who, I know, interpret the law with the utmost latitude, but I feel that at the moment they are, shall I say, considerably handicapped by the "life and health" standard.

5860. Would you accept the standard that the Law Society suggests as a definition of cruelty? Would that satisfy you?—It would.

5861. If that is so, I do not think that I need take up an undue amount of time on this, but with regard to paragraph 6 (b) I am not quite sure that your premises are right. Speaking about the position in England you say, "English law differs from Scots law on the question of divorce for cruelty", and then you refer to the Act of 1937 and the Act of 1950 in England. You say:—

"The court is not concerned, as in Scotland, with whether the cruelty is likely to be repeated: all it has to determine is whether or not there has been cruelty. I think that the law of Scotland should be assimilated to that of England . . ."

I do not know whether you are familiar with the recent decision of the House of Lords in the case of *Jameson*?—Yes.

5862. Does not that suggest to you that perhaps your premises here are wrong, and that so far as England and Scotland are concerned, there really is not a substantial difference in the law at all, or perhaps you have not studied the case sufficiently to say?—Speaking from recollection, the House of Lords' decision in *Jameson* is comparatively recent?

5863. Yes.—I must admit I was not conversant with it at the time I wrote this. (Lord Keith): I did not think you could be, but I think I am right in saying that it was quite clearly stated that there was really no difference between the laws of England and Scotland in the matter of cruelty as a ground of divorce. (Mr. Young): I think that in fairness to Mr. Masson it should be said that the effect of the House of Lords' decision in *Jameson* was to overturn the contrary view previously adopted in the English case of *Meacher*.

5864. (Lord Keith): Regarding paragraph 7, you differ here from the Law Society. You are against the introduction of treatment as a voluntary patient as evidence of incurable insanity?—And my reason, my Lord, is perfectly logical. It is an argument of the heart rather than the head.

5865. One could say perhaps a sentimental objection?—Purely.

5866. Is there anything further you would like to say upon that matter?—No, I think what I have said explains my attitude.

5867. In paragraph 8, there is a passage that might interest members of the Commission. You say:—

"It is my experience that the majority of wives aged, say, forty and over, raise an action of separation and alimony rather than an action of divorce . . ."

That is your experience?—It is.

5868. What is the extent of your experience?—How many cases have you dealt with which support that view?—It is a little difficult separating cases, my Lord. I have dealt with thousands.

5869. Are you referring to cases which you came across when you were in the Army?—In some cases, yes, my Lord, where the Serviceman was the defender. Also in my own private professional experience.

5870. (Chairman): I suppose that in Service cases the wives are not often aged forty or over, are they?—No, not in the majority of cases, my Lord.

5871. (Lord Keith): Now here we come to what is quite an "advanced" proposal, Mr. Masson. You say that where there has been a judicial separation, the guilty party should, after a period of five years, and subject to specified conditions to safeguard the interests of the children of the marriage, be entitled to apply to the Court of Session to have the decree of separation converted into a decree of divorce. That is in line with certain submissions which we have already had from other bodies. Is this a view that you have formed upon experience of cases of this kind?—Yes.

5872. What experience is it that has led you to make this recommendation?—It is my experience of the numbers of parties who are at the moment living in sin, to use that expression, with no possibility of regularising their position, and the children born of the unions are illegitimate. Once again an element of sentimentality comes into this.

5873. There may be more than an element of sentimentality. There are the practical results arising out of the illicit union?—Yes.

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Mr. HAMISH MARSH, W.S.

[Continued]

5874. There is more than sentiment there?—I am sympathetic to the guileless wife—the guileless spouse is mostly the wife—and her position must be safeguarded, but I am equally sorry for the children of the subsequent illicit union.

5875. And on a balance of the considerations, this is the side on which you have come down?—Yes.

5876. And, of course, in that case if the divorce were granted the court would be asked to make provision by way of aliment for the guileless wife?—Yes. At the moment she would only get it for the children.

5877. Coming to your recommendation in paragraph 9, then, I think, you introduce *verbatim* the existing statutory grounds of nullity contained in the English Matrimonial Causes Act?—Yes.

5878. Here, I think, you differ from the Law Society, who support only ground (d)?—

"that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

You wish to add the other three grounds introduced into the law of Scotland?—Yes, Sir, although I must admit, my Lord, I have some doubts about ground (b). I do not know if it is quite logical to allow as a ground of annulment the fact that the defender is a mental defective or is subject to recurrent fits of insanity or epilepsy, yet to exclude such other misfortunes as cancer or tuberculosis. My recollection is that at the time of the Herbert 1881 the deciding factor was the fact that the recurrent fits of insanity or epilepsy are dangerous to the person, while a disease like cancer or tuberculosis is not. As I say, I have some doubt, but, on balance, as much for the sake of tidiness as anything else, I would adopt the whole Section from the English Act.

5879. I was going to ask you about another point under ground (b), namely, the provision that either party was at the time of the marriage of unsound mind. Now, of course, by the common law of Scotland, and I should have thought also by the common law of England, insanity at the time of marriage would render the marriage null.—There are degrees of insanity, my Lord.

5880. You mean that there might be lucid intervals?—Barely.

5881. I think, Mr. Marsh, that we can pass over paragraph 10.—Before we depart from paragraph 10, there was an omission on my part there. I recommended that the old Act of 1660 be repealed. There is also the old Scottish Act of 1592.

5882. There you and the Law Society are in agreement?—Yes.

5883. That will be noted, and you are also in agreement with the Society on the question of the hearing of divorce proofs by the Sheriff's Substitute?—Yes.

5884. You raise a point under paragraph 12 which has been referred to before on several times, and that is that the procedure for recovering aliment by a wife in Scotland should be dealt with in a simpler and more summary manner, and you suggest the adoption of the procedure of the small debt court.—I would be in favour of that.

5885. Would you agree with what was said by the Law Society that that should be subject to a right of appeal which does not exist in the ordinary small debt court?—No, my Lord, I do not agree. I think that the right of appeal would defeat the whole object.

5886. Suppose that the action is not an ordinary action for adherence and aliment but is an action for separation and aliment. That is a more serious step, because the decree of separation is a permanent decree, is it not?—Yes.

5887. And not only that, but it can found the basis for a subsequent action of divorce?—Yes.

5888. In that case would you think it was suitable to have that process dealt with in a small debt court?—I would draw a distinction. If there is any question other than the pure question of aliment I would prefer it to be dealt with in the ordinary Sheriff Court.

5889. I do not have anything to ask you on paragraphs 13, 14 or 15, and, so far as paragraph 17 is concerned, I think that your recommendation accepts what the Law Society has accepted in its memorandum, namely, that

what was used as evidence in the one process should be available as evidence in the other?—Yes.

5890. So far as paragraph 18 is concerned, you rather favour the English procedure of making the recovery of aliment the business of the court or an official of the court?—I do, but I would retain the existing Scottish forms of diligence.

5891. In other words, you would retain the arrestment procedure?—Yes.

5892. Would you not agree that if this change were to be considered, the Commission would have to have the views of the Sheriff Clerks, as they would be very much affected by this new procedure?—I agree, my Lord, and I know what their answer would be. They would say, "There would have to be more of us to do the job".

5893. I think there is no doubt that they would certainly say that. Do you think that there should be more of them in order to carry out this change?—I do not see how they could do the job unless there were additional ones.

5894. And there would have to be a pretty substantial increase in numbers, would there not?—Certainly in the industrial part of Scotland.

5895. I was thinking of Glasgow?—Yes.

5896. In spite of that, do you still stand by this proposal?—I still stand by it, my Lord, because, speaking in a quasi-official capacity, I think of the amount that I am paying out at the moment to solicitors for the purpose of enforcing decrees which have been obtained under the auspices of legal aid. That would no longer arise if enforcement became the function of the court.

5897. As regards paragraph 19 of your memorandum, you are opposed to the Law Society in this matter of marriage with a divorced wife's sister?—I must plead guilty here, my Lord. I am afraid that I was unaware of the fact that the prohibition of intimacy with a sister-in-law or a brother-in-law had been removed by the 1936 Act, but I would like my recommendation to stand.

5898. I am not quite sure you have made it clear to the Commission as to what the misunderstanding was?—I have said:—

"I am totally opposed to this suggestion, which I consider would be an encouragement to incestuous relations before a marriage was dissolved."

In actual fact such a relationship is not incestuous. I would insert the word "quasi".

5899. "Quasi-incestuous", but in spite of that discovery you are still opposed to the suggestion that a man should be able to marry his divorced wife's sister, or that a woman should be able to marry her divorced husband's brother?—I listened with some interest this morning to the arguments relating to the introduction of an emotional factor into marriage which previously was not there.

5900. And that has helped to convince you further, and you still stand by your original view?—Yes.

5901. As regards your second memorandum, I do not think I need take up much of your time. You set out in the first part of the memorandum, under paragraphs 1 (a) to (e), what you consider to be the existing, or many of the existing, causes of present-day divorce. As regards the second part of your memorandum, which deals with reconciliation, the gist of this is that you are against the suggestion that conciliation should be introduced into matrimonial disputes?—I am sceptical as to the results in the light of my own experience.

5902. And therefore you are not prepared to recommend that reconciliation procedure should be introduced into Scotland as part of the law of divorce or of matrimonial disputes?—That is correct.

5903. (Chairman): Lord Keith has dealt with all the matters which I had noted to raise except one, and that arises on paragraph 8 of your first memorandum, where you make the suggestion that the guilty party should, after five years' judicial separation, and subject to specified conditions to safeguard the interests of the children of the marriage, be entitled to apply to the Court of Session to have the decree of separation converted into a decree of divorce. I quite appreciate, and I am sure we all do, the reasons which may have led you to make this suggestion, but I would like to call your attention

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MR. HAMESH MASON, W.S.

[Continued]

to one or two matters, without repeating all the arguments which have been very fully canvassed against this proposal. First, is there not a certain inconsistency in what you say here? Earlier in paragraph 3 you say:—

"I do not contend for one minute that the innocent spouse should be forced to divorce the guilty one..."

Then you go on to suggest that the guilty party should have this right. Is not that in effect forcing the innocent wife to have her marriage dissolved? How do you reconcile these two statements? The innocent spouse is, in effect, being made to give up her status and to be divorced against her will—I see the inconsistency, my Lord.

5904. There is no doubt, is there, that if this proposal were accepted a wife, for example, would be compelled to give up her status as wife at the end of five years' judicial separation, even if she should have the very strongest objections to it, whether religious or otherwise?—I think that the fact to be taken into consideration there, my Lord, is the time lag. I am not suggesting that the defender should have this right immediately following on the decree of separation. A period should elapse, three or even five years, and that always allows an opportunity for reconciliation. I do not think what I am suggesting is quite on a par with forcing the innocent pursuer to divorce the defender *ab initio*.

5905. Not *ab initio*. She has chosen to have the judicial separation, but you say in one breath, "I do not contend for one minute that the innocent spouse should be forced to divorce the guilty one", and then you go on to suggest that she be forced to divorce the guilty one. Against her will, after five years have expired, the guilty party can compel her to be divorced. However, you see the point?—I see the point.

5906. Again, may I turn to your observation, "But I do think that, generally speaking, an innocent wife should be no worse off after divorce than after judicial separation"?—No worse off financially.

5907. But is she not almost bound to be worse off financially? Let me give you two examples. First, she will lose her right to a pension as a widow, will she not, if she survives her husband, because in fact the widow will be the second wife who may have been his mistress for some time?—That is a factor which should be taken into consideration by the court when converting the decree of judicial separation into a decree of divorce.

5908. And further, if after the divorce the husband remarries and has another family, then whatever provisions are made by the court for the first wife, presumably the husband does not regard her with the same affection, and the court order is rather difficult to enforce. The first wife has no longer got the status of a wife and the husband has a second wife and children to look after, whom he regards as his first care. Will that make no difference to the wife divorced against her will?—I agree that from the practical point of view the first wife will be worse off.

5909. May I put one last point, without repeating all that has been said on the subject? This proposal has the unusual result that a guilty party is allowed to take advantage of his own wrong. Because he has committed a matrimonial offence he is allowed to get a divorce. Is not that rather contrary to the principles of both English and Scottish law?—I agree. That is perhaps the most radical suggestion in my memorandum. As I said before, my Lord, it is based largely on reasons of sentimentality and on having seen the misery that is created among the second families.

5910. (Mr. Justice Pearce): As it is the court on whom you rely to see that the first wife is provided for, I should like to put to you some of the difficulties that do result from this. Do you realise how infinitely more difficult it is to procure maintenance for the first wife when the husband has re-married?—I do.

5911. And I am not exaggerating when I put it in those terms?—Might I enlarge on that, again speaking in a semi-official capacity? It is my duty to try to recover costs awarded against a defender in legal aid cases, and the question of costs is usually tied up with the question of alimony. We write to the defender and say, "What proposal have you to make?" We are prepared to consider anything reasonable, and the answer we normally

get back is, "Well, I am living with the other woman, I have married her now and had a couple of children", and I just have to accept the position. I know I cannot get blood out of a stone.

5912. And it would be fair to say that it becomes infinitely harder to procure maintenance for the wife when there has been a second marriage?—Yes.

5913. And also would your experience lead you to find that this is increasingly a world in which pensions are of importance compared, shall we say, with twenty years ago?—I would agree wholeheartedly.

5914. There are many more people who have very little in the way of savings but have quite substantial pension rights of some sort?—Yes.

5915. And, of course, you deprive the first wife of that. You say that you see the unhappiness caused to people who are merely living together when they wish to marry, but do you also see a very large amount of unhappiness caused to the first wife and the first family, who cannot get any support from the husband who has re-married?—Yes.

5916. And another difficulty one has got to look at in this case is this. Not only do you rob the first wife of the hope of reconciliation—which admittedly has become rather thin after five years—but you rob her of the hope of reconciliation from the day after the decree, because the woman with whom the husband is living can keep him up to scratch by pointing out that in five years she would have a right to be his wife. Do you agree?—I agree.

5917. May I return to paragraph 4 (c)? On the question of wilful refusal of marital intercourse, would not what you want be more conveniently obtained if you were to adopt the law as to constructive desertion and count as desertion conduct of one party that completely broke up a marriage? Assume for the moment that you were to adopt that. Then refusal of marital intercourse falls easily into that scheme, because if, in fact, it is wilful and is of such importance to the parties that it does disrupt the home, then you get the position where the party who refuses can be divorced for desertion. Do you follow?—Yes.

5918. Under the rule as to constructive desertion you get a divorce on the ground of wilful refusal of sexual intercourse only if it is a serious factor that does, in fact, disrupt the home, and that would be right, would it not?—Yes.

5919. But there are many cases, particularly of people advanced in years, where wilful refusal is a source of annoyance rather than an act which is sufficient to disrupt an established home. Would you agree?—I agree.

5920. And there are really many men and women who would put up with it for the sake of family life and go on living together with that annoyance?—I agree.

5921. And it would, of course, be unfortunate if in that class of household spouses were led into issuing a petition for divorce on wilful refusal, which would otherwise never have caused them to disrupt the home and go apart?—I follow.

5922. Your proposal appears to make it rather too easy in the border-line case for a wife, for example, to enjoy the advantages of a home for so long and also to enjoy the advantage which would come to her as a divorced wife, if she wishes such an advantage. Whereas if you were to make wilful refusal a ground for constructive desertion, you would then see whether it genuinely did break up the home.—The question would then be—did the refusal materially contribute or not to the break-up of the marriage?

5923. That is, I suggest, what you really want to find out. And the best way of finding it out is to see if it does break up the home, and if it does break up the home then it becomes a ground for constructive desertion. Would you accept that as meeting the point that you really want to deal with?—Yes.

5924. (Mr. Mason): May I turn to the proviso in your recommendation, that where there is a child this should not be a ground of divorce? Would you agree to withdraw that proviso having accepted what Mr. Justice Pearce put to you?—Yes.

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Mr. HAMISH MARSH, W.S.

[Continued]

5925. I want to ask you a question or two about reconciliation, because I appreciate that you have had very great experience in handling the type of divorce case where perhaps there is a question of whether reconciliation could be effected. In your experience in the Forces was reconciliation available to the parties?—Yes.

5926. What was your experience, how did it happen?—I remember many men who came to me in connection with domestic problems. I formed the impression that their problems at that stage were not legal ones. They were matters for the welfare officer or one of the welfare organisations like S.S.A.F.A. I used to refer these men, and some women, to the appropriate welfare authority. It was amazing the number of these men and women that we saw again.

5927. (Chairman): "That you saw again"?—They came back to us for legal advice.

5928. (Mr. Marsh): Reconciliation had failed?—Had failed, or had only operated temporarily.

5929. Not that the men had refused to take advantage of the services?—No.

5930. But you found no hesitation in the offer of the reconciliation service being accepted by the man?—Subject to this. I had to explain to a man back from overseas, whose wife had been unfaithful during his absence, that if he went back to live with his wife he therefore condoned her adultery, and would not thereafter be able to raise divorce proceedings. The average soldier or airman, when he heard that, was not prepared to take the risk. I did something which a good many welfare officers did not do. I explained his legal position to him.

5931. Now, Mr. Marsh, assume that there was a welfare officer attached to the Court of Session who would be publicly known, and that his services were not compulsory, but that the judge could invite the parties to use him or could refer the case to him for a report. Do you think that that would be a good service in Scotland?—I would not be enthusiastic about the suggestion, Sir. I think that when a case has reached the stage of the Court of Session it has passed the stage of reconciliation. There are certain odd cases, but, by and large, the parties are past the question of reconciliation.

5932. Let me put this to you. Assume that it was the law that before a petition for divorce was lodged in the court, there was an obligation upon the lawyer to inform the parties of the conciliation officer, invite them to go and see that officer, and make some record on the court papers presenting the petition that that had been done. Do you think that that would result in some reconciliations?—In about one per cent., possibly.

5933. That is your view from your experience in dealing with a very large number of cases?—Yes.

5934. (Mr. Maddocks): Mr. Marsh, might I refer to paragraph 6 (b) of your first memorandum, in which you deal with divorce for cruelty? Is not the object of that paragraph to get rid of the decision in *Dunlop v. Dunlop*, which requires proof in Scotland that cruelty is likely to continue?—That is so. The object is to give a vested right to divorce if cruelty has occurred.

5935. (Lord Keith): Might I intervene for one moment? Did *Dunlop v. Dunlop* decide that the pursuer had to prove positively that cruelty would continue? Was it not rather that the defender in *Dunlop v. Dunlop* had proved that cruelty would not continue. He had proved that it was due to drunkenness and he had proved, had he not, to the satisfaction of the court . . . —That he was reformed. (Lord Keith): That he was reformed. There was no specialonus put upon the pursuer. It was that the defender had had such an onset of showing that all threat and danger of cruelty had now vanished.

5936. (Mr. Maddocks): That is what you want to get rid of?—Yes.

5937. I would like to ask you a question about the machinery for recovery of alimony. I did ask Mr. Lyons, of the Law Society, a few questions about this, but I still do not quite understand your procedure. Suppose that a woman in Edinburgh obtains a maintenance order against a man who goes to live in Aberdeen, and the man, after a period, does not pay. That woman consults a solicitor in Edinburgh under her existing legal aid certificate?—She consults the solicitor who acted for her in the legal proceedings for which legal aid was granted.

5938. In Edinburgh?—Yes.

5939. But the court in Scotland which can enforce that order, and the only court which can enforce that order, is the court in Aberdeen?—That is so, the defender being in Aberdeen.

5940. So that the solicitor in Edinburgh has to instruct an agent in Aberdeen to start proceedings in the Sheriff Court in Aberdeen?—Not necessarily, initially. He can instruct a sheriff officer in Aberdeen to serve a charge on the defender. A charge is, I might say, a preliminary warning.

5941. A charge does not summon him to appear before any court?—It is a warning, or he can instruct a sheriff officer to arrest the defender's wages in the hands of his employer.

5942. But can you arrest wages before you have got what we in England would call a judgment or an order of the court?—Yes.

5943. On the mere evidence of the woman that she has not received the money?—Yes.

5944. (Chairman): You must have an initial decree, must you not?—Yes.

5945. (Mr. Maddocks): Let us take a concrete case; the man is in arrears, say, to the extent of £50. Surely before an arrestment is made, some court has to ascertain whether or not the man is in arrears to the extent of £50, has it not?—The wife holds a decree for almost.

5946. She has got a decree, let us say, for £3 a week, which is payable, I gather, in Scotland by the defender to her personally. There is no system of paying it to the court, as there is in England. It is payable to her personally?—Yes.

5947. She goes along and says, "He has not paid, and he owes me £50". Surely some point has to be ascertained whether or not he does owe £50 before any arrestment warrant can be issued?—No. (Lord Keith): The way in which it is ascertained whether the man is in arrears to the extent of £50 or not, is that after the arrestment is made, the man whose money has been arrested can appear in a subsequent process and say, "This is a bad arrestment, because I was not due £50 at all. I had paid it all up to date". (Mr. Maddocks): Would you tell me what happens to the money in the meantime, before the case is decided? (Lord Keith): The money is retained by the employer.

5948. (Mr. Maddocks): He has an order nisi?—The arrestment is merely a looking diligence, an inchoate diligence.

5949. The solicitor in Edinburgh instructs somebody in Aberdeen to issue an arrestment order against the man's wages in Aberdeen, that is one way?—We are speaking of arrestment, which is one form of diligence.

5950. (Mr. Young): I would like to clarify the position on the system of arrestment. If you get a decree in any Sheriff Court in Scotland you can take it to any other Sheriff Court in Scotland and get it extended?—That is correct.

5951. Extended into that area. Accordingly, if you get a decree in Edinburgh, but the man shifts to Aberdeen, you simply send the decree up to Aberdeen. First of all, you get it extended to operate in the Aberdeen area. Having done that, if the man is in arrears you can then instruct for an arrestment in Aberdeen?—Yes.

5952. And the man then has two courses. He either says to his employers, "Yes, I am due that money, pay it over", or he can keep quiet and say nothing, in which case you have then to use another action called an action of furthcoming, which makes the money forthcoming. At that point the husband then has an opportunity, as Lord Keith has said, of coming forward and saying, "It is a lie, I am not due £50, I have paid it all". Would you also agree, Mr. Marsh, that there is a very material protection to a husband, in that if the solicitor instructs the arrestment of the man's wages when, in fact, there is no money due under the decree, he is liable in law for damages to that man?—That is correct.

5953. Just one point. I wanted to know if you had perhaps too quickly agreed with something put to you earlier by Lord Keith. You agreed that you would have

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Mr. HAMISH MASSON, W.S.

[Continued]

a summary procedure only in actions of adherence and aliment, and not in actions of separation and aliment?—In questions of aliment alone.

5954. Let me get this clarified. You cannot have an action for aliment alone in the Sheriff Court unless it is tagged on to adherence or separation?—No.

5955. Did you not find in your experience, as one of the officers in an Army Legal Aid Section, that there was a very real difficulty in aliment cases? Did you not find that, when you were trying to vary the award which had already been made, it was a very expensive and delaying process?—I found that the whole question of expense in alimentary actions compared very unfavourably with England, especially from the point of view of compulsory stoppages from soldiers' and airmen's pay.

5956. Would it not have been much better if we had had a simple, summary procedure in all cases where it was required to vary the aliment?—It would.

5957. (Lady Bragg): May I ask you one short question, Mr. Masson? If the law were changed, so that if a genuine attempt at reconciliation was made by a couple but failed, then that failure would not prejudice the issue, would you then be ready to welcome some sort of reconciliation agency?—I am, how shall I put it, rather suspicious of reconciliation officers, because the number of people who are qualified to act in that capacity is so limited. I have enumerated in my second memorandum the attributes of a reconciliation officer, and personally I have come across very few people who are fitted for the task.

5958. Do you think, then, that nobody should intervene to help a couple at any stage?—I would provide facilities for reconciliation, but I would not have any element of compulsion, any element of interference in individuals' private lives. I am tired of the Welfare State and of our lives being regulated from the cradle to the grave.

(Chairman): Thank you very much, Mr. Masson, for your memorandum, and for your attendance here today.

(The witness withdrew.)

(Adjourned to Monday, 3rd November, 1952, at 10.30 a.m.)

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PAPER No. 71

MEMORANDUM SUBMITTED BY THE FACULTY OF ADVOCATES

1. The Divorce (Scotland) Act, 1938, 1 & 2 Geo. 6, Ch. 50 (hereinafter referred to as "the 1938 Act"), should be amended so as to include a proviso to Section 1 in the following terms: "Provided also that, where the ground of action is desertion, the pursuer shall be entitled to decree provided that he or she satisfy the Court that he or she was willing to adhere to the defender at the date of the desertion, and that he or she has not been called upon and refused without reasonable cause to adhere to the defender during a period of three years thereafter".

Reasons

The Faculty of Advocates are impressed by the temptation to perjury which is a result of the law as laid down in *Macaskill v. Macaskill*, 1939, S.C. 187. It is not in human nature to suppose that there are many pursuers who, having suffered the indignity and injury of a wilful desertion without reasonable cause, are willing thereafter to receive back a spouse who has shown no inclination to return. There may be cases in which such pursuers, bound as they are as a condition of success to swear that they have for three years been willing to cohabit with the defender, give evidence which is untrue. This consideration obviously weighed heavily with the court in *Reff v. Reff*, 1940, S.C. 229, and, 1941, S.C. (H.L.) 5. The decision in *Macaskill* was referred to in the House of Lords in *Reff* (Lord Simon L.C. at 12, Lord Thankerton at 23, Lord Wright at 30, and Lord Merriman at 39). The House gave no opinion on it, although Lord Merriman clearly disapproved of it, and Lord Thankerton, after considering the "evil" which, in his opinion, was remedied by the Act of 1938, said: "It is unnecessary to decide whether this hardship still subsists in respect of the triennium, as was decided in *Macaskill*". That there is a real hardship (in the sense of the denial to an honest witness of what is readily granted to a perjurer) is seen from the case of *Borland v. Borland*, 1947, S.C. 432, where divorce for desertion was refused, inevitably as the law now stands, to a Scotsman whose deserting wife had within the triennium obtained a divorce against him in the United States. He honestly said that after the divorce he was not willing to adhere. If he had untruthfully said that he was, he would have been granted a decree. This is the type of situation which Parliament seems to have intended to remedy by the Act of 1938, the object of which has to some extent been frustrated by the failure of the legislature expressly to free the law from the older conceptions embodied in the 1861 Act. The present recommendation, if adopted, would enable

the fact of desertion to be ascertained by the courts without placing on them what is in practice the impossible task of enquiring into the state of mind of the pursuer during the triennium.

2. An examination has been made of the Matrimonial Causes Bill, 1951, which provides for divorce at the instance of either spouse after a separation of not less than seven years. It is frankly stated in the explanatory memorandum to the Bill that this proposal introduces a new principle of law, namely, that divorce should be considered as a remedy not for an injured spouse but for a marriage which has broken down. The Faculty, on the ground that this proposition primarily involves questions of social and religious policy with which they are not in a corporate sense concerned, do not offer any recommendation on this question. They do, however, draw attention to the fact that in many cases where the marriage has in fact broken down, and no remedy in law is open to the spouses, a spouse is tempted to bring an action on grounds which are not genuine, or to commit a matrimonial offence for the purpose of procuring a dissolution of the marriage.

3. Legislation is required to the effect that, where a wife has by artificial insemination been impregnated from the seed of her husband, neither he nor she can thereafter have the marriage annulled on the ground of her husband's impotence.

Reasons

While the most curious feature of the case of *R. E. L. (otherwise R.) v. E. L.* (1949) P. 211, namely, the bastardisation of the resultant child, was remedied by Section 4 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949 (not repealed so far as extending to Scotland), it seems to be an anomaly in the law that a fruitful marriage can be annulled on the ground of impotence of a spouse.

4. Legislation is required to the effect that the voluntary impregnation of a wife by artificial insemination from the seed of a stranger without the consent of the husband is to be deemed to be adultery.

Reasons

The existing definition of adultery, namely, sexual intercourse between a married person and a stranger to the marriage, was arrived at before artificial insemination had been brought into practice. Obviously no greater injury could be done to a husband and his legitimate

children than by the illicit introduction into the family of children not his own, whether by means of sexual intercourse or by an artificial substitute therefor.

5. It ought to be a ground for declaring a marriage to be null, that the wife was at the time of the marriage, unknown to the husband, pregnant by another.

Reasons

This proposal is contrary to the rule laid down by Seven Judges in *Lang v. Lang*, 1921, S.C. 44, overruling the case of *State v. Stein*, 1914, S.C. 903. On the other hand, it is understood to be consonant with the laws of France, Germany, Austria, some of the United States, and, since 1937, England. In England, a similar provision is now dependent upon the Matrimonial Causes Act, 1950, Section 8 (1) (d) (hereinafter called "the 1950 Act"). It is the opinion of the Faculty, that while there is no reason to suppose that the law as laid down in *Lang* was incorrect, the decision displays an anomaly when the results upon family life are regarded. Just as adultery by a wife may cause confusion of the family by the introduction thereto of strangers to the marriage, so the same result attends the fraudulent concealment of pregnancy to another, and the consequent misnomer of the progeny of the marriage by one who in fact is a bastard.

6. The Faculty recommend that the other grounds of nullity specified in Section 8 (1) of the 1950 Act, i.e., (a) non-consummation of the marriage owing to the wilful refusal of the defender, (b) that either party was at the time of the marriage of unsound mind, or a mental defective, or subject to recurrent fits of insanity or epilepsy, and (c) that either party suffered from communicable venereal disease at the time of the marriage, be made grounds of nullity in Scotland. These grounds were introduced into England by the Matrimonial Causes Act, 1937. It is considered undesirable that there should be decided in Scotland matrimonial remedies which are allowed in England. It is possible that this situation may give rise to the converse of what was said to be the practice before the 1937 Act was passed, namely, persons acquiring a Scottish domicile in order to obtain the advantages of a more lenient consistorial code.

7. The law should be amended to the effect that a spouse may be held to be incurably insane if he or she has been undergoing treatment as a voluntary patient, and not only if he or she has been under care and detention by order of the Sheriff.

Reasons

The Faculty consider that, since a person who is undergoing treatment as a voluntary patient may equally be incurably insane as a person who is under care and detention, there is no legal justification for confining the definition of incurably insane to the latter class.

8. The Act, 1600, c. 20, which forbids the marriage of a divorced spouse with a person "with whom they are declared, by sentence of the ordinary judge to have committed the said crime and fact of adultery", should be repealed.

Reasons

The Act may be in desuetude, although Lord Fraser says it is not. The Act is in practice evaded by omitting the third party's name from the decree. If its insertion could be insisted upon by the pursuer, remarkable and revolutionary consequences would follow.

9. The Faculty considered the question whether marriage should be permitted with a divorced wife's or husband's sister or brother. They decided to make no recommendations, since this is a social rather than a legal question. There do not appear to be any objections to the proposal of a purely legal nature.

10. The Faculty do not recommend that the jurisdiction of the Sheriff Court be extended to cover consistorial actions not now competent before that Court.

Reasons

(a) The Sheriff Court has at present no jurisdiction in cases of (i) declarator of marriage, (ii) declarator of nullity of marriage, (iii) declarator of legitimacy, (iv) declarator of bastardy, (v) divorce, (vi) actions of putting

to silence. This is a consequence of Section 5 (1) of the Sheriff Courts (Scotland) Act, 1907, whereby the Sheriff Court is denied jurisdiction in actions the direct or main object of which is to determine the personal status of individuals. There remains with the Sheriff Court jurisdiction in cases of separation and aliment and adherence and aliment. There have also been cases, for example, in connection with pauper settlement or workmen's compensation, where it has been necessary to decide questions of potency or validity of marriage as ancillary to the principal question at issue.

(b) An action of divorce, being an action involving the status of the parties and having serious effects on family life, ought to be under the supervision and control of the Supreme Court having jurisdiction over all Scots men and women. Actions involving the status of individuals also involve the public interest. The practice of confining such actions to the Supreme Court tends to emphasise this fact, and to elevate such actions into a category different from that of pecuniary disputes. The Faculty are of opinion that the present practice is in the interests of the community as a whole, and should not be altered. There is, further, room for doubt whether a decree of divorce pronounced in the Sheriff Court would be regarded as a decree *in rem*.

(c) The Faculty have not heard of any general demand for the extension of the jurisdiction of the Sheriff Court in this direction and experience does not suggest that it is desirable. The jurisdiction of the Scottish courts in consistorial cases depends upon the domicile of the parties. There is thus a uniform law and practice and a single forum for all Scotsmen in consistorial cases. The jurisdiction of the Sheriff Court does not and cannot depend on domicile.

If divorce were competent in the Sheriff Court, it would commonly arise that a pursuer would be obliged to bring his case in a remote Sheriff Court which happened to have jurisdiction over the defender. This might, in a desertion case, not be the court having jurisdiction in the place where the married life had been lived, and the transportation of witnesses would be inconvenient and expensive.

(d) It is by no means certain that an action of divorce, in which the greater part of the expense is commonly occasioned by the citation of witnesses, would be cheaper in the Sheriff Court.

(e) In a populous Sheriffdom, the addition of a general consistorial jurisdiction would overload the already congested Rolls of Court, and occasion serious delays in all forms of litigation.

11. Upon the divorce of a wife, the husband (pursuer) ought to have a claim upon her estate for *jus relicti*, as on her death.

Reasons

Under the present law, on the divorce of a husband, the wife (pursuer) has a claim for *jus relicte* upon his estate, as on his death. There appears to be no logical reason why the converse should not apply. The present law was laid down in *Edlington v. Robertson* (1895) 22 R. 430, a case remitted under the British Law Ascertainment Act, 1859, by the High Court of Justice in England, and, in accordance with the usual practice, the court answered the questions put without delivering opinions.

12. It is recommended that the guilty party to a divorce action should be liable to aliment the innocent party after decree of divorce. This liability is in addition to, not in substitution for, the liability of a divorced spouse under existing law. The recommendation is subject to the following provision:—

(a) The liability to the innocent party should not exceed an amount which in the opinion of the court is reasonable aliment in the circumstances, having regard to the means of the parties, including the value of any legal rights, their station in life at the date of the decree, their family responsibilities, and their potential earning capacities.

(b) In the original decree awarding aliment, power should be reserved to vary the amount of aliment payable from time to time or to terminate the payment on the application of either party on proof of change of circumstances.

(c) In any subsequent decree awarding, varying or terminating the aliment payable, the right of the court to vary the terms of that decree should be reserved.

(d) If no award of aliment is made in the decree of divorce, power should be reserved to the court to award aliment to the innocent party on the subsequent application of that party on proof of change of circumstances.

(e) The innocent party's right to aliment from the guilty party should cease on re-marriage of the innocent party.

Remarks

The present law is inequitable in the following respects:—

(a) The present law, which restricts the claim by an innocent spouse for support by the guilty spouse, after divorce, to a claim upon capital, is not in accordance with the requirements of modern conditions. In the great majority of cases the defender, although perhaps in receipt of a substantial income, has little or no capital, and real hardship is caused to a wronged spouse who may have to choose between foregoing a right to divorce and penury after divorce. It is not proposed that the present capital rights of innocent spouses should be altered, and the awarding of aliment is proposed to be in the discretion of the court, in order to deal with cases where these capital rights form an adequate provision for the pursuer, and to ensure that no undue hardship is caused to the defender. It is not thought that the court would be occasioned any greater difficulty in exercising this discretion than in fixing the capital or income provision to be made for an insane defender after divorce—see *Adamson v. Adamson* (O.H.), 1939, S.L.T. 272.

(b) According to the existing law of Scotland only the innocent party has any claim on the estate of the other on divorce. This is considered to be preferable on grounds of equity to the English rule that a husband is always liable for the maintenance of his wife after dissolution of marriage, vide *Matrimonial Causes Act, 1950, Ch. 25, Section 19 (2) and (3)*. The distinction is deep-seated in respect that the Scottish principle is that the guilty spouse forfeits all claims against the other on committing a matrimonial offence. It is not considered that this principle should be departed from.

(c) No change is recommended as regards existing financial rights and duties of the spouses where incurable insanity is the ground for divorce under the *Divorce (Scotland) Act, 1938, Section 2*.

(d) The right of aliment after termination of marriage should be limited to marriages terminating by divorce. It is illogical that there should be a mutual right of support subsisting after a declaration of nullity of marriage by which the marriage is deemed to have never existed.

(e) The English provision for securing a gross or annual sum of money to the wife should not be adopted even with the substitution of the terms "guilty party" and "innocent party" for "husband" and "wife", respectively—vide *Matrimonial Causes Act, 1950, Ch. 25, Section 19 (2)*.

(f) From time to time recommendations have been made that the law relating to judicial separations should be altered, to the effect that, three years after decree, the defender in an action of separation ought to be entitled to apply to the court for the decree to be transformed into a decree of divorce, in order that a marriage which has in fact broken down should not be kept in existence by the refusal of the innocent party to dissolve it. It has been objected to this proposal that, where the guilty party had no capital, the innocent party might be forced into a dissolution of marriage with no provision for subsequent support. The Faculty considered the proposal but decided to make no recommendation thereon. They do, however, draw attention to the fact that the recommendation contained in this paragraph would have the effect of invalidating the objection stated above.

13. Section 25 of the *Matrimonial Causes Act, 1950*, empowers a court in England after pronouncing a decree of divorce or of nullity of marriage, to enquire into the

existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as it thinks fit, and these powers may be exercised notwithstanding that there are no children of the marriage.

Prima facie it would seem that a good case might be made out for the introduction of some similar provision in Scotland, but it is not known how well this provision operates in practice in England.

14. Consideration has been given to the problem which arises when a husband, either living in family or separated from them by force of circumstances, makes periodical payments to his wife, which are presumed to be for the maintenance of the family, and the wife makes savings out of these payments, banking or investing them in her own name. "In all cases of this class the conception of the *procurator* has at the root of the matter. Her *procurator* cannot entitle her to make savings out of that of which she is only stewardess. If, therefore, any accumulations are made, they belong to the husband. The wife's right is at best a right to consume but not a right of fee." (Lord President Cooper in *Pearson v. Pearson*, 1950, S.C. 253 at 257, quoting Lord President Clyde in *Smith v. Smith*, 1933, S.C. 701 at 705). See also *Logan v. Logan*, 1920, S.C. 537. The Faculty are aware that injustice to the wife sometimes results. It may be that, unless it is proved that some other arrangement had been agreed to, savings effected by the wife out of the housekeeping money should be regarded as her absolute property.

It is, however, difficult, if not impossible, to formulate any satisfactory rule for such cases. Consequently no recommendation is made.

15. The Faculty gave consideration to the question of the enforcement of decrees of custody of children. For the reasons given hereunder, they make no recommendation, and they are, further, in some doubt whether this topic is within the Royal Commission's terms of reference. They think it right, however, to lay the following considerations before the Royal Commission. By the *Summary Jurisdiction (Married Women) Act, 1895, Section 4*, jurisdiction to deal with the question of custody in certain circumstances was conferred upon the magistrates' courts in England. (This procedure is cheap, swift and effective and has admirers among Scots lawyers.)

The *Maintenance Orders Act, 1950*, enables maintenance orders granted in one part of the United Kingdom to be enforced in another part.

Although the Act confers jurisdiction in certain questions of custody on the courts in England notwithstanding that the defender is resident in Scotland and vice versa, there is no provision in the Act for the enforcement of decrees of custody outwith the jurisdiction of the court granting these decrees. It has been suggested that orders relating to custody granted by the courts in Scotland should be enforceable in England in the same manner as orders relating to aliment under the Act. This topic cannot have been overlooked when the Act was passed by Parliament. It is reasonable accordingly to suppose that while the shorthand method of enforcement outwith the jurisdiction prescribed for maintenance orders might be suitable for petty decrees it was inappropriate for decrees which concerned the life and well-being of human beings.

Several cases have arisen in recent years in which it has been possible for a wife defender to botch herself over the Border to England with the children and there to flout the decree of a Scottish court awarding custody to the father. On the other hand, cases must exist where the father in England cannot enforce an English decree for custody because the defending wife betakes herself to Scotland with the children.

The view expressed in recent cases is that the court in each country is *parens patrie* in relation to children domiciled or resident within its jurisdiction (*McClellan*, 1947, S.C. 79, *McKee* (1951) A.C. 352. In *re B—'s*

PAPER NO. 71. MEMORANDUM SUBMITTED BY THE FACULTY OF ADVOCATES
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Settlement (1940) Ch. 54). Formerly, where enforcement of an order granted by a foreign court of domicile was sought in Scotland the Court of Session refused to review the decision as to whether parent should have custody but considered only whether the order of the court could be enforced without harm to the child (*Rodovitch*, 1930, S.C. 619; *Powder*, 1932, S.C. 233).

It has been suggested that in questions of custody within the United Kingdom, where a decree has been pronounced by the court of the husband's domicile, that decree should be enforceable without further investigation in the other jurisdictions of the United Kingdom. This recommendation deserves careful scrutiny—in many cases thorough investigation can only be made by the court of the country in which the children are resident. Accordingly, from a practical point of view, it may well be that the court of

the country in which the children are in fact resident is the most appropriate forum.

If the welfare of the children as distinct from the satisfaction of the *onus prope* of the spouses is to be the paramount consideration most difficult practical questions arise.

Machinery might be evolved, however, whereby notes of evidence adduced before the courts in Scotland could be made available to the English courts and vice versa, but it is doubtful whether it should be recommended that decrees for custody pronounced by the court of the husband's domicile should preclude investigation into the circumstances of each case by the court of the country in which the children are resident.

(Received 15th October, 1952.)

EXAMINATION OF WITNESSES

(MR. C. J. D. SHAW, Q.C., MISS M. H. KIDD, Q.C., and MR. A. M. JOHNSTON, Advocate, representing the Faculty of Advocates; called and examined.)

5959. (Chairman): We have before us, representing the Faculty of Advocates, Mr. C. J. D. Shaw, Q.C., Miss M. H. Kidd, Q.C., and Mr. A. M. Johnston, Advocate. Mr. Shaw, should I address any questions in the first instance to you?—(Mr. Shaw): If you please, my Lord.

5960. Is there anything you wish to add to this memorandum, before we ask our questions?—I think, my Lord, that it would be right if I were to add the substance of a resolution which was passed by the Faculty when a report by their Committee was put before them. The Committee reported to the Faculty in the following terms:—

"Your Committee desire in the first place to indicate, for the approval of the Faculty, what they deem to be an important limitation upon the scope of their remit. All inquiries into social questions, and pre-eminently those into questions of marital status, involve matters of public, moral and religious policy, on which lawyers are no more qualified to express an opinion than laymen. Accordingly, so far as possible, the Committee have restricted their recommendations to those aspects of the subject in which the opinion of the legal profession as such might be of value to the Royal Commission.

Agreeably to the instructions of the Royal Commission, they have set out their propositions followed by reasons and arguments in support thereof. Your Committee beg to draw the attention of the Faculty to the appendices annexed hereto, which relate to questions considered by your Committee but upon which no recommendation is made."

That was approved by the Faculty by resolution, and it is on that basis that the memorandum was submitted.

5961. I observe that on more than one occasion the memorandum points out that on these matters to which you have referred they have not made any recommendation, no doubt for the reason you have mentioned.—That is so.

5962. This memorandum was prepared by a committee specially set up for the purpose, and it was approved by the Faculty?—It was, my Lord.

5963. Did the Faculty have a general meeting to approve it?—They had several meetings, and the way in which the business was dealt with was this: each paragraph was put to the meeting separately and discussed separately and then put to a vote, and some of the recommendations of the Committee were struck out of the memorandum in the end; others were added in accordance with the will of the Faculty at the time.

5964. That is very helpful, as it shows that the memorandum does represent the general feeling of the Faculty of Advocates.—I think it does. (Chairman): As it deals primarily with matters of Scottish law, I am going to ask Lord Keith to ask questions first.

5965. (Lord Keith): Mr. Shaw, we have heard a lot of evidence from Scotland on the question dealt with in the first paragraph of the memorandum, namely, willingness to adhere, and the recommendation of the Faculty is

in line with the majority of the memoranda which have been put before us. You say that the Act should be amended so as to add this proviso:—

"Provided also that, where the ground of action is desertion, the pursuer shall be entitled to decree provided that he or she satisfies the Court that he or she was willing to adhere to the defender at the date of the desertion, and that he or she has not been called upon and refused without reasonable cause to adhere to the defender during a period of three years thereafter."

I want to ask you about the words: "without reasonable cause". How exactly would you work that out, with regard to the three years' desertion period? Assume that initially there has been plain desertion, then the defender comes back and says, "I now wish to return", and the pursuer says, "I am not now prepared to have you". What would you consider might be regarded as reasonable cause for refusal to adhere?—I think that it would be very difficult to get any definition of what is reasonable cause. It would necessarily depend on the circumstances of each case. I have in mind, for example, the case of *Haining*, in 1941, where the ground for refusal to take the spouse back was that she had deceived him into marriage by maintaining that he was the father of her child, conceived before the marriage; he actually brought an action of bastardy, and then he left her. She had brought an action for divorce against him, and he said, "No, I have reasonable cause for leaving you", and the judge said there was reasonable cause, although that cause was neither adultery nor cruelty. I think that the judge would have to decide that the desecration of married life had been so interfered with that there was reasonable cause.

5966. My difficulty is how the proposed proviso is going to operate consistently with a three years' desertion period. Suppose the wife has been deserted; then the husband comes back two years afterwards and says, "I am now willing to resume cohabitation", and the wife says, "No, I am not now prepared to have you back, because you have done something which gives me reasonable cause not to adhere to you". If the wife wishes to bring an action of divorce for desertion when the three years have expired, is she then going to get a divorce for desertion on the view that the husband has deserted her for two years, and that for the last year he has given her cause not to take him back?—Is that on the basis that at the end of the two years the wife was not justified in refusing to take him back?

5967. No, I am assuming for the moment that she was justified, that she had some good reason not to take him back; she waits until the three years run out. Is she then going to get a decree for desertion?—I should say so. (Lord Keith): Then she is really getting it for two years' desertion. You cannot say that the husband has been in desertion for three years, when he was willing to come back. (Chairman): Might I venture a suggestion? Could it not be said that he was in desertion for three years, because although there was an attempt to

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come back the wife had reasonable cause for refusal, and that therefore that offer did not put an end to the desertion? I think that is the view that is taken in England. (*Mr. Justice Pearce*): The English view would be (this: the parties are still apart), whose fault is it that they are still apart? If it is the fault of the husband, then he has still deserted her because he is continuing to break up the matrimonial home.

5968. (*Lord Keith*): Perhaps you assent to that view?—Yes, I would respectfully assent to that.

5969. But at the same time do you see that it might cause some difficulty in the matter of judicial interpretation, at any rate in Scotland? I would say nothing about England at the moment.—The judge would have to determine whether the husband's attitude at the time he came back after the two years was such as to justify the wife in saying, "I am not going to have you".

5970. And if he had given her cause not to take him back, then you would say that he remains in desertion although he himself is willing to come back at the end of two years?—Yes, it would come to that, my Lord.

5971. I do not know whether that point of view was considered by the Faculty?—Yes, I think it was.

5972. May I ask you this, because it has been raised before us and it does not appear in your memorandum? At the present moment there is a vested right to divorce after three years' desertion, which in effect means that the desertion runs from the initial date of the desertion, whereas in England it is the three years immediately preceding the raising of the action. Did the Faculty consider that question?—I do not think we considered that. It certainly must have been in the mind of the Faculty, I think, that the three years ran from the desertion.

5973. That is the existing law in Scotland. You are not able to express any opinion on behalf of the Faculty, on the pros and cons of the two views?—I do not think so. I think it was assumed by the Faculty that the existing law would remain. Perhaps I ought to point out that the phraseology of the proposed amendment to the Act would, I think, cover the case where the pursuer commits adultery during the trimum. That would not be a bar, as this proposal stands.

5974. You do not specifically say anything about that?—We do not specifically say anything about that, but on the interpretation of the proviso, the Committee certainly had that in view, and I think the Faculty must be held to have accepted it.

5975. May we take it, then, that the Faculty's view would be that adultery during the trimum should not be a bar to obtaining a decree of divorce for desertion?—I certainly understand that to be the view of the Faculty.

5976. Supposing the adultery were put forward by the defender as a reason for his not returning, what would be the position then?—If he was right in that, he would not be in desertion.

5977. You would make it a question really of a defence, and not a matter of discretion?—Yes, I would, my Lord.

5978. The court would then have to decide how far the adultery was material to the question of desertion?—Yes.

5979. May I now pass to paragraph 2? You draw attention to the proposal that there should be divorce at the instance of either spouse after a separation of not less than seven years, and here you say that this is a matter on which the Faculty is not prepared to make any recommendation, for the reasons you stated at the outset of your evidence. You draw attention, however, to the fact "that in many cases where the marriage has in fact broken down, and no remedy in law is open to the spouses, a spouse is tempted to bring an action on grounds which are not genuine, or to commit a matrimonial offence for the purpose of procuring a dissolution of the marriage". Is that in line with your own experience, Mr. Shaw?—That seemed to be in line with the general knowledge of the Faculty. They purposely put it rather carefully—they did say, "a spouse is tempted", which, I think, is only human nature. I do not think that anybody would be prepared to give perhaps specific chapter and verse about it, but it is the general impression.

5980. And that was the view of the Faculty?—Yes.

5981. May we now come to paragraph 3, which deals with the question of artificial insemination? You say: "... where a wife has by artificial insemination been impregnated, ..."—by that you mean made pregnant, I take it?—Yes.

5982. Made pregnant "from the seed of her husband, neither he nor she can thereafter have the marriage annulled on the ground of her husband's impotence". You draw attention to a curious feature of the English case of *R. E. L. v. E. L.*, in which the bastardising of the child resulted from a decree of nullity, and you say: "... it seems to be an anomaly in the law that a fruitful marriage can be annulled on the ground of impotence of a spouse". I do not know whether you would agree personally, Mr. Shaw, that it is not a very satisfactory marriage which has got to continue upon a basis of this kind, where, let me say, the husband is impotent and the wife can only bear children by him by artificial insemination?—If it had not been for the case of *R. E. L.*, I should have thought that anybody who was asking for an annulment of the marriage would have been in great difficulty owing to what I think is called the sincerity rule.

5983. (*Mr. Justice Pearce*): I wonder if I could save a little time on this, because I decided the case of *R. E. L.* That case is a wholly individual case in the sense that there both the husband and wife agreed that, in order to try to cure the husband's impotence, they would, on medical advice, try to have a child, because it was thought, rightly or wrongly, that the possession of a child would cure his psychological impotence, which arose largely from over-anxiety to produce a child. As a result of that arrangement between them, which was shown in the letters, artificial insemination took place and a child resulted, but only after the wife had left the husband. I think you may take it that the normal rule in English law would be that the birth of a child approbated a marriage. But as both parties in this case were specifically not approving their marriage by what they were doing, but were merely trying to make it a normal marriage, I held—and whether it is right or wrong I do not know—that they were not covered by the ordinary rules of estoppel and approbation. That is a case on which I do not think you need focus your minds unduly, because it is a very rare case and the ordinary rule would, I think, be, that the conception of a child is evidence of an approbation of the marriage unless there are particular circumstances which justify departure from that rule.—In that case it looks as if the proposal in paragraph 3 is not really required, because it states the law as it exists now. (*Lord Keith*): It did seem to me to be a little unnecessary to legislate for this very peculiar case, particularly if it is the case under the existing law, on the doctrine of bar, or homologation of the marriage, as we would call it in Scotland, that where the parties have acted in such a way as to homologate the marriage, then of course there could not be a nullity on the ground of impotence. (*Chairman*): Might I add, in view of the suggestion postulated by Lord Keith that such a marriage might be regarded as unsatisfactory, that I have a very intimate doctor friend, who told me that he knows of several instances where people were most anxious to have a child, and could only have it by artificial insemination? They did in fact have a child by that means and the marriage was abundantly happy. Thus it is not always, at any rate, an unsatisfactory arrangement.

5984. (*Lord Keith*): I agree, of course, that if the two parties are happy about such an arrangement that is all we are concerned with. But I can visualise cases in which parties might be very unhappy about it, and one of them wished to get a nullity in spite of the use of artificial insemination. There my view would be that it would be much better to rely upon the doctrine of bar rather than to make some specific statutory provision about it. If that is so, Mr. Shaw, this paragraph, which really is not of very grave importance, could disappear?—I do not think that the Faculty would have any objection to that at all, now that the law has been explained.

5985. May we turn to another aspect of this matter of artificial insemination? In paragraph 4 you say: "Legislation is required to the effect that the voluntary impregnation of a wife by artificial insemination from the seed of a stranger without the consent of the husband is to be deemed to be adultery". You explain that in the law that

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would probably not be regarded as adultery at the present time, and therefore you think that that should be provided by legislation.—Yes, my Lord.

5986. Of course, it has to be without the consent of the husband?—Yes.

5987. (Chairman): Could I follow that up? It occurred to me that it might be better to say, "shall be a ground for divorce" instead of to say, "is to be deemed to be adultery". There is a point, which I think was made by one of the witnesses in London, that it is neither more nor less adultery if the husband consents. It is the same act, which either is or is not adultery in the strict sense, irrespective of whether it is done with or without the husband's consent. Do you think that the Faculty might accept the words, "shall be a ground for divorce" as a possible improvement?—Yes.

5988. It would perhaps obviate any embarrassing and unnecessary questions as to whether it is or is not adultery?—Yes.

5989. (Lord Keith): May we pass to your proposal in paragraph 5? On this we have had a lot of similar recommendations from Scotland. The Faculty approve of the introduction by statute of the rule that it should be a ground of nullity that the wife was at the time of the marriage, unknown to the husband, pregnant by another. It was formerly regarded as the law in Scotland, until the law was over-ruled in the case of *Lewis*. You wish to revert to the old rule of *Smith*?—Yes, my Lord.

5990. You point out that one of the reasons in favour of the introduction of such a law is the confusion caused by the introduction of a stranger within the family.—Yes.

5991. It is quite definitely the view of the Faculty, that this should be a ground of nullity and not of divorce?—Yes, I think it should be a ground of nullity, because one ought, I suppose, to preserve the distinction, that divorce is to be applied in cases of matrimonial offences, and that nullity is to be applied to questions of whether the marriage was truly a marriage or not.

5992. Of course, one can see that there may be cases where a marriage has been entered into in every sense of the term, but consent has been obtained by misrepresentation. Apart from marriage, in other contracts that would really be regarded as a valid contract (until rescinded)?—Yes. This proposal is not in line with the general law, but it is the most convenient way of dealing with the situation.

5993. You then pass to other grounds of nullity, and you recommend the introduction of the other three grounds of statutory nullity which we find in England. The Law Society, whose evidence we heard last week, had certain difficulties on this matter. They approved of nullity in respect of concealment of pregnancy by another man, on the part of a woman who entered into marriage, but they were not prepared to go the length that you go in paragraph 6. As regards proposal (a), non-consummation owing to wilful refusal, do you think that is a proper ground of nullity? It is something that happens after the marriage, and the view has been expressed by quite a number of witnesses in England that it is very unsatisfactory, as it is not in line with principle to make this a ground of nullity. It is said that if it is going to be a ground at all it should really be a ground of divorce.—Of course, I am not myself very familiar with this ground, because it has not operated in Scotland, but I have always assumed that non-consummation of a marriage owing to wilful refusal was regarded as a ground of nullity because it in some sense raised a presumption of impotence.

5994. At the time of marriage?—Yes.

5995. If that is so, then we do not need this ground. If wilful refusal is evidence of impotency at the time of the marriage, as in many cases the court would hold it was, in view of some psychological impediment, then you would not need it.—Of course, if it were to be said that non-consummation owing to the wilful refusal of the defender was to be presumed to be impotence, then the same effect would be obtained. (Lord Keith): But it seems unnecessary to introduce this specifically as a ground of nullity, if you are only referring to actual impotence at the time of the marriage. (Mr. Justice Pearce): I think

I might be able to help, because in practice the wilful refusal cases that we have in England are not confined to those cases where there is psychological impotence. There is quite a different class of case sometimes, namely, wilful refusal through bad temper, not impotence, where the man has felt that he had to marry the girl, probably to give the child a name, and then from the time of the marriage says, "You have made me marry you, but you will get nothing else". I think that Lord Keith's suggestion, which would cover a large number of cases, would not cover that class of case, and I think that my English colleagues will agree with me that they do occur.

5996. (Lord Keith): Take that case, Mr. Shaw, of a man who has made a woman pregnant, which is pretty good evidence that he is not impotent, and then he marries her and refuses thereafter to have any intercourse with her. Is that not rather a ground for divorce than a ground for nullity?—I do not think that I could assent to that on behalf of the Faculty, because I may say that the question of whether the case of *Lewis* should be reconsidered was brought before the Faculty and was very fully discussed; it was put to a vote and the meeting was equally divided, so in accordance with ordinary constitutional principles the Chairman gave his casting vote against the proposal.

5997. *Lewis* was a case of refusal of sexual intercourse?—Yes, and that was held to be desertion—at least, in the old days it would have been held to be desertion.

5998. But the House of Lords said "No"?—Yes. The Faculty had before it a recommendation that that decision should be reconsidered, but the Faculty by a casting vote did not agree to uphold that recommendation, so I think I am bound by that.

5999. I see. So, whatever your personal view is, you just leave it to us?—Yes, I am afraid so.

6000. The next point is proposal (b) in paragraph 6, namely, the fact that either party was at the time of the marriage of unsound mind should be a ground of nullity. The view of the Law Society was that that was unnecessary, because, of course, if one of the parties was insane at the time of the marriage it would not be a valid marriage, the marriage would be null at common law. Was that point considered by the Faculty?—There are, of course, the other aspects of it, the case of the mental defective, or the person who is subject to recurrent fits of insanity.

6001. We will leave that out of account at the moment. I am dealing only with the question of unsoundness of mind.—I suppose it is possible to conceive of a case where a person of unsound mind could enter into a valid marriage during a lucid interval. (Lord Keith): That is so. I am not quite sure what the view in England is about this, and perhaps Mr. Justice Pearce could give us some help on this question of unsoundness of mind. Does it apply in the case of a person of unsound mind who contracts a marriage during a lucid interval? (Mr. Justice Pearce): I cannot recall having had such a case before me, but I have had one or two cases of epilepsy, I think. The provision must, I suppose, include the case of a marriage contracted by a person of unsound mind during a lucid interval.

6002. (Lord Keith): Yes, that may be. Has the point which was taken by the Law Society been considered at all by the Faculty, Mr. Shaw?—No, not by the Faculty.

6003. Then, as regards mental deficiency, or recurrent fits of insanity or epilepsy, I think that the view of the Law Society was that these were just forms of illness, which did not go to the root of the marriage at all, and if these forms of illness were to be grounds of nullity you might as well introduce many other forms of illness. I do not know whether that view was considered by the Faculty?—No, my Lord, I do not think it was. Of course, the recommendation goes fairly near the line which the Faculty had drawn for themselves, and really in a sense it is not truly what I might call a legal recommendation. Nevertheless the Faculty think it desirable that the law of England and the law of Scotland should be the same in this matter.

6004. The same point about various forms of illness would, of course, apply to venereal disease?—Yes.

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6005. But the Law Society's view was that if the venereal disease were knowingly communicated you could get divorce on the ground of cruelty.—Yes, I could understand that, but these grounds for nullity are allowed in England presumably on the theory that they constitute breach of warranty at the time of the marriage.

6006. That may have been why they were introduced into England. Of course, it is a little dangerous to draw inferences from what was done in England, because we do not know but that the exigencies of the law required certain things to be done in England which may not be called for in Scotland. Anyway, that is the recommendation of the Faculty?—It is, my Lord.

6007. In paragraph 11 you make the following recommendation: "Upon the divorce of a wife, the husband (pensioner) ought to have a claim upon her estate for *ius relicti*, as on her death". Perhaps you would explain, for the benefit of the lay members of the Commission, just what is involved in this.—Upon the death of a spouse, in Scotland the surviving spouse has certain rights in her or his estate, unlike, I think, the law of England, except as recently modified. The *ius relicti* (or *ius relictae*) amounts to one-third of the movable estate of the deceased, if there are children, and one-half of the estate of the deceased if there are no children. On divorce, the divorce is taken to be the same as death, so far as the rights of property are concerned and also so far as contractual rights, such as under a marriage contract, are concerned, with this exception, that when the woman divorces her husband she gets her *ius relicti*, but when the man divorces his wife he does not get the *ius relicti*, as he would have done on her death, had the marriage persisted.

6008. *Ius relicti* was not a common law right of a husband on the death of his wife, but was introduced by statute?—That is so.

6009. And the courts held, I think, that the statutory right applied only on death, and did not apply on divorce. Therefore a husband divorcing his wife did not get *ius relicti* out of her estate, although she got *ius relicti* out of his estate. You wish to remove that anomaly?—Yes, my Lord.

6010. Now may we pass to paragraph 12? You suggest there that the guilty party to a divorce action should be liable to aliment the innocent party after decree of divorce, and you say: "This liability is in addition to, not in substitution for, the liability of a divorced spouse under existing law". You introduce a number of provisos, but before I come to them, may I put this to you? Lord Mackintosh's Committee proposed to abolish altogether legal rights on divorce and simply to leave it to the discretion of the court to make either a capital sum payment or an annual payment, or both, to the wife or the husband, as the case might be. You are not substituting the one right for the other, but are introducing a cumulative right?—Yes.

6011. Was that the considered view of the Faculty?—Yes, my Lord, it was. It was considered on more than one occasion, because when the report first came before the Faculty it did not seem to the Faculty quite clear enough on this point, and they wanted to make their view quite definite, that the traditional remedy was to remain, that the other remedy was to be cumulative, and that the cumulative remedy was to be under the control of the judge.

6012. The other would be automatic, and the judge would have nothing to say on that beyond ascertaining the amount?—Yes.

6013. Can you explain what moved the Faculty, in coming to this view?—I remember that when the Mackintosh Committee was sitting the Faculty reported in the opposite sense from what the Committee finally arrived at. I think that what was in the mind of the Faculty in this matter was that the traditional capital liability, as it were, of the guilty spouse, should remain, and that aliment should only be introduced where it was necessary.

6014. In other words, in those cases where there was no substantial property from which to take a capital payment?—Yes.

6015. Was this just a conservative affection, shall I say, of the Faculty, for the old institutions and law of Scotland?—I should say that it might partly have been that—without saying anything against such an affection—but at the same time I think that the Faculty felt that on the breaking of the marriage there should be a capital break as well as an income break, if necessary.

6016. I am not quite sure that I follow that.—The capital of the partnership, as it were, should be split up on the breaking of the partnership.

6017. I see, and where there was no capital to split up then some equitable provisions should be introduced to allow for an annual payment?—To mitigate hardship, yes.

6018. I see that you add certain provisos to your proposal. The first is:—

"The liability to the innocent party should not exceed an amount which in the opinion of the court is reasonable amount in the circumstances, having regard to the means of the parties, including the value of any legal rights, their station in life at the date of the decree, their family responsibilities, and their potential earning capacities."

Take as an illustration one case about which we have been told several times—that of a young wife who has no children, and who is able to support herself. Would she be regarded as a person having potential earning capacity?—Yes.

6019. And that is a matter which the court would take into account?—Yes, my Lord.

6020. Then you say in proviso (b) that power should be reserved to vary the amount of aliment payable from time to time or to terminate the payment—that, I think, we understand, and I think the other provisos are really ancillary to that. In proviso (d) you say:—

"If no award of aliment is made in the decree of divorce, power should be reserved to the court to award aliment to the innocent party on the subsequent application of that party on proof of change of circumstances."

So that the party who has divorced the other one come forward at any time and ask that an award might be made in the light of existing circumstances?—Yes.

6021. Then, in proviso (e), you say that the innocent party's right to aliment should cease on re-marriage. That would be absolute?—Yes, we thought so, my Lord.

6022. Supposing the second spouse died, and left the innocent party in the original action of divorce in a state of penury, could she then come back and claim aliment?—Not as recommended by the Faculty. I think the reason was that the liability to look after the wife was discharged on the second marriage.

6023. She took that chance?—Yes.

6024. You are proposing that the right to an award of aliment should be confined to the innocent party?—Yes.

6025. That has been general in all the recommendations we have heard from Scotland. You say in your supporting arguments that you consider this "to be preferable on grounds of equity to the English rule that a husband is always liable for the maintenance of his wife after dissolution of marriage"—so that the matter has been quite plainly before the Faculty, and that is their considered view?—Yes.

6026. In proviso (d) you say that the right of aliment should be limited to marriages terminating by divorce. In other words, it should not apply to a marriage declared null?—That is so.

6027. There again, I think, the position is different in England.—Yes, I understand so.

6028. Would you turn to your supporting arguments in paragraph 13 for a moment? At (f) you say:—

"From time to time recommendations have been made that the law relating to judicial separations should be altered, so the effect that, three years after decree, the defender in an action of separation ought to be entitled to apply to the court for the decree to be transformed into a decree of divorce. . . ."

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and wife, and to consider whether any changes should be made in the law or its administration . . ."

—I think that what the Faculty had in mind was that the interests and well-being of the children do not come in until the later part of the remit, and they thought that perhaps the Royal Commission would consider them only in so far as they were affected by the law relating to divorce and other matrimonial causes. They did not know whether the Royal Commission would be prepared to consider the machinery for enforcing the orders of courts. (Chairman): It might be said that the custody of children and the enforcement of orders for custody do affect relations between husband and wife. However, I will not pursue that now.

6052. (Mr. Justice Pearce): May I first deal with the question of settlements, to which my Lord has already referred? I think that the view current among the judges and the members of the legal profession in England is that the power to vary settlements is a very valuable one, but my colleagues will correct me if they take a different view. My Lord has mentioned the general principles. To take an example of a case where our machinery is so useful—the case of the rich wife who settles all her fortune in the marriage settlement on the usual terms, life interest to herself, then to the husband, and then to the children. Would that be quite a normal settlement in Scotland too?—Yes.

6053. Now assume that in a moment of folly she is seduced by somebody, perhaps after she has had a family. I understand that under Scots law the whole of her property would go for ever?—Yes, that is right.

6054. And she is then a beggar and her husband has her whole fortune?—Yes, I am afraid so.

6055. And her children would be rich?—Yes.

6056. Now that kind of case is perfectly simple to deal with provided the court is entitled to vary settlements. In other words, assume you adopt the law that has operated in England, and which has allowed the judge a complete discretion, that is, since 1819, or, in cases where there are no children, since 1878. The judge deals with the wife as seems fair, bearing in mind the fact that she was guilty but that the money was all hers to begin with. That would be useful for you in Scotland in dealing with cases which, though not as extreme as that, present features of that sort?—Yes, I think it would.

6057. Another class of problem we in England deal with by varying settlements is where the innocent wife who, say, has a large sum of money, wants to re-marry. Under the terms of her settlement she is entitled to re-marry when she is a widow. But the terms of the settlement would not allow her to settle sums of money on a husband taken by her during the life of her divorced spouse or on any children of that marriage. In that case it is a great hardship for a perfectly innocent woman to have one family which is extremely rich and not to be able to settle anything on the children of the second marriage. That, of course, is a perfectly simple case that is dealt with again and again without difficulty under this power. Do you think, on the assumption that the power has worked well in England, that it would be valuable in Scotland?—I think so. I have a recollection—though I cannot put my finger on it at the moment—that one of the learned judges did say in some case that he wished they had in Scotland that power which judges have in England.

6058. A similar power could either be taken on the lines of the wording of the statute as it was first drafted in 1819, or in the light of judicial decisions since. The Court of Appeal and judges of first instance have deliberately said again and again that it is their duty to interpret the wording of the statute as liberally as possible. Indeed, perhaps if one were starting anew from the words of the statute, one might find difficulty in accepting the construction that has sometimes been placed upon them. Take the case which is very common today where, after marriage, the family put all their money into a house, without drawing up any deed at all. That is intended, of course, as the family fortune, and that has been construed as being a post-nuptial settlement. Would you think it wise to take on the accumulation of judicial decisions that have gone with the words of this statute? You can either take the statute and try to work out its liberal intention for yourself, or take the power as it now exists as a result of

judicial interpretation, and which would include, say, a house into which some not very well-to-do family have put their fortunes?—It would be, I suppose, ideal if something like a consolidated statute could be drafted which would incorporate the views expressed in various judgments—as was the case with the Sale of Goods Act. I do not know whether that would be easy in a matter of this sort.

6059. I think it might be possible. Then you say that there should be no allowance to the guilty party. You expressly say that, do you not?—Yes.

6060. I wonder if that is a wise fetter to put on the court. Let us take an extreme instance, because that always makes so much more clear the essential point at issue. Suppose a very rich husband, whose wife has produced a family and then at an advanced age she goes off in a moment of folly with somebody else, and then is left by that man. Probably in the ordinary course of decency a husband would do something for her rather than leave her to starve. In England we have power to order that there should be a payment by that rich husband to keep his wife from starving—it used to be called a compassionate allowance and by the Bar it is still called so, but that is not a technical expression. Would it not be advisable to leave to the court power to make an order for some payment in favour of a guilty spouse, bearing in mind that in matrimonial cases it may be that one cannot say that one of the parties is wholly beyond blame and that the other is wholly blameless?—It is very difficult for me to say more than this. That does not seem to be the opinion of the Faculty. They certainly were quite definite about that.

6061. (Chairman): Mr. Shaw, may I clear up one point? Did I understand you to assent to this—that if a rich woman settled her fortune on herself for life, then on her husband for life, then on her children, and thereafter she committed adultery and was divorced, she would have nothing left? Would she forfeit everything?—She would forfeit the life interest. (Chairman): I am much obliged. For the moment that satisfied me.

6062. (Mr. Justice Pearce): It startled me too, but it seemed to me that that must be the answer.—She would forfeit it under the Statute of 1533. (Lord Keith): She is treated as if she were dead. (Chairman): In England the court would consider the settlement and decide what variation was proper in the circumstances.

(At this stage Mr. Shaw withdrew.)

6063. (Mr. Justice Pearce): Miss Kidd, on the question of the disposal of savings from housekeeping money when the home is broken up, would you say that the only satisfactory way of dealing with it, if the court is to deal with it at all, would be to leave it to the court to make such order as may be just?—(Miss Kidd): Yes.

6064. Mr. Johnston referred to the difficulties in trying to find out the intention of the parties about housekeeping savings. Would you not say that in the average family in which the question of housekeeping savings arises there is rarely any exact intention at all at the time the savings are being made?—I think that it is only on a very rare occasion that you can prove what the intention was. Speaking personally, and not on behalf of the Faculty, I have always felt that these cases might have been argued in a different way from that in which they have been. One might have proved that really the common law of Scotland now was that the housekeeping savings belonged to the wife, that nobody has ever argued like that. Instead, it is always assumed in Scotland that that is the wife's prerogative—that she is acting as the husband's agent.

6065. That is the difficulty about making it a legal matter. When you are dealing with ordinary people, say, a young couple who put their savings into the Post Office for themselves and their children, you find that they never work out what would happen if their marriage broke up?—No, of course not.

6066. The only convenient way of dealing with the problem would be to allow the court to make what order may be just about the housekeeping savings? Would you think that was reasonable?—Yes.

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6067. The court would then take into account the fact that the wife was thrifty, that it was largely she who was responsible for the savings, and all the other household matters. If it could be dealt with in that way, do you think it would be a useful power of the court for affecting the disposal of these savings about which something has to be done when the marriage breaks up?—I think that so far as the Scottish cases go the judges might be influenced by the idea of the *proportionate*. I think that has been the real difficulty, and sometimes the deciding factor, for there is nothing to hinder either party adducing evidence at the present time as to what the understanding was.

6068. There have been suggestions put to us in England that the court ought to have power on the break-up of the home to make such disposition of the furniture and so forth as may be just. At present we have a system whereby the parties can come before the court to agree to whom they belong, but again, in dealing with wedding presents and so on, that is not always very satisfactory. Would you think it reasonable to have a general power for the court to decide what was a fair disposition, considering all the circumstances?—Yes, I think so; I think that the Faculty would have agreed to that.

6069. Mr. Johnston would not?—(Mr. Johnston): I would not speak for the Faculty.

6070. (Chairman): In that event, the court would not be deciding legal rights at all. The judge would be, so to speak, sitting under a palm tree and doing what he thought was just in all the circumstances. I do not know whether the Faculty would approve of that?—It is a novel proposition to me, and certainly one which the Faculty did not consider. (Miss Kidd): I think that it is fair to say that the Faculty would feel that there had been some very hard cases under the present law.

6071. (Mr. Justice Pearce): I was only trying to meet your objection to the view that the only way of getting the matter straightened out would be simply to leave a discretion to the court. Otherwise, I think Mr. Johnston agrees, it seems insoluble.—That would certainly solve the problems in equity, but it might have little or no bearing on the existing legal position. While I see the force of it on equitable grounds as an individual element . . . (Mr. Justice Pearce): It seems more revolutionary where there is no power to provide for alimony. Where there is such a power it does, as my Lord has said, mean that the judge sits under a palm tree saying what is a fair sum for one party to pay the other. There is no rule of law about that at all.

6072. Miss Kidd, dealing with enforcement of decrees of custody of children, is it your view that there is no satisfactory solution to the problem? You do not make any recommendation but you say that you doubt if it is within our terms of reference. Although I must be guided by my Lord on that, I should have thought that anything which enabled the court to enforce its jurisdiction over children might possibly be within our remit. You have found the same difficulty that we have in England. When some mother wants to take her son to holiday in Scotland, then there is the question of her going out of the jurisdiction of the court in England, and a nervous husband may say, "Once across the Border she will never come back again with the child." We thus get complications, which one would have thought need not exist between two countries so closely allied. Would you feel that there would be any real difficulty in the courts of the two countries enforcing one mother's orders? It could be done by a mutual abrogation of judgment in this respect: namely, that if the English court said that a child must be brought back to England the Scottish court would accept that, and vice versa. That would be one possible way. The other way, of course, would be for the Scottish court to investigate the matter, giving weight to the decree of the English court. Do you follow what I mean? The Scottish court would not bind itself in advance, but as a matter of comity, would probably come to the same conclusion as the English court. Which of those two do you think would be preferable? Neither involves any loss of sovereignty to either jurisdiction.—The Faculty made no recommendation on this matter and thus I can give only a personal view, but I feel that it is desirable that the court of the country

where the child actually is should always investigate the matter itself, giving due weight, of course, to any representations from the other side of the Border. It seems to me that all the questions of custody are such important questions and that they really require investigation on the spot.

6073. I see the force of what you are saying, but the difficulty of your proposal is this. Suppose that the mother wants to get leave to take her child to Scotland for a holiday, and the husband is afraid that the child will not be brought back. If it is thought that the mother may be able to go to a Scottish court and persuade it that she ought to keep the child in Scotland, then the alarm is there and the ill which I would wish to see cured is not cured. It really is the English court that knows all about that child (and similarly the Scottish court in the case of a Scottish child coming South). Would that weigh with you against your view that the court of the country in which the child is immediately resident should be the court exercising jurisdiction?—It might, but there are so many different circumstances that one can envisage.

6074. (Lord Keith): Miss Kidd, supposing the mother has been awarded the custody of the children, say, in Scotland by a Scottish court. She then goes to England and settles there with the children, and the father then wishes to have the order for custody varied. On the view which Mr. Justice Pearce has been presenting, would the father have to go to England in order to get the order varied? Or would he go to Scotland because Scotland was the country which gave the mother the custody originally, to get the order varied there, and then, having got it varied, would he then go to England and get the English court to enforce the order?—Yes, I think that on the argument postulated by Mr. Justice Pearce the father would go to the Scottish court first; my theory was that he would go to the English court in the case envisaged.

6075. Because the children are in England and may have been there for two or three years. The facts have already changed, the order originally made has become a stale order. The question is whether it is more convenient for the Scottish court to investigate anew the new situation, or whether that should be left with the court of the country where the children are?—My view is that from a practical point of view it is better to have at least some jurisdiction in the country where the children are.

6076. (Chairman): You see, in both *B—'s Settlement* and *McKee*, the view taken was that there was a child in this country and it had to be decided what was best for that child in the circumstances which existed. In the case of *B—'s Settlement* it was a Belgian child, if I remember rightly, who had been brought over to England by the mother and was at that time still in England, and the question was whether the court had to give automatic effect to the order of the Belgian court giving custody to the husband; or whether it had to consider what was best for the child, giving due weight to the Belgian order and making up its own mind. The court adopted the latter course. But of course England and Scotland are so close together that this is rather a different problem.—Quite

6077. (Mr. Justice Pearce): A half-way house might be found if you were to leave the court of the country of residence to decide, provided the child had been resident for more than a certain period. The problem that seems to me rather a ridiculous one is that of the "holiday child". In a case of that kind, the fact that the child has crossed the Border either south or north, means that the court which has been dealing with this child, possibly for years, ceases to have any power over it. Between England and Scotland I feel that it should be possible to make some arrangement.—It might be possible to keep a process alive, as it were, in either country.

6078. Miss Kidd, there is one further question I want to put to you—you will probably feel that you can give only a personal view and not a view on behalf of the Faculty of Advocates on it. You have not got the principle of constructive desertion in Scotland?—No.

6079. Do you not think that there is something to be said for this doctrine? Supposing with regard to desertion you take this view: that desertion is desertion from a state of affairs, namely, the breaking up of a home. You must then find out who was responsible for the break-up of the home. Suppose a husband made things so intolerable

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that no reasonable wife would stay with him. The wife has thus to leave the home, and though the husband continues to stay in the home it is he who has broken it up. Would it not be an improvement on the existing law of Scotland if one were able to say that the intolerable husband who has driven out his wife by his conduct is at that time deserting her?—The Faculty, of course, had not considered that view, and I can give only a personal answer to your question. I personally consider that it would assist our system of law if that view could be taken.

6090. (Chairman): Might I ask if Mr. Johnson would share that view or not?—(Mr. Johnson): It involves a complete departure from the present concept of desertion as known in Scotland, and I personally am not satisfied that there are a sufficient number of cases in which no other solution is possible to warrant that innovation. There are of course many cases in which a spouse leaves the matrimonial home but is nevertheless deserted by the other spouse. The case I am thinking of is where the husband says to his wife, "Get out, I want nothing more to do with you". It is the wife who leaves, but it is the husband who is in desertion.

6091. (Mr. Justice Pearce): I was leaving those aside. Those I would consider as cases of physical expulsion, where the husband drives the wife out deliberately. But do you not find that there are a large number of wives who are driven away by an impossible state of affairs without any words of expulsion being used?—I have had experience of that, but in a very, very few cases.

6092. There is no real remedy?—No, there is no real remedy.

6093. It may be that such cases exist but that you do not see them. In England we find that quite a large proportion of the desertion cases are of that type. And if in addition to recognising constructive desertion as a ground of action, the court has power—as it has in England—to award maintenance when there has been neglect to maintain, it means that the wife so driven out by intolerable conduct can at once come to the court for maintenance, and at the end of three years secure a divorce on the ground of desertion. Nothing of that kind exists in Scotland?—(Miss Kidd): No.

6094. (Chairman): And the proposal in the first sentence of your memorandum would not cover that?—(Mr. Johnson): No. (Miss Kidd): I do not think so.

6095. (Mr. Justice Pearce): One final question on that first paragraph. If that first paragraph were agreed to, then would you deal with adultery committed by a pursuer during the desertion in the same way as the English courts do, namely, that that adultery would be no bar provided it was either not known to the other spouse or, if known, did not affect his or her conduct?—Yes, that is my understanding of the Faculty's position. (Mr. Johnson): I think that the idea is simply that if there is desertion *ab initio* and the deserting spouse does not return, does not ask to be taken back, then there is a vested right to divorce at the end of the three years. If, of course, the other spouse asks to return, then the pursuer would be bound to take the deserting spouse back. In that aspect of the matter the question of the pursuer's adultery does not arise.

6096. (Sheriff Walker): I think I am right in saying that in Scotland if both spouses have been guilty of adultery that does not prevent either getting a divorce?—(Miss Kidd): No, there could be a cross-action.

6097. And, of course, if they came to judgment at the same time you could have a decree of divorce at the instance of the husband and a decree of divorce at the instance of the wife?—Yes.

6098. That would have an odd effect, would it not, on the property rights—each would be assumed to be dead?—Yes.

6099. How is that trouble got round? How is that avoided in practice?—You mean in relation to settlements?

6100. I mean that if each spouse has his action against the other for adultery, both coming on at the same time and both proved before the same judge, what is the form of decree?—There will be two decrees, I should say. I do not know really whether the property rights are dealt with in the same decree or not.

6091. Or whether a decree is pronounced in the one action and refused in the other because there is no marriage to dissolve? Can you remember what the practice is?—I think that the practice is to pronounce a decree in both cases.

6092. Then that would have an effect on the property rights?—Each party would claim. Each would be entitled to his or her rights.

6093. And each would forfeit his rights?—(Mr. Johnson): I do not see that there is any difficulty from the practical point of view, because if their estates were equal there would be no point in either party making a claim, and if one had a great deal more than the other, then the more impecunious would benefit at the expense of the other.

6094. (Lord Keith): Might I intervene? If there are cross-actions of divorce and each party obtains a decree of divorce, I am not quite clear, Miss Kidd, what it was that you assented to with regard to legal rights. Is it not the case that neither party would get any legal rights out of the other's estate? There would be no question of legal rights if each party were successful in a cross-action of divorce. Each party has forfeited all his rights out of the other's estate. How could there be any rights?—(Miss Kidd): I think that your Lordship has provided the correct answer.

6095. (Sheriff Walker): In the case of divorce for cruelty, is there any reason in Scotland why each spouse should not be able to pursue the other for divorce for cruelty—for example, the husband complaining that his wife had been mentally cruel and the wife complaining that her husband had been physically cruel? Is there anything, as far as you know, which would prevent cross-actions of divorce for cruelty?—No. But, of course, cruelty is always much more difficult to establish than any other offence—at least, that is the general experience.

6096. You assented to Mr. Justice Pearce's suggestion that the doctrine of constructive desertion is not known in Scotland. But in the days before cruelty became a ground for divorce, supposing that the wife had left the home because the husband had been cruel to her, would you say that she could not have pursued her husband for constructive desertion?—She might have tried, but I think that it would have been very difficult for her to succeed.

6097. If the altering proposed in paragraph 1 were made, it would be possible, would it not, to have a wife pursuing her husband for divorce for desertion and a husband pursuing his wife for divorce for adultery? That would make cross-actions of that kind possible?—Yes, I think it would.

6098. There is only one further question I want to ask—about the effect of divorce on property rights. In the case of divorce of a domiciled Scotsman, then of course the legal rights arise on the divorce. But if, where the parties are domiciled abroad, the defender owns heritable in Scotland, am I right in thinking that the legal rights to property arise?—I could not answer that. (Mr. Johnson): I may be wrong about this, but my recollection is that these rights only arise if the husband is domiciled in Scotland because they are rights affecting the domiciled Scotsman.

6099. I want to ask about the statement in paragraph 13 of your memorandum where you refer to the powers of the court in England, on pronouncing a divorce, to enquire into settlements and to vary their terms. I think that there have been at least two cases of ante-nuptial settlements between, say, an English lady marrying a Scotsman, which contained a clause that the settlement had to be interpreted according to the law of England, and as if the parties were domiciled in England, whereas in fact they happened to be domiciled in Scotland and it fell to the Scottish court to pronounce a decree of divorce. What happens in such a case about the settlement?—As I understand it, the parties have agreed that the settlement is to be construed according to the law of England and the construction is given in accordance with that agreement.

6100. And the Scottish divorce, I take it, would not accelerate any rights under the settlement?—Not unless that was the effect of the settlement—construed according to the law of England.

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Mr. C. J. D. SNAW, Q.C., Miss M. H. KING, Q.C.
and Mr. A. M. JOHNSTON, ADVOCATE

[Continued]

6091. And the court in Scotland would not have the power of the English court to modify the terms of the settlement?—They have not at the moment, nor could they have power in the circumstances you postulate.

6102. I suppose the court in England would not have any power either, because it did not pronounce the decree?—Yes, I think that situation might arise.

6093. Is that kind of international complication, if I might put it that way, in your view a reason for giving the Scottish court a similar power to the English court?—I think it is a very cogent reason.

6104. (Mr. Lawrence): Like Mr. Justice Pearce, I am a little troubled by the wife's position after decree of divorce. May I draw your attention to heading (5) of your supporting arguments under paragraph 12:—

"According to the existing law of Scotland only the innocent party has any claim on the estate of the other on divorce. This is considered to be preferable on grounds of equity to the English rule that a husband is always liable for the maintenance of his wife after dissolution of marriage. . . ."

May I say that, as I understood the matter, stated like that there is an inaccuracy? The English rule is not that a husband is always liable for the maintenance of his wife after dissolution of marriage. The English rule is that the wife has a right to apply to the court for maintenance in all circumstances, but the discretion of the court ordinarily is not exercised in favour of the wife whose conduct has resulted in the termination of the marriage. There is, however, a residuary discretion in the court in a proper case to grant even a guilty wife some maintenance.—It might be better to say that the husband alone is liable for the maintenance of the wife because there is no liability on the wife to support the husband. That was the point.

6105. That is another matter. What I was drawing attention to is this: that in all cases of maintenance in England the court, irrespective of the guilt or innocence of the parties, has a discretion to hear and determine a wife's application. May I ask you to turn back—I am trying to clarify what is in my mind—to paragraph 12? After recommending that there should be a liability to aliment the innocent party after a decree of divorce—a discretionary addition to the legal rights to mitigate a case of hardship—you then go on in proviso (a) to indicate the matters to which the court should have regard in determining the amount. And as I read that proviso, it is an accident, is it, that, among the matters to which the court has to have regard, there is no mention of the conduct of the parties, because of course that would be irrelevant if the application can be made only by the innocent party?—Quite.

6106. Then again, in England, substantially the two matters to which the court has to have regard on hearing these applications, are the resources of the parties and their conduct interpreted in the widest possible sense and not merely limited to matrimonial offences. Am I also right in thinking that the Macintosh Committee, which made a recommendation which differs from yours in the way you have already indicated, still limited the right to apply for maintenance to the innocent spouse?—That is so.

6107. May I draw the attention of the Faculty to this? Take the case of a wife, with no means of her own, who has suffered for years from unsympathetic, unkind conduct on the part of her husband falling short of a specific matrimonial offence, and through a conjunction of circumstances, including perhaps her own frailties of character, she commits one isolated act of adultery and is divorced. Let us postulate that she is without means in those circumstances at all, and is also ailing. Now, as I understand it, in Scotland such a woman would have no right even to apply to the court for enough maintenance to save her from extreme destitution and penury. Is that right?—(Mr. Kidd): Yes, that is the position.

6108. You understand that in England she would have a right to apply for maintenance and it would be open to the court in hearing the application to consider not merely the resources of the parties but their conduct throughout the marriage, in its widest sense. I have fully in mind the deep-seated distinction that you talk about between the Scottish and the English law in this

respect, but would the Faculty not think that perhaps a law which denied an erring wife, in those circumstances, even the right to apply for a small amount of maintenance, was open to criticism on the ground of harshness?—We have made our recommendation, and I can only say that the Faculty have decided to recommend that the law should remain in that respect as it is now.

(At this stage the Commission adjourned for a short period.)

6109. (Mr. Lawrence): I want to follow up just for a few moments what I was asking you about before the adjournment. Let us take the case where there have been cross-decrees, which you were discussing with Sheriff Walker. Am I right in thinking that by virtue of the fact that a decree was obtained in such a case by the husband against the wife, that by itself would preclude her, both under the present law and under the proposals of the Faculty, from making any application for aliment?—Yes.

6110. Notwithstanding the fact that she had also obtained a decree against her husband, and notwithstanding the fact that in a given case he might be much more gravely at fault, both in the matter of specific matrimonial offences and otherwise, than she? It might appear to some people, might it not, that that law was a little harsh?—It might, yes.

6111. Now may I add to both those cases the hypothesis that the wife was destitute of money of her own at the time of the divorce, though she had not always been destitute but had brought her fortune into a marriage settlement at the time of the marriage? I gather that under the present law, both in the case that I put before the adjournment—where she was guilty of one isolated act of adultery, perhaps in some ways driven to it by her husband—and in the case where a decree was pronounced against her although she had also had a decree in her favour against her husband, she would, on the decree being made against her, have forfeited completely her position under the marriage settlement?—It might depend on the terms of the marriage settlement.

6112. Suppose that it was in the ordinary form, a conveyance to trustees of her property upon trust, the wife's for life, after her death to her husband and then to her children. The decree of divorce would operate to extinguish her rights entirely, as if she were dead, would it not, under the present law?—(Mr. Johnston): Under the present law, yes. (Mr. Kidd): Her right in her husband's estate would be extinguished.

6113. But would not her right to her own fund, the income of her own fund, be extinguished also?—I think that would depend upon the terms of the settlement. (Mr. Johnston): Assuming that that is so in particular circumstances, if the law were to be altered by giving the Scottish court the power to vary the terms of settlements, any inequitable result could be rectified.

6114. I appreciate that, because you have stated, subject to being entitled as to how it works in England, that there may be a good case for the introduction of a similar provision in Scotland. But I just wanted to get clear what the present position is, because it arises out of the questions I was asking you as to whether there should not be a discretion vested in the court to consider the case of the guilty wife, as in England. Did the Faculty consider specifically the question as to whether the recommended provisions as to aliment might in certain cases be operable in favour of a guilty wife, or not?—The reasons for the recommendation are clearly stated. I think that does demonstrate that the Faculty did apply its mind to this particular point, and recommended that only the innocent party should have a claim.

6115. Yes, but I see you say, "The distinction is deep-seated in respect that the Scottish principle is that the guilty spouse forfeits all claims against the other on committing a matrimonial offence". I fully appreciate that if the court is to be given the discretion that I have indicated, it would be a departure from established principle in Scotland, but maybe there comes a time when principles have to be reconsidered. I do not know—what does the Faculty think?—The Faculty's view was that the innocent party only should be entitled to aliment.

3 November, 1952]

Mr. C. J. D. SHAW, Q.C., Miss M. H. KIDD, Q.C.
and Mr. A. M. JOHNSON, ADVOCATE

[Continued]

PAPER No. 72. MEMORANDUM SUBMITTED BY THE COUNCIL OF THE SOCIETY OF WRITERS
TO HER MAJESTY'S SIGNET

6116. (Lord Keith): On that last topic, may I try to clear up what may be a misapprehension? Take it that there have been cross-actions, and each party has got a decree of divorce, and there is a marriage contract; is it clear that the one spouse or the other would not continue to enjoy the rights under the marriage contract? I cannot recall the case ever having come up, but there may be some decision on it. You see, the husband is not going to get any rights out of the contract adverse to his wife, and the wife is not going to get any rights adverse to the husband. Does that not leave the position as it was, the wife enjoying such contractual rights as are there? Or are you not in a position to answer the question?—Personally, I am not aware that the question has ever been considered by the courts. (Chairman): I am glad Lord Keith mentioned that question again, because I am very puzzled. It was suggested that a rich woman settles her property on marriage so that she gets the income during her life, her husband gets it on her death, and then it goes to the children—not an unusual provision; and it was suggested, if I understood it right, that if she committed adultery and was divorced she would forfeit her life interest under her marriage settlement. Is that really the law? I can quite understand that anything to which she was absolutely entitled might be affected by divorce, but does she really forfeit a life interest which is vested in trustees upon trust to pay the income to her for the rest of her life? Do you mean to say that she forfeits that entirely if she is divorced? (Lord Keith): That plain one is not so difficult, because she is supposed to be dead. The

husband gets the life interest after her death. (Chairman): I see, she is supposed to be dead, therefore the husband gets it immediately. (Mr. Mace): I would like to ask a question arising out of that, if I may. Assume that both husband and wife put their estates into a marriage settlement, and then there is a divorce on the wife's adultery. In the present law of Scotland, would she lose the whole of the interest under the settlement, or would she lose only half? (Chairman): She would apparently lose her life interest in her own estate, because she is presumed to be dead, but clearly she could not take any life interest she had in the husband's funds because equally she is supposed to be dead. Is that right? (Mr. Mace): I thought that she might succeed to the interest on her own money, because that would not be arising from the husband. (Chairman): I understand that the plain proposition is, she is dead, and all life interests are at an end. I must say that it sounds very startling to one who has been brought up on English law. (Mr. Lawrence): May I put this supplementary question? In the case of cross-decrees both parties are presumed to be dead, therefore if there are any children I suppose the children's interest is accelerated *pro tanto*? (Lord Keith): No, that does not follow. (Chairman): I do not think that the witnesses are prepared to commit themselves upon that, and it is not surprising.

(Chairman): Thank you very much, we are indebted to the Faculty for their memorandum, and to you and to Mr. Shaw for helping us today.

(The witnesses withdrew.)

PAPER No. 72

MEMORANDUM SUBMITTED BY THE COUNCIL OF THE SOCIETY OF WRITERS TO HER MAJESTY'S SIGNET

1. It may be remarked generally that there does not seem to have been any special agitation in Scotland for reform in the law and its administration, and it accordingly seems unlikely that, *quoad* Scotland alone, any such elaborate inquiry would have been initiated. It is, however, the case that certain matters within the scope of the inquiry have been ventilated in this country since the passing of the Divorce (Scotland) Act, 1938, and in this sphere it is desirable that the law of Scotland and England should, where the same considerations apply in both countries, be assimilated.

2. On question (a): what, if any, changes should be made in the law of Scotland concerning divorce and other matrimonial causes:—

(1) *Divorce for desertion.* Under the Divorce (Scotland) Act, 1938, Section 1, it is competent for the court to grant decree of divorce, on the ground, *inter alia*, that the defender has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years. There is nothing said about "privity ademption" on the part of the pursuer, which was an essential condition for such divorce under the Act, 1873, C. 55, which was repealed by the Act of 1938. The courts have, however, considered themselves bound by precedent to insist on evidence of the pursuer's willingness to cohere during the whole period of three years. It is freely admitted by the courts, and strongly felt by the profession and the public, that this onus on the pursuer is or may in particular cases be unjust in the extreme. The pursuer may have, during the three years, passed "from hope, through disillusionment and despair, to indifference and antagonism", and not be prepared to perjure himself or herself by denying the latter phase. The more honest the pursuer the more hopeless the case, the corollary being that there is a premium on perjury. An example of this hardship is the case of *Macaskill v. Macaskill*, 1939, S.C. 187. It is considered that such a state of affairs, apart from the hardship which may be involved, tends to bring the law into disrepute.

In Scotland adultery of the pursuer during the statutory period of three years is an absolute bar to divorce for desertion. The position is different in England, provided the petitioner's adultery did not contribute to or influence the respondent's desertion. It is considered that in Scotland also the court should be given a discretion in the matter. It may in a particular case be a great hardship on the pursuer that an act of adultery, perhaps wholly unpremeditated, and it may well be resulting from the desertion itself, should be a complete bar.

It is recommended—

That legislation be introduced by way of amendment or enactment of the Divorce (Scotland) Act, 1938, to the effect that the court may completely grant divorce if satisfied that the alleged desertion was truly desertion and not separation by mutual consent.

That legislation be similarly introduced making adultery on the part of the pursuer during the triennium a discretionary bar only.

(2) *Divorce for cruelty.* This also stands upon the Divorce (Scotland) Act, 1938, Section 1, divorce being competent if the defender has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of the Act, the granting of a decree of separation *a mensa et thoro*, the innovation being to provide divorce as a remedy alternative to judicial separation on the same terms and conditions.

There is an aspect of this matter which is at least a potential hardship to a pursuer, and in which the law of Scotland, *quoad* divorce, differs from the law of England. *Stante* the decision in *Dunlop v. Dunlop*, 1950, S.C. 227, the position in Scotland is that the court must consider the position as it exists, not at the date of the last act of cruelty or the consequent actual separation of the spouses, but at the time when the court hears the case and is asked for a decree

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For the pursuer to succeed, the court must be satisfied that cohabitation cannot be resumed, with safety to the pursuer, at the date of the proof. The point is that the conduct of the defender after the actual separation of the spouses is a relevant consideration. This is or may be a very serious hardship, and throw a very unfair onus on the pursuer. The Court of Session seems uncomfortable on the matter, and doubts have been expressed in the House of Lords. Take the case of an injured wife who leaves her husband through desperation at his conduct. She may, on praiseworthy grounds, be strongly averse to dissolving the marriage, and it may be a long time before her doctor and other advisers persuade her of the necessity. The more loyal the wife, the longer the delay. Also the judicial proceedings themselves may be protracted. Meantime the husband has been called to his senses and may, *inter alia*, have been advised of the proprietary results of divorce. Having been a savage, he may in this interval have paraded himself as a reformed character, perhaps even as having been religiously converted. Having been a habitual drunkard, he may have been an occasional motorist during this important period. The wife's position as pursuer becomes precarious indeed.

English law is different on this aspect of divorce on the ground of cruelty. In terms of the Matrimonial Causes Act, 1937, Section 2, repeated in the Matrimonial Causes Act, 1950, a petition for divorce may be presented on the ground, *inter alia*, that the respondent "has since the celebration of the marriage treated the petitioner with cruelty", in the light of which it appears generally that, once the cruelty has been inflicted, the injured spouse has a vested right to the remedy, the respondent's subsequent conduct not being a relevant factor. It is submitted that, on an over-all view, this is in the interests of justice.

It is recommended—

That legislation be introduced, by way of amending and supplementing the Divorce (Scotland) Act, 1938, signing the position with that created by the English Act of 1937, and applying the innovation to judicial separation as well as divorce.

3. On question (b)—Jurisdiction.

It is considered that no change is called for in Scotland. The question has perhaps been raised mainly because of the appointment of divorce commissioners in England, but the reason for that was intolerable congestion and delay, which does not exist in Scotland. Legal aid has eliminated any hardship in divorce and nullity cases being confined to the Court of Session, and the vast majority of divorce cases are undefended. The jurisdiction of the inferior courts in other matrimonial causes works perfectly well.

4. On question (c)—Property rights of husband and wife, either during marriage, or after its termination otherwise than by death:—

Property rights during marriage. It is considered that no change in the law of Scotland is desirable.

Property rights on divorce. Reference is made to the Report of the Committee of Inquiry into the Law of Succession presented over by the Hon. Lord Mackintosh, submitted to the Secretary of State on 9th December, 1950—Cmd. 8164. The terms of reference included inquiry in regard to the legal rights of spouses, and, as regards divorce, the Committee made a unanimous recommendation to the following effect:—

That on divorce the innocent spouse should no longer be able to claim legal rights out of the other spouse's estate but that it should be left to the

court in each case to adjust the nature and extent of the provision, if any, to be made for the innocent spouse and that the court should have power to make such provision either by way of a capital sum or by annual payment or partly by the one and partly by the other as might seem best to the court in the circumstances of the particular case, and on a change of circumstances to vary or terminate the provision so made.

The Council respectfully concurs in the recommendation, which is likely to receive legislative sanction independent of the present inquiry.

The Mackintosh Committee referred to a widespread opinion that a husband divorcing his wife should be entitled to *jus relictii* out of the wife's estate. This is not the case at present. It is suggested that the existing position is out of touch with present-day conditions, particularly as an indigent husband has since 1920 been entitled to alimony from a wife having separate estate more than sufficient for her needs. It is submitted that the proprietary results of a divorce at a husband's instance should be similar, *mutatis mutandis*, to the results accruing in the case of a divorce at the instance of the wife.

Case of divorce on the ground of insanity. Reference is made to the provisions of the Divorce (Scotland) Act, 1938, Section 2 (2), which relates to the effects on property rights in the case of divorce on the ground of insanity. The sub-section provides for an order by the court for payment by the pursuer, or out of any estate belonging to him or held for his behoof, or, in the event of his pre-deceasing the defender, by his executors, of a capital sum or an annual or periodical allowance to or for behoof of the defender and any children of the marriage.

It is considered, consistently with the suggestions already made in this memorandum, that the court should be empowered to make an order, in suitable circumstances, for the support of the pursuer (whether husband or wife), as well as for any children, by the defender or out of his or her estate. A husband of substantial means may be divorced on the ground of incurable insanity by a wife who has little or no means, and who, along with children, may in consequence be reduced to something much below the standard of life to which the family as a whole have been accustomed, the husband's estate being possibly much more than necessary for his maintenance. Any order of the court should be based on a consideration of the respective means of the spouses.

It is recommended—

That, subject to the over-riding recommendation of the Mackintosh Committee as to adjustment by the court in cases of divorce on grounds other than insanity, legislation be introduced making the results of a divorce, at the husband's instance, similar, *mutatis mutandis*, to the results accruing in the case of divorce at the instance of the wife.

That, as regards divorce on the ground of insanity, Section 2 (2) of the Divorce (Scotland) Act, 1938, should be amended to the effect of empowering the court to make an order in favour of either the defender or the pursuer, against the other, taking into account their respective means.

5. On question (d)—The administration of the law relating to any of the above subjects:—

No change is recommended, save only any minor adjustment which may be consequential upon the foregoing recommendations.

(Dated 14th November, 1951.)

3 November, 1952]

Sir ERNEST M. WEDDERBURN, Mr. D. G. McGRIGOR, W.S., and
Mr. J. L. FALCONER, W.S.

EXAMINATION OF WITNESSES

(SIR ERNEST M. WEDDERBURN, Deputy Keeper of the Signet, MR. D. G. McGRIGOR, W.S., and
MR. J. L. FALCONER, W.S., representing the Council of the Society of Writers to Her Majesty's Signet;
called and examined.)

6117. (Chairman): We have before us Sir Ernest M. Wedderburn, Deputy Keeper of the Signet, and Mr. J. L. Falconer and Mr. D. G. McGregor, who are both Writers to the Signet. We have of course read and studied your memorandum, and I have very few questions on it, for this reason, that it follows so closely the lines of the memorandum presented by the Law Society of Scotland, and we have already gone into many matters with them, which we might otherwise have had to go through with you. Before I ask any questions, is there anything that you would like to add orally to your memorandum?—(Sir Ernest Wedderburn): I do not think so, my Lord. I would like to explain that there was no collusion between the Law Society and our Society. The procedure adopted in framing this memorandum was that our sub-committee prepared a draft, which was then considered by the Council. The Council did not accept all the recommendations of the sub-committee. The report was then printed and submitted to the Society as a whole, and any representations made by individual members were again considered by the Council.

6118. Would you turn to your first recommendation in paragraph 2 (1):—

"That legislation be introduced by way of amendment or clarification of the Divorce (Scotland) Act, 1938, to the effect that the court may competently grant divorce if satisfied that the alleged desertion was truly desertion and not separation by mutual consent."

Although you do not set out the terms of the proposed Section, your proposal is really to get rid of the necessity for adherence throughout the three years?—That is so.

6119. Then you continue:—

"That legislation be similarly introduced making adultery on the part of the pursuer during the triennium a discretionary bar only."

We went into that with the Law Society of Scotland, and I venture to suggest that what you have in mind here is not exactly a discretionary bar, in the usual sense of the word. I thought that what you and they both had in mind was this. That if, for instance, a wife was bringing an action for divorce on the ground of desertion and she had committed adultery during the triennium, but the adultery had not in any way conduced to or contributed to the desertion, then she should get her decree; that is to say, it is not a discretion in the true sense of the word, it is a case of satisfying the court on a particular matter of fact, and then if the court were satisfied on that she would get her decree. Is that your intention, or do you think that even where she has satisfied the court on those matters, the court should have a discretion to say, "Notwithstanding that your adultery in no way contributed to or caused the desertion, you shall not have your decree?" Which of these alternatives had you in mind?—I think we had in mind that there should be a full discretion in the court.

6120. (Lord Kinn): That means that even if it conduces to the desertion the court would still have a discretion to grant a decree?—Yes, I think so.

6121. (Chairman): And even if it did not conduce to the desertion, even if the other party did not know of the adultery, the court would still have the discretion to say, "We will not give you a decree"?—That is so.

6122. Would you turn to paragraph 4, which deals with property rights of husband and wife? There you state that your Society concurs in the recommendation of the Mackintosh Committee. The Mackintosh Committee, you note, recommended:—

"That on divorce the innocent spouse should no longer be able to claim legal rights out of the other spouse's estate but that it should be left to the court...."

Then you continue:—

"The Mackintosh Committee referred to a widespread opinion that a husband divorcing his wife should be entitled to *ius relicti* out of the wife's estate. This is not

the case at present. It is suggested that the existing position is out of touch with present-day conditions.... and then you explain why, and you go on:—

"It is submitted that the proprietary results of a divorce at a husband's instance should be similar, *mutatis mutandis*, to the results accruing in the case of a divorce at the instance of the wife."

If the Mackintosh Committee's recommendation were accepted, that of course would be so. The spouses would have no legal rights one against the other, but the court would have this discretion. But have you in mind that if the Mackintosh Committee's Report is not accepted the husband shall have a *ius relicti* under his wife's estate?—That is the intention.

6123. Of course, if the Committee's recommendation is accepted, all questions of legal rights are gone?—Yes.

6124. You have expressed no opinion on the question of whether a man should be able to marry his divorced wife's sister?—No, we express no opinion.

6125. (Lord Kinn): There is really little I want to ask you, Sir Ernest, because a good deal of what is said here has been covered by the proposals which we have had from the Law Society and others. In the case of desertion you are proposing, as other societies have done, to abolish the necessity of proving willingness to adhere?—Yes.

6126. I think we understand that, and I do not want to go into the matter further. There is just one question I might ask you on desertion. As you know, at the present time there is a vested right to a divorce after three years' desertion?—Yes.

6127. That three years normally would begin to run when the desertion begins. Has the Society considered whether the three years should be rather the three years immediately preceding the raising of the action, rather than the three years running from the commencement of the desertion?—I do not think any consideration was given to that at all.

6128. It has just been accepted that the law in Scotland is a triennium running from the commencement of the desertion?—Yes.

6129. May I now pass to paragraph 2 (2), which deals with divorce for cruelty? You recommend:—

"That legislation be introduced, by way of amending and supplementing the Divorce (Scotland) Act, 1938, aligning the position with that created by the English Act of 1937, and applying the innovation to judicial separation as well as divorce."

I have raised this question before with other witnesses. It did strike me that you and they were reading more into the cases in England and Scotland than the position warrants. In other words, there is really no radical distinction between divorce for cruelty in the law of England and in the law of Scotland. I gather that the Society took a rather different view on the matter?—The Society is not very clearly instructed as to what English law is, but the view which they held was that in regard to cruelty, where cruelty was such as to justify a divorce, it gave the offended spouse a vested right to a decree of divorce.

6130. I think you set that out in your supporting argument?—Yes. (Lord Kinn): Of course, if the Society has got the wrong view upon that matter, then this recommendation really disappears?

6131. (Chairman): But may I say that I think the Society has got the right view on this matter? Under the law of England, if there has been cruelty, sufficient to justify a divorce, then it is a fact that from that time on there is a ground for divorce. I understood your suggestion to be that that was a better rule than the existing rule in Scotland, under which the court looks at the cruelty as at the date of the hearing?—Yes.

3 November, 1952]

Sir ERNEST M. WEDDERBURN, Mr. D. G. MCGREGOR, W.S., and
Mr. J. L. FALCONER, W.S.

[Continued]

6132. It is not, as I understand it, that you are suggesting that the test of what is cruelty is different, but the timing, so to speak, is different?—I think that puts it very clearly.

6133. (*Lord Keith*): I quite appreciate, if that is the position, that you want the Scots law to be brought into line with the English law?—Yes.

6134. My only doubt, and it might be a personal doubt, is as to whether there is that distinction between the two laws, and of course if there is no such distinction then this recommendation disappears. Let me put my difficulty in this way. You will appreciate that if there is a vested right to divorce for cruelty, that is the end of the matter and it does not matter what happens, from the defender's angle, after that. In other words, the defender's position or character may have changed so completely that any possibility of cruelty has now vanished. In that case, the wife would get a decree of divorce against him notwithstanding his reformation?—That, I think, is what the Society considers should be the position.

6135. Then I note from paragraph 3 that you do not consider that there should be any change in the jurisdiction to deal with divorce cases. In other words, you are against any transfer of jurisdiction from the Court of Session to the Sheriff Court, or against any concurrent jurisdiction in the Sheriff Court?—That is so.

6136. Now may I come to paragraph 4? You see no reason for any changes in property rights during marriage, and in property rights on divorce you are adopting the recommendation of the Macintosh Committee. I think you heard some evidence, given earlier today by members of the Faculty of Advocates on the position with regard to marriage contracts?—Yes.

6137. I have no doubt, Sir Ernest, that from your experience you will be able to give some help to us on the position in the matter of rights on divorce, in respect of marriage contracts. Take the plain case, the simple case which was put to the Faculty by my Lord Chairman—a marriage contract, under which the wife gets the income of the marriage contract funds during the subsistence of the marriage, the husband gets the income if he survives his wife, and after his death it goes to the children. In that case, if the wife has been divorced is there any doubt that, under the present law of Scotland, she forfeits her income provision under the marriage contract?—I think that there is no doubt.

6138. And the husband would then take his income provision immediately?—Provided that the marriage contract were in terms such as to give him that income.

6139. Yes, with that proviso. Under the marriage contract he gets the income if he survives his wife?—Yes.

6140. And divorce would be taken as operating in his favour as if survivor?—Yes.

6141. Take a more difficult case of a marriage contract. Cross-actions of divorce are raised, each of the actions succeeds, the wife gets a divorce from her husband and the husband gets a divorce from his wife—what would then be the position under that marriage contract provision?—I am afraid that is a matter on which we would take the advice of counsel.

6142. Then may I take it that it is not a case which has ever come under your notice?—I have never seen such a case.

6143. It is a case that could happen quite easily. Cross-actions of divorce are not unknown, and are not unknown to succeed?—Yes, but I think there would probably be a family arrangement in a case of that sort.

6144. But there might not be a family arrangement, and you might have to apply to the courts to decide?—You might.

6145. It occurred to me that it might be possible to take the view that as the husband had forfeited his rights out of the marriage contract, the marriage contract provisions did not fall as regards the wife. But you have not ever had to consider that question?—I have never had to consider that.

6146. I will now come to divorce on the ground of insanity. You have one proposal here which, so far as I know, has not been put forward by any other legal

body. At the present time, if a person is divorced on the ground of insanity, the court can make an order for payment by the pursuer to the spouse who has been divorced, for his or her maintenance. You are proposing that if the circumstances require it the court should also be able to make an order for a payment out of the divorced spouse's estate to the person obtaining the divorce?—That is so.

6147. That obviously would be a rule to be applied, for instance, where a wife, who brought the action of divorce, was left with children to maintain, and the divorced husband had a substantial estate. In such a case you see no reason why the wife should not get maintenance out of the estate?—If she is looking after the family, I see no reason why she should not.

6148. And there is no provision for that at the present time, either under the Divorce Act, 1938, or in common law?—That is so.

6149. (*Sheriff Walker*): Can you tell me from your experience, in a case where a divorce is refused, be it a defended case or an undefended case, what is the fate of the parties? Do they come together again, or do they live apart and form other associations? Is there any information as to what happens?—I am not aware of any.

6150. Can you tell me whether it is common to have policies of assurance, under the Married Women's Policies of Assurance Act? Is that a common practice?—That is quite a common practice nowadays.

6151. I think that there is a special Act which applies to Scotland, which is similar to but not quite the same as the English Act?—That is so.

6152. Take the case of a married man who effects a policy of assurance on the life of his named wife. In that case when the husband dies the policy money is treated by the Inland Revenue as not to be aggregated with his general estate, because he never had an interest in it. Is that so?—Yes, in general.

6153. And I think that that stems from a decision of the English courts, does it not?—There are Scottish decisions, too.

6154. Are you aware that in at any rate one case in the Outer House, the case of *Wallace v. Wallace*, it was decided that on the wife being divorced a policy in these terms reverted to the husband?—I had not that before me.

6155. Of course, if that was good Scots law, it would seem to follow that on the husband's death, in Scotland, the policy moneys would have to be aggregated with his estate, because he had a contingent right in the policy?—I think that there are a number of questions which the Estate Duty Office would raise along these lines.

6156. What I am trying to ascertain, Sir Ernest, is whether there is a case for assimilating Scots and English law more closely in relation to married women's policies of assurance?—That is a very difficult question to answer.

6157. It is rather outside your memorandum, but I wondered whether from your large experience you could give us some assistance?—It is a matter which solicitors generally have in front of them, the differences between the terms of the English Act and the Scottish Act. There are circumstances under which it seems to be preferable to have a policy written under the English Act, and others in which it would be more convenient to have it written under the Scottish Act, and the assent can pretty well choose which Act he prefers.

6158. I was wondering whether you knew of this practice, that some insurance companies insuring a Scots life insert in the policy a statement that the policy is issued under the English Act, and not the Scottish Act?—Yes, that is done. Sometimes the husband gives the address of a club in London or a bank in London.

6159. (*Mr. Young*): In paragraph 5 of the memorandum, Sir Ernest, you say that you have no changes to recommend in the administration of the law. It has been suggested in the evidence before us that there might be a change of procedure in the Sheriff Court, by allowing actions of affirm in the Sheriff Court to proceed on the lines of our small debt procedure. The present procedure is criticised as being rather cumbersome, slow and expensive. Have you any observations to make on that?—May I ask Mr. Falconer to deal with this, as it is not

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[Continued]

a matter on which I know very much? (Mr. Falconer): It is always possible in the small debt court to start an action for interim aliment, under which the wife can obtain up to £30. Provided the wife has good grounds, it is possible, when lodging the initial writ in the Sheriff Court, in an action of separation and aliment or adherence and aliment, to ask for interim aliment, i.e., for aliment *pendente lite*. There cannot therefore be very much delay, or, since the introduction of the Legal Aid Scheme, very great expense involved, so far as the wife is concerned.

6160. Let me present another case to you: supposing a husband wants to vary aliment, he cannot do it just as simply as that?—I agree. If a husband wishes to vary aliment, he requires to lodge a minute in the original process in the court. That generally results in the wife being allowed to answer by pleadings of her own, and so another small action is started. It is perhaps difficult to visualise a scheme under which a full result can be obtained, however, without such pleadings, which afford the court the necessary information.

6161. Could you not get that information in the small debt procedure quite easily, without the expense?—By a proof?

6162. By a proof.—Yes, that is possible.

6163. Would it be fair to say that the result of the present procedure, in respect of variation at any rate, often is that a husband is advised that while he might get a reduction in the amount of aliment which he is required to pay, the expense in getting it reduced would outweigh the benefit of that reduction?—I agree that that sometimes happens.

6164. (Mr. Beloe): Mine are two layman's questions, and I hope that they will be intelligible to you. The first is this: I gather that you wish the custody rules to be the same as now exist in England?—(Sir Ernest Wedderburn): Yes.

6165. In the case of a wife to whom her husband had been cruel and who took him back again, would you still say that at any time during the future she could petition for a divorce?—I think that the fact that she took him back again would act as a bar. That is my personal view.

6166. The other point is this: with regard to marriage settlements, is the risk of divorce now so great that in drawing up a marriage settlement it is usual to say, "This shall be applied according to the law in England, and not the law of Scotland"?—No, I cannot say that that is usual at all.

6167. So most marriage settlements are still drawn up according to the law of Scotland?—Perhaps I should mention that most marriage settlements bar legal rights altogether, and provide that neither spouse nor children shall have any legal rights in the other's estates.

6168. And it is permissible to do that under the law of Scotland?—Yes, it is done.

6169. You can renounce legal rights?—Yes, and you can bar the children's rights also.

6170. (Chairman): But I suppose in order effectively to bar the children's rights you must make some adequate provision for them?—Yes, adequate as at that time, which may be very inadequate indeed at the time of the parents' death.

6171. (Mr. Brown): Under the system of arrestment of wages a certain amount of money must be left to the man in his wage packet. Can you tell me what is the amount which must be left?—(Mr. McGregor): The amount at present, Sir, is 35s. per week.*

6172. I raise that question because the amount of 35s., which has been mentioned to me before, seems to be a quite unrealistic figure at the present day, and may very often lead to a man leaving his work. Can you tell me off hand when the sum was laid down? How old is that provision?—I cannot give you the date when that sum of 35s. was fixed, but I know it has been fixed for some considerable number of years.

6173. (Chairman): It is, I understand, the minimum which must be left to him?—Yes, that is the sum fixed which must be left to the employee on the wages being arrested.

6174. (Lady Bragg): From the legal profession in Scotland, Sir Ernest, we have heard little about reconciliation. What are we to infer from that?—(Sir Ernest Wedderburn): I think the answer to that depends on whether the lawyer who is consulted is a family lawyer, to the old sense, or whether he is someone who has been consulted after his client has made up his or her mind. In that case, any proposal for reconciliation is too late, and the solicitor would simply take his instructions. But if he is consulted as a family adviser, then I think every solicitor of any standing will do his best to effect a reconciliation, and only as a last resort will take instructions to proceed with an action.

6175. Would you like to see a reconciliation officer attached to the Court of Session for that purpose?—I think that when proceedings reach a court there is usually too much exacerbation to make reconciliation very likely.

6176. (Mr. Macle): Sir Ernest, may I discuss the question of reconciliation a little further? What would be the views of your Society if there were a recommendation that every party for a divorce, before the petition was launched in the courts, had by compulsion to see a reconciliation officer?—That is not a matter on which I can speak on behalf of the Society at all. That has not been considered.

6177. Then would you feel able to give us your personal views? Could we have the views of the three of you, from your personal experience as practising Writers to H.M. Signet?—(Mr. McGregor): Personally, Sir, I think that recourse to a reconciliation officer at an early stage would be a very good thing, and I think—speaking, of course, for myself—that the W.S. Society would be very willing to give attention to any such suggestion. I think that no solicitor, at any rate no member of the W.S. Society, is keen to have notions of divorce, and if they can be avoided then I think all possible measures should be taken to avoid them. The possibility of a tacit reconciliation officer having access to parties before proceedings are taken might in some cases have a good result.

6178. Accepting that one answer for the moment, I put to you whether it would be good that the visit to the reconciliation officer should be compulsory before a petition is launched. Do you think that if it were compulsory for everybody it would fall into disrepute and become a mere formality?—I would not be in favour of any compulsory measure.

6179. But, on the other hand, if a solicitor had to sign a declaration that he had explained to his clients that there were facilities for reconciliation, and thus satisfy the court that the client had had the opportunity to take advantage of such a procedure, would you favour such a proposal?—Yes, I think that would be entirely sufficient and quite satisfactory.

6180. Do you think that it would serve a good purpose and be worthy of the public expense which it would entail?—Yes, I think so.

6181. (Chairman): Would you, Sir Ernest, and Mr. Falconer, comment on this matter so that we may have your views also?—(Sir Ernest Wedderburn): I am very sceptical as to the results which would follow from a visit to the reconciliation officer, and very doubtful as to whether the appointment of such an officer, paid at public expense, would be justifiable. The fact that he was simply an official would rather militate against any influence he might bring to bear. If he were a voluntary officer entirely, then he might have more influence.

6182. If he gave his services for nothing, you mean?—Or not as a servant of the State.

6183. I do not understand that. Either he is voluntary and gives his services for nothing, or else presumably he has to be paid by the State.—He may be an officer of a voluntary association.

6184. Yes, I see. You think that he would then have more influence?—I think that he would have more influence.

6185. Have you any views to express, Mr. Falconer?—(Mr. Falconer): Speaking as an individual, my Lord, I would not be in favour of compulsion for all cases. I

* Section 4 of the Wages Arrestment Limitation (Scotland) Act, 1870, provides, *inter alia*, that the statutory limitation on arrestment of wages shall in no way affect arrestments in virtue of decrees for alimentary allowances.

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[Continued]

PAPER No. 73. MEMORANDUM SUBMITTED BY THE SOCIETY OF SOLICITORS IN THE
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have always thought, however, that harder standards of divorce should be made where there are children than where there are no children. It is difficult to visualise how that could be worked, but where there is divorce it is the children who seem to suffer.

6186. And from that what do you deduce, on this particular topic of reconciliation?—Some system might be evolved under which parents might be asked to see the reconciliation officer, who should be satisfied perhaps as to the future arrangements for the children, before the petition was brought. That is my personal view.

6187. (Mr. Macle): Now may I put to you another situation? Let us disregard for the moment the suggestion of having a signed declaration by the solicitor before the petition is granted. Instead, let us assume that there is a welfare officer attached to the court. We can ignore for the moment whether he should be a permanent official employed by the State, or a member of a marriage guidance council or some other voluntary body financed by the State. When any petition comes before the court, the court can then at any time refer a case to the welfare officer. Would you agree with that suggestion? Would you think it preferable to my first suggestion?—(Sir Ernest Wedderburn): If I may say so, I think that would be a much better suggestion than the previous one. (Mr. McGregor): Yes, I think that would be a good suggestion.

6188. And the parties would not be compelled to go to him by the court, but a suggestion might be made by the court that they should go to him?—Yes, I would agree with that as being a good suggestion.

6189. Mr. Falconer?—(Mr. Falconer): It is sometimes difficult, I think, to enforce suggestions.

(The witnesses withdrew.)

PAPER No. 73

MEMORANDUM SUBMITTED BY THE SOCIETY OF SOLICITORS IN THE
SUPREME COURTS OF SCOTLAND

The Society do not consider that there is any justification for any substantial alteration in the law of Scotland concerning divorce and other matrimonial causes. The three Acts of Parliament, namely, the Divorce (Scotland) Act, 1938, the Marriage Act, 1939, and the Marriage (Scotland) Act, 1939, rectified certain anomalies and satisfied general criticism. It appears, however, to the Society that certain modifications might be usefully made in the law as it presently stands.

1. Question (a)—what, if any, changes should be made in the law of Scotland concerning divorce and other matrimonial causes?

(1) *Divorce for desertion.* The Society consider that the existing law, whereby the injured party must have been willing to adhere to the guilty spouse for a period of three years, should be modified. They are of the view that three years is a reasonable period, and do not propose any alteration on the period of time. At present, however, the courts insist on evidence that the pursuer was willing to adhere during the whole period of desertion. The Society do not consider it reasonable to expect the innocent spouse to be able to maintain an attitude of forgiveness and willingness to resume cohabitation for the whole period. Human nature being what it is, there must be in the mind of the injured party resentment, disappointment and disillusionment. The evidence given by the pursuer in such cases would be much more genuine and much more honest if the evidence required were to be restricted to evidence which shows that the pursuer did not concur nor connive in the original separation, nor subsequently refuse any reasonable offer of reconciliation. The Society consider that this opportunity should be taken to reconsider the present position whereby the adultery of the pursuer at any time during the prescriptive period is an absolute bar to divorce for desertion. They consider that the court should be given a discretion in the matter.

It is recommended (i) That legislation be introduced by way of amendment of the Divorce (Scotland) Act, 1938,

6190. As a practising Writer to the Signet, you know how to advise your client, if he is not going to agree with suggestions which come from the court—I agree, but I think it would have to be more than a suggestion to the litigants that they go and see the officer. The court would have to have power to instruct them to go for interview.

6191. Now may I turn to judicial separation? As I understand it, a separation case comes before the Sheriff Court and there are pleadings, so that when the matter comes to the court the judge knows what he is going to try and each of the parties has an idea of what the other is going to say before the matter comes into court. The delay from the issue of the original summons to the trial can be as much as four to six months?—That is possible.

6192. Has it ever been considered by your Society that in matrimonial work there should be a tribunal, similar to the magistrates' court in England, where a summons can be issued on Monday, returnable for Friday of that week if necessary, or perhaps in a fortnight's time at the longest. The parties then come before the court with no pleadings whatsoever, and very often not represented by a lawyer. Three magistrates—having the advantage of advice from a clerk with legal knowledge—hear them both and make their determination or adjourn the case. Has that ever been considered by your Society as one solution to matrimonial problems?—(Sir Ernest Wedderburn): No, that has never been considered.

(Chairman): Thank you very much for your memorandum and for your attendance here today. It has been most helpful.

to the effect that the court may competently grant divorce if satisfied that the alleged desertion was truly desertion, and not a separation by mutual consent.

(ii) That legislation be similarly introduced making adultery on the part of the pursuer during the period of three years a discretionary bar only.

(2) *Divorce on the ground of cruelty.* The present position is that it is a sufficient ground for divorce on the head of cruelty if there have been personal violence, or threats of violence inducing the fear of immediate danger to the person, or conduct which leads to injury causing danger to life or health. The Society are of the view that the definition of cruelty according to the Act of Parliament is too rigid, in respect that it does not fully cover acts or conduct which render life intolerable for the spouse or the children of the marriage. There are forms of cruelty which are harder to bear than physical assault, and which make life more intolerable for the assaulted party than blows dealt in rage. It is within the experience of most practising solicitors that deliberate and calculated mental cruelty is much harder to bear, is less easily forgiven and is capable of reducing either spouse to a state of mind which frequently results in nervous breakdowns. Nevertheless, the guilty spouse may never have laid a hand on the other party. It is considered, therefore, that the definition of cruelty should be extended so as to include such cases, and a discretion should be allowed to the judge to admit evidence supporting any such allegations.

It is recommended that legislation be introduced by way of amendment of the Divorce (Scotland) Act, 1938, so as to include as a ground of divorce a course of conduct wilfully persisted in by one spouse towards the other spouse or towards the children of the marriage of such a nature as, in the opinion of the court, shows an unwarrantable indifference to, or disregard of, the normal obligations of marriage such as to render the married life of the spouses intolerable to the other spouse.

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(3) *Divorce on the ground of insanity.* Reference is made to the provisions of the Divorce (Scotland) Act, 1938, and it is recommended that the words "other than treatment as a voluntary patient" be deleted from the Act.

2. Question (b)—what changes, if any, should be made in the powers of courts of inferior jurisdiction?

The Society consider that this matter was fully dealt with by the Report of the Royal Commission on the Court of Session (the Clyde Report, 1929), and in that Report the Commission expressed the view that actions of divorce should continue to be heard by the Court of Session only. The Society are proposing recommendations which will involve the discretion of the judge. It is undesirable, they consider, that this discretion should be entrusted to inferior courts scattered throughout the country, as it would be unlikely that uniformity of practice would follow, and it would be very undesirable if differences in practice were to prevail in different parts of the country. They consider that it is important that the Court of Session sitting in Edinburgh with the judges having the benefit of daily consultation, should alone have the discretion to deal with the matters suggested by the Society.

3. Question (c)—what, if any, changes should be made in the law relating to the property rights of husband and wife?

No change is recommended. It is, however, considered that decrees of divorce should be registrable in the Register of Inhibitions, or some public register, so that any claim to a wife's tace, which may emerge as a result of the dissolution of the marriage, should be ascertainable on exam-

ination of the Search for Incumbrances over the property. It is not uncommon for a purchaser of a house in good faith to find, after the transaction has been settled, that there is a claim for tace outstanding.

4. Question (d)—the administration of the law relating to any of the above subjects.

No change is recommended.

5. Question (e)—changes in the law prohibiting marriage with certain relations by kindred or affinity.

Attention is drawn to the anomaly that a man may marry his deceased wife's sister, but not his divorced wife's sister. Exceptions have been made to the rule of the common law by the Deceased Wife's Sister's Marriage Act, 1907, by the Deceased Brother's Widow's Marriage Act, 1921, and by the Marriage (Prohibited Degrees of Relationship) Act, 1931, but these all refer to previous marriages of one or the other spouse, which have been dissolved by death. It is considered that the exceptions to the common law should be extended so as also to permit the marriage of persons whose previous marriage has been dissolved by divorce.

Civil marriage with a deceased wife's sister or with a deceased husband's brother is permitted. There seems to be no reason in principle why marriage with a descendant of the sister or brother, respectively, should be prohibited. It is considered that legislation be introduced to effect this extension.

(Dated 4th December, 1951.)

EXAMINATION OF WITNESSES

(MR. W. MACDUFF URQUHART, S.S.C. and MR. NEIL WATSON, S.S.C., representing the Society of Solicitors in the Supreme Courts of Scotland; called and examined.)

6193. (Chairman): Mr. W. MacDuff Urquhart, S.S.C., Vice-President of the Society, and Mr. Neil Watson, S.S.C., before we ask you any questions would you like to make any preliminary statement?—(Mr. Urquhart): I might perhaps sum up the memorandums by saying that this Society does not consider that there is any justification for any substantial alteration in the law of Scotland concerning divorce and other matrimonial causes. We consider that the law as it stands is clear, concise, and is well understood by the people. It is considered that it is not possible for the legislature to remove all hardships in marriage because in the last analysis marriage depends largely on an emotional human relationship. The law need not be materially altered, and we are against making divorce easier. We consider that what does need to be altered is the attitude of mind and behaviour of those entering into Christian marriage. We would commend this problem to the Church and to the leaders of youth organisations, who should stress that marriage is not to be lightly entered into, and their aim should be to inculcate that marriage is a permanent partnership. It will also be observed that we do not favour any alteration in the law as to property rights. I should explain that this was a majority decision. The attitude of the majority was that the position as to property rights is well and generally known, and that the advantage in treating the guilty spouse as dead is that it brings this unfortunate marriage to a final and logical conclusion. The minority, however, did consider that even if a man had no capital, some payment ought to be made, if only based on his expectation of life, because had he died his widow would have been entitled to some right to pension, insurance or other benefit.

Finally, the Council do not see any real advantage in an assimilation of the Scots law in the English law except in respect of certain particular modifications which have been found to be advantageous there and which are absent from Scots law. In this connection I regret that my friend and I are unable to express ourselves as to the doctrine of constructive desertion, which I heard discussed this morning in connection with the evidence of the Faculty of Advocates. This matter has, of course, been ventilated quite considerably before you, but in my opinion insufficient attention has been given to the idea here in Scotland to justify us in making any recommendation.

6194. Arising out of what you have said, I would like to ask this—what were the reasons of the majority for rejecting the Mackintosh Committee's recommendation that the court should, in divorce, be given a complete discretion for making out of capital or income such payment as might be just at the time, because there again the whole matter could be brought to an end so far as capital is concerned by an immediate order. What were the reasons which led the majority to reject the Mackintosh Committee's suggestion?—I think that what was in the minds of the majority was that the Mackintosh Report is at the moment only a report, and that they did not consider that they should recommend to this Commission any substantial alterations in the capital payment or alimony payment in view of the fact that the Mackintosh Report was under consideration, and that legislation might follow.

6195. Yes, I follow that, but at the same time the Commission invited you to answer this question:—

"What, if any, changes should be made in the law relating to the property rights of husband and wife?"

and, in paragraph 3 of your memorandum, you say that no change is recommended. I should have thought that in considering the answer to that question, one of the matters which you would have to consider would be the changes recommended in the Mackintosh Report, and that you would have formed a conclusion as to whether you agreed or disagreed with the suggested changes. Did your Society not do that?—I think the majority considered that the law as it stands is satisfactory in respect that it is clear and well understood.

6196. Yes. I wonder what your answer would be to the point, which has been made so often before us, that you might, for example, get a case of real hardship to a wife. A wife divorces her husband, who has got no capital at all but is earning a very substantial income. As the law stands at present, her property rights are quite useless to her and the court has no power to improve her position by making an order for payment of alimony. Did you consider that objection to the present position?—Yes, we considered it, my Lord, but hard cases make bad

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[Continued]

law and we felt that one could not attempt to legislate for every possible variation in the circumstances of the spouses.

6197. (Lord Keith): After your very clear opening statement there are no general questions I wish to ask you. I will turn to the first question you deal with in your memorandum, namely, divorce for desertion. Your recommendation is that the court should grant divorce if satisfied that the alleged desertion was truly desertion and not separation by mutual consent. In effect that means that you are doing away with the necessity to prove willingness to adhere?—That is so. It was felt that sometimes almost perjury. We felt that the present requirement was no true criterion, and human nature being what it is, it was almost impossible to expect a wife or a husband to remain in the same state of mind three years afterwards towards the deserting spouse. At the same time we felt that marriage had to be safeguarded, by the court being assured that there was no arrangement between the parties and no mutual separation.

6198. Will you come to the next point? You put it that adultery on the part of the pursuer during the period of three years should be a discretionary bar only?—Yes.

6199. One view has been put to us that it should be a defence if the adultery condoned to the desertion.—What was in our mind, my Lord, was that where there is a separation, there is great emotional stress and strain and the pursuer may slip up by way of adultery on one occasion. That is a very different matter from a course of adultery during the trisennium, and that was why we felt it should be in the discretion of the court alone to enquire into and satisfy itself that this was an isolated emotional outbreak or something of that sort, and which it was reasonable to assume was not a sustained course of conduct.

6200. Suppose there was a course of adultery—the pursuer who had been deserted had taken up with someone and lived with that person for a term of years, but the defender who had deserted had perhaps gone out of the country. He had gone away and really was not caring one bit what the pursuer did, and perhaps did not even know of this illicit union that the pursuer had formed. In that case would you still make the adultery subject to a discretionary bar? Would you leave it to the court to say whether divorce for desertion should be refused or not?—I cannot bind my Council, my Lord, because that particular set of circumstances was not, I think, considered by us, but generally the opinion of the Council was that this question of adultery on the part of the pursuer should be left to the discretion of the court. My own view is that if there is a course of adultery over the whole of the trisennium that should be an absolute bar.

6201. Whether it affects the deserted spouse or not?—But I think that could be left to the discretion of the court, which could make special enquiries as it thought fit.

6202. But I wanted to get it quite clear—it is a discretionary bar you are thinking of—a matter which the court has got to take up and deal with, and either grant or refuse divorce?—That would be the view of my Council.

6203. In paragraph 1 (2) you deal with divorce for cruelty. I think you adopt there an extended definition of cruelty which is on the same lines as that proposed by the Law Society?—Yes.

6204. We discussed that matter very fully with the Law Society and I do not want to go into the matter again, but there is one question I want to ask you on it. Take the last sentence of your narrative in that sub-paragraph:—

"It is considered, therefore, that the definition of cruelty should be extended so as to include such cases, and a discretion should be allowed to the judge to admit evidence supporting any such allegations."

I do not understand what you mean by "discretion". If there is to be an extended definition, and if the pursuer comes in alleging certain facts in support of cruelty under the definition, there could be no discretion, surely, to the judge to admit evidence?—No, my Lord, but we have not got the definition.

6205. No, but granting you the definition as you have stated it here, there would be no question of a discretion?—I should imagine, my Lord, that in the relationship of husband and wife, it would be impossible to define the variations in conduct which might be included in that definition. Our view is simply that the matter will be in the hands of the court with complete discretion on its part to call for any evidence which would support allegations which might otherwise, if it were a defended action, be deemed to be irrelevant.

6206. Would it not rather be this, that the party would lead such evidence as he or she thinks proper to support the allegation of cruelty under the new definition, and that the court, having heard all the evidence would decide whether the divorce should be granted upon the new definition?—I think that was what was in the mind of our Council when we came to frame this answer.

6207. Would you turn to the question of divorce on the ground of insanity? What you want to do here is to make treatment as a voluntary patient evidence of incurable insanity?—The position, my Lord, is that it might be possible for someone who has recurrent fits of insanity to escape the penalties thereof, so far as marriage is concerned, by entering a home as a voluntary patient, and thereby leading the other spouse a cat-and-dog life. In such a case, if the patient's mental health deteriorated to a certain extent he or she could seek refuge in a nursing home as a voluntary patient and the other spouse would be left without any remedy.

6208. Then you would admit voluntary treatment as evidence of insanity?—I think it is a question of medical evidence, my Lord. If the medical evidence is quite clear, then there ought to be no doubt on the remedy, irrespective of whether the unfortunate spouse is in a nursing home or mental home, voluntarily or otherwise.

6209. But would you turn to your recommendation? You say:—

"Reference is made to the provisions of the Divorce (Scotland) Act, 1938, and it is recommended that the words 'other than treatment as a voluntary patient' be deleted from the Act."

I would like to point out to you that these words appear in a sub-section which is dealing, as I understand it, with care and treatment in England. It has nothing to do with care and treatment in Scotland. It reads:—

"While he is under care and treatment (other than treatment as a voluntary patient) within the meaning of section one hundred and seventy-six of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Matrimonial Causes Act, 1937;"

These are English Statutes and this obviously has reference to care and treatment in England.—Why was it included in the Scottish statute, my Lord?

6210. For obvious reasons. If a person is under treatment in England we want it to be a ground of divorce in Scotland in an appropriate case. I do not know that there is any difficulty, Mr. Urquhart, as long as I understand what the recommendation is in substance, and I thought I understood it simply to mean this: that treatment as a voluntary patient should be a relevant consideration for a court asked to give a decree on the ground of insanity.—That is exactly what is meant.

6211. I see that your Society recommends in paragraph 5 of the memorandum that a man should be allowed to marry his divorced wife's sister and, similarly, that a woman should be allowed to marry her divorced husband's brother.—Yes, my Lord.

6212. Have you anything to add on that point as to the reasons that moved the Society or any argument you wish to advance in support of that?—No. There did not seem to be any reason why, when a man can now marry his deceased wife's sister, he should be prohibited from marrying his divorced wife's sister. It seems neither law nor common sense to make the exclusion, in view of the amendments that have already taken place.

6213. There has been a suggestion that to allow a man to marry his divorced wife's sister might tend to introduce trouble into the matrimonial home. That is a social question, of course. I do not know whether your Society considered it from that angle?—I do not think that we did, my Lord. On the other hand, other things being equal, one might have thought that if there were children

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[Continued]

of the marriage, their aunt would be more likely to take a friendly and motherly interest in them than a complete stranger. (Lord Keith): I think that the last part of paragraph 5 of your memorandum, Mr. Urquhart, would disappear. I do not know if you remembered that the Marriage (Prohibited Degrees of Relationship) Act, 1931, covers the question of the descendants of the deceased wife's sister and deceased husband's brother.

6214. (Chairman): Would you turn again to paragraph 1 (2), in which you deal with divorce on the ground of cruelty? In the middle of the paragraph you say:—

"It is within the experience of most practising solicitors that deliberate and calculated mental cruelty is much harder to bear, is less easily forgiven and is capable of reducing either spouse to a state of mind which frequently results in nervous breakdowns. Nevertheless, the guilty spouse may never have laid a hand on the other party. It is considered, therefore, that the definition of cruelty should be extended so as to include such cases . . ."

If it were proved that there had been deliberate and calculated mental cruelty, which was in fact reducing the spouse to a state of mind resulting in nervous breakdowns, or that there was reasonable ground for apprehending that, then under the existing law in England a divorce would be granted on the ground of cruelty. Is that not the law in Scotland?—It is the question of the danger to health that is emphasised, my Lord. And it is all a question of degree. There may be no apparent or easily provable deterioration in health . . .

6215. Yes, but are you suggesting that some test other than deterioration, or apprehended deterioration, in health should be applied?—It would depend on whether the proposed definition of cruelty were wide enough.

6216. I note the proposed definition which, as Lord Keith has said, has been fully discussed already. Turning again to paragraph 5, you begin by saying:—

"Attention is drawn to the anomaly that a man may marry his deceased wife's sister, but not his divorced wife's sister."

Did you in fact consider any argument which was put forward against a man being allowed to marry his divorced wife's sister, or did you simply think that this is anomalous and that there is no reason why the anomaly should not be removed?—I do not think that the other point of view was canvassed to any extent by the Council.

6217. (Mr. Justice Pearce): I was not quite clear about your answer to my Lord Chairman when you spoke of the standard of calculated mental cruelty which is liable to lead to nervous breakdown. That is already covered by the law of cruelty in England. What exactly are you saying with regard to the law of Scotland—that conduct of that kind is not covered by the present definition of cruelty?—Cruelty of that kind is extremely difficult to prove.

6218. That is rather a question of whether the case is genuine, is it not? If you can prove that there has been a calculated course of mental cruelty causing injury, or apprehended injury, to health, can you get a decree in Scotland as well as England?—Yes, if it is contributing to a deterioration in health. Health is the prime consideration.

6219. So the definition is not the trouble. The difficulty lies in proving the facts? You follow my point?—Yes, I quite see.

6220. Thus the definition under the existing law on the subject of cruelty is satisfactory, provided you can prove it to the satisfaction of the judge. Is that right?—It is suggested that the standard of proof required is perhaps too high. We are dealing with husband and wife, and proof is not always easily obtained because there are no third parties and one is dependent upon medical evidence probably.

6221. In England, I do not know if it is the same in Scotland, it is merely a question of the judge trying to find out what he believes to be the truth of the matter. And provided there is a wife who can give evidence of the matter, then it is his affair to find out whether she has really been suffering in the matter she complains of. Is there an additional ruling in Scotland that makes it harder to prove? (Lord Keith): Yes, corroboration is required.—Often a wife will come forward and there is

not a mark upon her; she has not been physically ill-treated at all. Yet a client of mine, who was a wonderful singer and great musician, was driven nearly mad because her husband deliberately put her radio on to a flat key, holding it there. That sort of thing is impossible of proof. There was no material damage done to the poor woman but it drove her nearly mad.

6222. (Mr. Justice Pearce): I do not follow why it was impossible of proof.—Lack of corroboration.

6223. I quite understand that there may be a technical rule of corroboration which leads to a large number of these cases not obtaining the relief they ought to have because of that technical difficulty. But is that really what you are saying, that the rule of corroboration in these cases is too strongly held?—I think it comes to that.

6224. I am only trying to find out what the substance of your complaint is. I follow that you may say the rule of corroboration in these cases destroys a pursuer's case which on merit ought to be successful. That is really what you are saying?—That is really what it comes to.

6225. Then you spoke of conduct that renders life intolerable for the spouse, if it is conduct which renders the continuance of married life impossible so that the home is broken up, in England that would be considered desertion by the party who is responsible for the break-up of the home. Would it meet part of your objection if that were held to be so in Scotland? If conduct, though not necessarily cruelty, was such that no spouse could reasonably be expected to put up with it, and that spouse was thereby compelled to leave the home, that in England would be considered constructive desertion. Would it meet part of your problem if that were adopted in Scotland?—That the person who leaves the home is not the deserting party at all?

6226. Certainly.—I doubt if my Council would regard that theory with favour.

6227. In fact, I think you said that they did not consider constructive desertion; the term is unfortunate, as it suggests that there is something artificial about it, whereas it is very real.—It is a new conception to us, and the Council, as such, have not considered it, and therefore I am unable to express any view on it.

6228. Yet it would seem to meet part of the difficulty that you mention in paragraph 1 (2)?—It is so open to abuse, my Lord.

6229. (Mr. Beloe): In your opening remarks you referred to those who enter Christian marriage. Are there a large number of people in Scotland who do not enter marriage by means of a Christian service?—I am quite sure of it. As a matter of fact the term "Christian marriage" probably was not the right expression to use. What we had in mind was marriage, as understood in Christian countries. We were not drawing distinction between a marriage in a registrar's office and a marriage in a church, because it is very common, I think, to have a marriage without a religious service.

6230. Yes, I see.—Particularly following upon—though it is now of course not competent—the old Scots form of marriage by declaration *de present*.

6231. You would consider, though, that the nearer marriage could approach to the Christian ideal, the better. Was that really what you were suggesting?—That was really what I was trying to convey, and that the Church and youth organisations had a great opportunity to improve what is admittedly a lamentable state of affairs.

6232. Might I ask a question about property rights of husband and wife? I gather you are of opinion that the law should not be changed in that respect in Scotland. Am I right in thinking that the law does not apply where a marriage settlement has been drawn up that provides that the parties forego these property rights?—That is true. It is a question of the wording of the deed.

6233. I was thinking of the case of a rich husband and a not so rich wife, who have a marriage settlement. In that marriage settlement is it competent for the wife to renounce her legal rights?—Yes.

6234. So that in fairness, although you are saying that the law ought not to be altered, any solicitor can and will draw up a settlement which makes the law nugatory?—With the consent of the parties.

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[Continued]

6235. But you can still say before you get married, "If I divorce my husband, I will not pursue my rights". That is so, is it?—Yes.

6236. (Lord Keith): Mr. Urquhart, is that a very common form of marriage settlement?—I do not know that I have ever met it. Usually in the first flush of enthusiasm of a marriage contract, divorce is considered to be impossible.

6237. I think perhaps you should explain to Mr. Beloe that whereas in a marriage settlement the parties may renounce their legal rights, that is in return for other contractual rights they are getting under the settlement?—That is perfectly true. People are putting into the pool certain sums of money or certain properties, and it is a contractual arrangement. It is not for nothing that they renounce their legal rights; it is a contractual arrangement.

6238. (Mr. Young): Will you turn to paragraph 3 of the memorandum, which deals, *inter alia*, with registration of a decree of divorce in the Register of Inhibitions? Suppose that it were possible to register a decree of divorce in the way you suggest. Do you mean that if the party who has a right to register the decree does not do so, then he or she loses his or her legal rights?—No, what was in our mind was the protection of the bona fide third-party purchaser.

6239. That is the same thing, almost. If a wife or husband who is entitled to register a decree of divorce does not do so, and the property is sold without notice, then that husband or wife will lose any rights in that property in favour of the third party?—We did not go so far as that, but it is a reasonable assumption, I think, that if you fail to register in the Register of Inhibitions, then you cannot claim your right of action from an innocent third party who has purchased the property.

6240. One question on the subject of arrestment of wages. Can either of you, from your personal experience, make any comment as to the effect of arrestment on a working man's wages?—You mean in respect of employment?

6241. Yes.—I think that varies with almost every employer. There are some employers who will not be bothered with arrestment of wages, and if a man's wages are arrested, then he loses his employment. That is not general at all. I think that perhaps Mr. Watson might like to say something on this. (Mr. Watson): Mr. Urquhart has expressed exactly my own views on that. It all depends on the individual employer.

6242. (Chairman): Does it often happen that the man changes his employment because there has been an arrestment of wages?—(Mr. Urquhart): That does happen, in an endeavour to avoid his legal obligations. It depends on the type of man in that case.

6243. (Mr. Young): Were you present when I was asking the witnesses representing the Society of Writers to the Signet about a proposal that actions for aliment should be dealt with under a procedure akin to the small debt procedure in Sheriff Courts?—Yes, I heard it all.

6244. Have you any views as to whether it would be a good thing or a bad thing to introduce?—Could the Sheriff, without written pleadings, be in full possession of the facts?

6245. May I ask you to consider the corresponding procedure in England? In England there is a very summary procedure whereby aliment is obtained by a simple summons being taken out without written pleadings and in a very quick and inexpensive way. Do you not think that we might consider adopting that procedure in Scotland in some form or other?—If it is going to help the wife in obtaining aliment, it seems to me that no stone should be left unturned. It might be tried if it is going to result to the advantage of a wife, who otherwise cannot get support from her husband.

6246. People are always thinking about wives; I would like to consider husbands for a change. Consider also the husband who has been made liable to pay, say, 30s a week and then, because he changes his employment, or loses his employment, cannot pay that amount of money and wants the order varied. Do you not think that our present procedure to get that variation is rather cumbersome and expensive?—I am sure it is.

6247. Has either of you ever had the experience of having to advise a husband that the expense under the present procedure of attempting to get a variation of aliment would be more than the variation of aliment amounted to?—I think I have, but I have not been in this field for some time now, I would not like to say. But I think that must be a common experience.

6248. It is also subject to appeal—not only to the Sheriff Principal but also to the Court of Session?—Yes.

6249. (Sheriff Walker): In paragraph 5 of your memorandum, you deal with what you call the anomalous situation that a man may marry his deceased wife's sister but not his divorced wife's sister. Have you considered that from the point of view of the relationship between the prohibited degrees of marriage and the criminal law of incest?—No, I cannot say we did, Sir.

6250. You know that the three Acts you have mentioned apply both to England and Scotland?—Yes.

6251. And did you know that certain doubts that they raised in Scots law were cleared up by Section 13 of the Criminal Procedure (Scotland) Act of 1938?—No, we did not have that Act before us.

6252. That Section of the Act, Mr. Urquhart, states that intercourse between a man and a woman whose marriage is authorised by these Acts or would be so authorised on the death of any person, is not to be held to be incest. Do you see?—Yes.

6253. Does that not indicate, Mr. Urquhart, that at least in Scots law there is a pretty close relationship between the prohibited degrees and the law of incest?—Yes, I suppose that is a reasonable inference.

6254. And if it is not incest for a man to live with his wife's sister while his wife is alive whether she is divorced or not, is there any good reason why he should not be allowed to marry her on his wife's divorce?—No, we see none.

6255. Suppose for a moment that the law—as a matter of policy—and that it was desirable that a husband should not form an association with his wife's sister, in order to maintain the purity of the home. Could that, in your view, be made properly effective by the law saying to him, "You may lawfully live with your wife's sister, but you must not marry her unless your wife is dead"? You follow what I am trying to get at?—I am not very clear.

6256. Let me try again. If you read the Act of 1938 it looks very much as though Parliament in the earlier Acts had authorised marriage between people between whom intercourse would amount to incest. That would, of course, be quite anomalous, would it not?—Yes.

6257. But if you put it the other way round, that it is not in law incest for two people to live together, and yet they should not be allowed to marry—do you think there is a difference there?—Mr. Watson suggests that what was in the mind of the Council was that the divorce was to be considered as equivalent to death.

6258. (Mr. Maddoch): I would like to follow up the answers that you gave to Mr. Young. What kind of information does a Sheriff or a Sheriff Substitute get from the pleadings which are before him in an action for aliment, or an application to vary an order for aliment, which cannot be got from the parties themselves on an original hearing?—Which cannot be got from the parties themselves?—In essence, of course, the pleadings are merely an extension of the statement by the pursuer or the plaintiff, which are capable of proof.

6259. As I understand pleadings, they merely set out the names of the parties, the date of marriage, the cause of action, and possibly some particulars. Why cannot one get all that information from the parties when they appear before the court and then, if necessary of course, adjourn the case if the defender is taken by surprise?—The pursuer has a series of condescendences in which are set out the act or acts complained of, and that must be capable of proof by the Sheriff. The defender in his answers denies or modifies or varies in some way the allegations contained in the article of condescendences, and that constitutes the written pleadings which require to be set out by proof of third parties. Now whether that can be done orally without advice or without help, as I understand is the practice in England, is a matter on which we cannot express any view, because we have no experience of it. But if it is the experience in English courts that that works

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[Continued]

satisfactorily and that substantial justice is done to all parties, I am sure that it would be taken very carefully into consideration by the Sheriff Courts here.

6260. I want to put a case to you as to your answer on the question of cruelty to Mr. Justice Pearce, and see if it is not the kind of case you had in mind when you framed this definition. Take the case of a woman who comes to court and says, "My husband does not knock me about; he gives me enough housekeeping money, but I never see him. He gets up in the morning and goes to work; I never see him again until he comes and tries to get into my bed at night, usually under the influence of drink, and wants to have sexual intercourse with me. That is the last I see of him. Although it is not affecting my health—I cannot say it is—I cannot stand it any longer". Is that the kind of case you want to embrace in your definition of cruelty?—I should think not; it would need to be very much more intolerable for the wife than a set of circumstances such as you have envisaged.

6261. That kind of case is not bad enough?—I do not think so. After all, with a very slight change of emphasis—here is a man who slaves from early morning till late at night in order to support his wife in the station of life to which she has been accustomed, and to give her all the comforts she could possibly desire. He has too little leisure to spend time holding her hand. A slightly different emphasis and you put an entirely different case. That is a very different matter from a woman who goes in terror of her reason or of her body because of assaults, mental or physical, by her husband.

6262. I thought that you were, by your definition, desirous of getting rid of the necessity to prove injury or likelihood of injury to health?—I do not think that it would be possible to avoid the necessity of some sort of evidence, whether it be medical evidence or merely evidence of physical blows—there must be some evidence of conduct which makes life intolerable for the spouse. I do not think that the case you visualized was an example of intolerable life at all, bearing in mind a recent definition of "intolerable".

6263. There are a number of women who do find that sort of thing intolerable. But I thought that the whole point of your definition was that you wanted to get rid of the necessity for having evidence of injury

to health or the apprehension of injury to health?—The object of our recommendation is, Sir, to include as a ground of divorce a course of conduct wilfully persisted in by one spouse towards the other of such a nature as, in the opinion of the court, is an unwarrantable indifference to, or disregard of, the normal obligations of marriage, so as to render married life intolerable to the other spouse.

6264. So far as your Society are concerned, it is not your object to get rid of the present necessity to prove injury or likelihood of injury to health, in establishing cruelty?—We think that it is necessary to establish danger to health.

6265. (Mr. Mac): Following on that, where are the words in your definition which convey to the court the necessity of hearing evidence of danger to health?—A discretion should be allowed to the judge to admit evidence supporting any such allegations, the allegations being deliberate and calculated meant cruelty capable of reducing the spouse to a state of mind frequently resulting in nervous breakdowns, even though the guilty spouse may never have laid a hand on the other.

6266. May we leave it this way: in spite of the definition of cruelty that you have set out in paragraph 1 (2), you still desire the court to have cognisance of danger to health?—Yes.

6267. One further point on the question of cruelty. We have been told that the present rule in Scotland is that the cruelty must be taking place up to the time of the divorce. Certain witnesses have suggested to us that the law should be changed, that a spouse should have a vested right to a divorce on grounds of cruelty, the cruelty not having taken place possibly for many years prior to the divorce. Do you support that recommendation?—Our Council do not support the idea that isolated acts of cruelty constitute a vested right in the injured spouse. They consider that the act or acts of cruelty must continue approximately up to the date of service of summons, bearing in mind the possibility that the spouse may have signed the pledge, been converted, or have otherwise changed his mode of life.

(Chairman): We are much obliged to your Society for their memorandum and to you for coming to help us today.

(The witnesses withdrew.)

(Adjourned to Tuesday, 4th November, 1952, at 10.30 a.m.)

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26

TAKEN BEFORE THE

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

TWENTY-SIXTH DAY

Tuesday, 4th November, 1952

WITNESSES

PROFESSOR T. B. SMITH, M.A.
MR. C. A. CUMMING FORSYTH

... representing the Royal Scottish Society for Prevention
of Cruelty to Children.

MISS J. S. PEARSON
MR. T. F. HENSHELWOOD
MR. D. R. KEIR

} representing the Scottish Branch of the National
Association of Probation Officers.



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1953

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THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

TWENTY-SIXTH DAY

Tuesday, 4th November, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENKINGTON, M.C. (Chairman)

Dr. MAY BAIRD, B.Sc., M.B., Ch.B.

Mr. R. BELOE, M.A.

Lady BRAGO

Mr. G. C. P. BROWN, M.A.

Mr. H. L. O. FLECKNER, C.B.E., M.A.

Mrs. K. W. JONES-ROBERTS, O.B.E.

The Honourable LORD KEITH

Mr. F. G. LAWRENCE, Q.C.

Mr. D. MACE

Mr. H. H. MADDOCKS, M.C.

The Honourable Mr. JUSTICE FRASER

Dr. VIOLET ROBERTSON, C.B.E., LL.D.

Mr. THOMAS YOUNG, O.B.E.

Miss M. W. DENNERY, C.B.E. (Secretary)

Mr. A. T. F. O'GILVIE (Assistant Secretary)

Mr. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 74

MEMORANDUM SUBMITTED BY PROFESSOR AND MRS. T. B. SMITH

GENERAL

This memorandum is concerned only with the law of Scotland, and we would submit *in limine* that the separate development of the Scottish and English systems of consistorial law, property law, and of Church government make undesirable any attempt to assimilate by legislation the law of Scotland and of England upon the matters to be considered by the Royal Commission.

On the question as to what changes should be made in the law of Scotland concerning divorce and other matrimonial causes, we would submit for consideration the following proposals.

GROUNDS FOR DIVORCE

Desertion

1. That a pursuer in an action for divorce upon the ground of desertion should not be required to prove willingness to adhere throughout the full triennium. We would respectfully adopt the reasoning of Lord Keith's dissenting opinion in *Borland v. Borland*, 1947, S.C. 432 at page 442 *et seq.* Divorce by consent is not suggested. For desertion to run at all we assume that the defender must have left the pursuer against the latter's wishes; and that a period of desertion would be broken in any case where the defender offered to resume cohabitation during the triennium. It might well be that the spouse who had been deserted would be justified in refusing to resume cohabitation if the absent party had given reasonable ground to justify such refusal. Even so, we suggest that a genuine offer by the defender to resume cohabitation within the three-year period should preclude an action for divorce on grounds of desertion but without prejudice to the pursuer's right to rely upon other independent grounds of divorce such as cruelty or adultery.

2. That, in an action of divorce on grounds of desertion, adultery of the pursuer during the triennium should not be an absolute bar to divorce, as is the case at present.

A fortiori do we take this view in cases where there is no evidence that the adultery was known to, or in fact influenced, the party who had withdrawn from cohabitation. It is no bar to an action founded on adultery that the pursuer has himself committed adultery, and it seems inequitable that the party originally responsible for the breakdown of the marriage, by abandoning the other, should be in a stronger position in law than one who, after being abandoned, has committed adultery.

3. That the present ambiguity of the law should be clarified on the point whether reasonable grounds for a spouse refusing to adhere must amount to a substantive

consistorial offence such as cruelty or adultery, and, further, that it should be specifically declared that a defender may establish reasonable grounds for refusal to adhere by proving that the pursuer has been guilty of serious misconduct in relation to the marriage, albeit such conduct may not amount to a substantial ground for divorce. (See also paragraph 5 *infra*.)

In England, not only may conduct falling short of a matrimonial offence justify a spouse from ceasing to live with the other, but, further, a doctrine of "constructive desertion" has been developed, whereby a spouse who has removed physically from the conjugal home may yet maintain a successful action for divorce on proof of misconduct by the respondent which would not amount to "cruelty". This doctrine was condemned in the *Outer House in Gow v. Gow*, 1887, 14 R. 443, but has not since taken root in Scotland.

Even though it may be undesirable for the Scottish courts to extend further by judicial interpretation the accepted scope of existing grounds of divorce already available to a pursuer, it seems at least desirable that the law should recognise the right of a defender to refuse to adhere on proof of serious misconduct of the pursuer falling short of a substantive ground of action as the law stands at present. There is at present a considerable body of dicta for and against the view that facts which could support a good defence in an action of adherence must amount to an independent ground of action for divorce or separation. Thus, in *McLachlan v. McLachlan*, 1945, S.C. 382 at page 388, Lord Moncreiff observed that a decree of adherence "is the exact converse of a decree of separation". See also *Gibson v. Gibson*, 1894, 21 R. 470; *Murray v. Murray* *ibid.* 723; *Mackenzie v. Mackenzie*, 1895, 20 R. 636, especially at page 670; *Chalmers v. Chalmers*, 1868, 6 M. 547 per L.P. Inglis at page 590; *McEwen v. McEwen*, 1906, S.C. 1263 per Lord Dundas at page 1266. On the other hand, in *Mackenzie v. Mackenzie*, 1895, 22 R. (H.L.) 32 the Lord Chancellor and Lord Watson reserved their opinion on the point whether or not conduct insufficient in itself to justify a decree of separation might be pleaded successfully as a defence to an action of adherence. They both, however, indicated a fairly clear provisional view that it might; and the Lord Chancellor seems to have favoured the doctrine of personal bar in such cases. See also the authorities cited by Lord Keith in *Borland v. Borland* (*sup. cit.*) and by Lord Robertson in *Hastings v. Hastings*, 1941, S.L.T. 323. The same point was also reserved, though an indication was given favouring the view more favourable to the defence, by Lord President Normand in *Wilkinson v.*

Wilkinson, 1942, S.C. 472 at page 477, and by Lord Merriman in *Leslie v. Leslie*, 1950, S.C. (H.L.) 1 at page 4. It would be a surprising position if the wife pursuer in *Leslie*, who had left her husband to emphasise, as the law then required, her non-acquiescence in his refusal to live a normal married life, should now be regarded as in breach of her own conjugal obligations. (See further paragraph 5 hereof for our suggestion regarding the provision which should be made for cases such as *Leslie*.)

Cruelty

4. That the law should be altered to the effect that where cruel conduct affects or endangers bodily or mental health, proof of this should be a sufficient ground of divorce, irrespective of whether or not the defender can establish that he has reformed by the time of the action.

The decision of the Second Division in *Dunlop v. Dunlop*, 1950, S.C. 227, has recognised that, under the present law, a pursuer is not entitled to divorce on grounds of cruelty if the defender can establish that the pursuer would no longer be in danger were cohabitation resumed. It may be observed, however, that the effect of the Licensing (Scotland) Act, 1903, Section 73, and of the Habitual Drunkards Act, 1878, is to regard as the equivalent of cruelty the incapacity of a habitual drunkard to manage himself or his affairs, albeit there is no actual danger to the pursuer. It would be an even more remarkable situation if a man who, by reason of factors outside his own control such as injury or imprisonment, had been deprived of the capacity to commit further brutal assaults on his wife, could successfully defend an action for divorce on grounds of cruelty because it was no longer in the defender's power to continue his cruel conduct.

General clause

5. That consideration be given to the introduction of a general section which would remove the occasion for creative and forced interpretations of certain specific grounds of divorce.

Thus, it is considered that the *species facti* proved in *Leslie v. Leslie* (sup. cit.)—i.e., unreasonable refusal of marital relations, should be recognised as a valid ground of divorce, though it is appreciated that such a conclusion may seem to overstrain the concept of "desertion". There are other cases of serious misconduct which fall short of *perjury*, but which might reasonably be thought to justify divorce. Without overstraining the interpretation of "cruelty" such cases might be dealt with under a general clause. As an example of what we have in mind we quote Section 43 of the German Marriage Law (Control Council Law No. 16 of 1946), though we do not suggest literal adoption thereof. We are obliged to Dr. Julius Fockelheim, Lecturer in Comparative Law at the University of Aberdeen, for a translation, and also for the information that the interpretation of Section 1568 of the German Civil Code is still authoritative under this Control Council Law and that the general clause includes the *species facti* of *Leslie*. Section 43 is as follows: "A spouse may bring an action for divorce if the other spouse, by reason of a serious violation of marital duty, or by reason of dishonourable or immoral conduct, is responsible for disrupting the foundations of the marriage to such an extent that restoration of common life in the true conjugal sense can no longer be expected". (There follows a general clause in favour of the defender which bars a pursuer from relief if he has himself acted in gross disregard of marital duty.)

We appreciate that such general clauses would inevitably cast a burden of interpretation upon the judges in the period immediately following enactment thereof, but we believe that this disadvantage would soon be outweighed by the element of flexibility which the clause would introduce, and by the removal of the occasion for forced interpretations of such grounds as "desertion" and "cruelty".

Presumption of death

6. That the present law regarding the effect of a decree of divorce under the Divorce (Scotland) Act, 1938, Section 5, on grounds of the presumed death of a spouse, be supplemented by provisions dealing specifically with the eventuality of a spouse who has been presumed dead later reappearing. Further, that in a case where the spouse in whose favour the decree was pronounced has re-married, he or she shall be entitled to elect between the former

and the subsequent spouse within a period of six months from the establishment by the person presumed dead of his or her identity before a court of law. Further, that provision be made to secure the legitimacy of children who may have been born of a subsequent marriage dissolved on the grounds of the reappearance of the former spouse.

The Third Edition of *Walton on Husband and Wife*, at page 122, concludes that, as the law stands, the court would be bound to reduce a decree pronounced under Section 5 aforesaid were the person presumed dead to reappear and were that person or the original petitioner to bring an action to reduce the decree. The learned editors conclude that a subsequent marriage would thereupon be dissolved, Section 5 was presumably designed to permit the supposed survivor to start life afresh. To concede an unrestricted right to reduce the decree of divorce will in some cases provide opportunity for blackmail, and one can anticipate other cases of hardship. It may be recalled that this country has lately been at war with a Power which disregarded civilised conventions with regard to prisoners of war, that there is current difficulty with regard to certain United Nations prisoners taken in the Korean campaign, and that any future war in which Scotland may be involved may well be with a Power which does not conform to standards hitherto recognised by Western Powers of identifying and classifying prisoners of war. It is thus expedient to provide for cases where a soldier may be presumed dead and decrees accordingly be granted to his wife. She may thereafter re-marry—possibly less for love than for affection, for security for her children, and for stability of family life. Were her first husband eventually to reappear, his former wife might well wish to return to him. On the other hand, in particular if there were children of the second marriage and the husband had greatly changed in character during captivity, a woman might prefer to remain with her second husband. We respectfully submit that the only person who is qualified to make the decision is the party who holds the decree, and that the matter cannot be resolved by an automatic rule of law. It is, however, in the interests of all parties that a time limit should be placed on the exercise of the option, and that its exercise should be endorsed by judicial recognition.

It does not seem to us desirable that a decree made under the Presumption of Life Limitation (Scotland) Act, 1891, Section 3, should actually be effective as a decree of divorce. On the other hand, we consider that it would be advantageous to draft an entirely new Act covering the various contingencies which can result from presumption of death, and thus supersede the need for separate procedure in respect of property and of marriage.

GROUND FOR NULLITY OF MARRIAGE

7. That it should be made a ground for declaring a marriage null that the defender was at the time of the marriage pregnant by some man other than the pursuer.

This should be made subject to limitations similar to those enacted in the law of England. Though in *Long v. Long*, 1921, S.C. 44, pregnancy *per alium* was rejected on a ground of nullity, it may be observed that in *Hamilton v. Hamilton* (sup. cit.) Lord Robertson considered that such a circumstance would justify the husband in refusing to adhere. We consider that the justification of recognising pregnancy *per alium* as a ground of nullity is not because consent is vitiated on grounds of the wife's inactivity, but because account must be taken of the third life, albeit it is still *in statu*.

LAW RELATING TO THE PROPERTY RIGHTS OF SPOUSES

8. On the question of property rights we would make the following submission.

That the present system of granting to the innocent pursuer legal rights in the estate of the defender should be superseded; and that the court should be empowered, when granting decree of divorce, to award to the pursuer a capital and/or periodic sum according to the financial position of the parties; and, further, that the court should also have power to vary the terms of marriage settlements.

In present circumstances, when the great majority of men own very little capital and yet may live on a substantial salary or wage, it seems to us that the law should have regard to the realities of present economic conditions in this country.

(Dated 10th January, 1952.)

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Professor T. B. SMITH, M.A.

EXAMINATION OF WITNESS

(PROFESSOR T. B. SMITH, M.A.; called and examined.)

6258. (Chairman): Professor Smith, you are Professor of Scots Law at Aberdeen University?—(Professor Smith): That is so, my Lord.

6259. And this memorandum is submitted by you and your wife jointly, but you are speaking for both?—I am, yes.

6270. I am going to ask Lord Keith to deal with the many points of Scots law that you raise, but do you wish to add anything to the memorandum before we ask you any questions?—I would like to make a few brief remarks on matters which have emerged since my memorandum was written. First of all, on the question of assimilation of the law of Scotland and the law of England, which I have seen mentioned in the Press accounts of evidence which has been given to the Commission. In supplement of what I said in my memorandum I would like to submit, with respect, that whereas each system may with advantage borrow ideas from the other, an attempt to assimilate these systems would be most undesirable unless the Commission had in mind the drafting of a matrimonial code which would supersede reference to the law which has been in practice hitherto. I think, so far as Press accounts of the evidence made out, that those who have suggested assimilation have failed to note that the same word even, in the two systems may mean very different things—for example, "desertion". My Lord, you are well aware of the differences in meaning which this word has in the two systems. Therefore, to say that both Scotland and England give divorce for "desertion" does not necessarily imply the same thing. Further, when one construes a ground of divorce together with the bars, defences and exceptions to it, the differences become very much more apparent. If one takes adultery and considers that in England there is recrimination, and that, especially since the case of *Riddell* recently decided in the First Division, the defences and bars like collusion, condonation and levity are very different in the two systems, I suggest that there would be great difficulty if assimilation were attempted except by a codifying matrimonial statute which forbade reference to the previous law. One could illustrate the same points from desertion and also from cruelty.

Secondly, there recently have been discussions of insanity as a defence in actions granted for cruelty. Mr Justice Pearce, for example, had such a case himself. The law of insanity as a defence to a criminal charge in Scotland and in England is substantially different, and therefore in a field such as divorce a difference which was not apparent on the surface might lead to complications in practice.

6271. (Lord Keith): When you refer to the law of insanity, do you mean divorce for insanity, or are you dealing with insanity generally?—Insanity generally as a defence. I think, my Lord, that no one has yet laid down in Scotland what the test of insanity in questions of divorce would be, whereas in England it has certainly been discussed in at least two cases—as a defence to an action based on cruelty.

Thirdly, on the law of cruelty I referred in my memorandum to the preferable view taken by the law of England in the case of *Meacher v. Meacher*. In view of certain *obiter dicta* by Lord Merriman and Lord Tucker in the recent Scottish appeal, *Jamieson*, it may or may not be that the view stated in my memorandum is the right one. If one looks to future protection, again *Jamieson* has raised the possibility of two views as to what future protection is. In the first place, it may be looking at the facts as they are when the action is brought, and if a man is, say, in prison or a lunatic asylum, the pursuer would not be in danger. On the other hand, as Lord Normand suggested in *Jamieson*, following the late Lord Justice Clerk Aitchison, it may mean—would the pursuer be in danger, were the defender to be called on how to resume cohabitation? But, as I submitted in the memorandum, it is preferable to look to whether there has been cruelty in the past. If I might say just one final word on cruelty, again with reference to the defence of insanity or, as in the case of *McLachlan* in 1945, the defence of epileptic seizure falling short of insanity. It seems to me, with respect, that the judges, realising the

tragic position in which the pursuer was placed, deliberately strained the logic of the law to grant a remedy. Indeed, Lord Moncrieff virtually said so in *McLachlan*. I wonder if, however, by granting a divorce on grounds of cruelty, albeit the defender might have no volition in the matter, it was realised that the pursuer could exact from his estate the same legal rights as could have been exacted had he been in full possession of his faculties. In short, the same concessions as are made to a person divorced on grounds of insanity are not made where divorce is on grounds of cruelty albeit the defender was insane. In my submission, cases where physical harm has been caused by someone who is not fully responsible would be better treated, not under the law of cruelty, but under such a general clause as I have already recommended to the Commission.

6272. (Chairman): Thank you very much. I am sure that the Commission will very carefully consider the additional suggestions which you have made in this opening statement. My first question is directed to the first sentence in your memorandum where you say this:—

"This memorandum is concerned only with the law of Scotland, and we would submit to limit the separate development of the Scottish and English systems of consistorial law, property law, and of Church government makes undesirable any attempt to assimilate by legislation the law of Scotland and of England upon the matters to be considered by the Royal Commission."

One appreciates the difference in the development of the systems, but you do not now go so far as to say that any attempt to assimilate by legislation is undesirable. What you do say is that each country may perhaps borrow from the other with advantage, but that assimilation, if it is going to be done at all, should be done by consolidating statutes.—Yes, excluding reference to the previous laws.

6273. And possibly containing definitions which would leave no doubt (if definitions ever leave no doubt) as to exactly what is meant by particular words in the statute?—That is so.

6274. I follow that. I was a little startled by the suggestion that it was in itself undesirable to try to assimilate by legislation to any extent, because, of course, both countries have borrowed with advantage, and may borrow with advantage in the future, from each other.—If I might go further, my Lord: if a codifying statute were contemplated, we might also consider the systems which have been arrived at on the Continent—which it may be the Commission has already considered.

6275. I can assure you that the Commission has got very extensive information as to other systems of law, which will be very carefully considered in due course. Before I ask Lord Keith to put his questions, we should like to know your age, experience and qualifications?—My age is thirty-seven. I am a member of the Scottish and English Bars. My practical experience is by no means extensive; I practised just before and after the war but was away between 1939 and 1946 in the Army.

6276. You practised at the Scottish Bar?—Yes, and the English Bar. My admission to the Scottish Bar had to await the conclusion of the war. Therefore in the submission which I put before the Commission, I do so as an academic lawyer and not from extensive practice.

6277. Would you tell us your qualifications as an academic lawyer?—I am a Master of Arts of Oxford University where I was *Eldon scholar*; and I was admitted to the Scottish Bar by examinations of the Faculty of Advocates. I have been Professor of Scots Law at Aberdeen since 1949.

6278. (Lord Keith): I do not know that I have very many questions to ask you, Professor Smith, but perhaps we might start with desertion, the first point you deal with. You take the view, adopted, I think, by nearly all the legal bodies that we have heard in Scotland, that the necessity of proving willingness to adhere during the *tristitia* should be abolished?—Yes.

6279. I notice that you say there:—

"It might well be that the spouse who had been deserted would be justified in refusing to resume cohabitation if the absent party had given reasonable ground to justify such refusal."

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[Continued]

You go on:—

"Even so, we suggest that a genuine offer by the defender to resume cohabitation within the three-year period should preclude an action for divorce on grounds of desertion."

What I want to know is this: what is your view of the position where the deserted spouse has a ground for refusing to resume cohabitation, which would not amount to cruelty, and the deserting spouse wishes to come back within the three years. There is a deadlock, is there not?—As the law stands, yes.

6280. How would you resolve that deadlock in this situation that you have envisaged?—In the first place, I should introduce, as I have suggested, a general clause which would cover matters not necessarily amounting to cruelty in law, as it stands.

6281. Is that the general clause we find in paragraph 37?—Yes.

6282. The one that is taken from the German Civil Code?—I think that the wording of the clause could be greatly improved.

6283. But it is a clause of that type which you have in mind?—Yes.

6284. I see. And therefore you would resolve the deadlock in that way. Supposing the cause for refusing to take back the husband—shall we say—was a cause that had emerged after the desertion. How would you apply your general clause then? You see, the cause would not have operated in any way on or against the wife. It was not an offence, or conduct, that would have taken place during the desertion; it is something which would have happened after the desertion which would give the wife some reason for saying, "No, I will not have you back now because of what you have done since you left me". How would you apply your general clause there?—I would allow the pursuer to found on the general clause.

6285. Although the offence or conduct had taken place after the desertion started?—Yes.

6286. Would you turn to paragraph 2? You wish to do away with adultery as a bar to divorce when committed during the triennium?—As an absolute bar, yes.

6287. Two views have been put forward. One is that unless the adultery conduces to the desertion or influenced the deserting party it should not be a defence at all. The other view is that the whole question of adultery should be left in the discretion of the court and the court should exercise its discretion simply to overlook the adultery or to say that it is a sufficient ground for the court refusing divorce. Which view do you favour? One view really fixes the circumstances in which adultery is going to be a defence; the other leaves the whole thing in the discretion of the court.—I should prefer the view that, unless the defender took the defence of adultery, it should not operate at all, but that if the defender did take the defence of adultery, then it should be in the discretion of the court.

6288. I see. So that the pursuer in bringing his or her action of divorce on the ground of desertion would disclose any adultery committed during the triennium, would he, or would that not be necessary if no defence was entered?—I think that a discretion statement would not be desirable.

6289. And therefore there would be no need to disclose the adultery, but it would be left to the defender, the deserting spouse, to come in and plead, "You have committed adultery inside the three years and therefore I have a good reason for not going back to you", and the court would then have to resolve that conflict?—Yes, precisely.

6290. (Chairman): Might I, instead of coming back to that paragraph later, just add a question here? If you are going to put it on the basis which you suggest, would there not be advantages in laying down a standard? That is to say, if the defender raises the matter at all, the court has to enquire whether the adultery conduces to the desertion—and if it finds that it did not, grant the decree, and if it finds that it did, refuse the decree. You see, otherwise you are leaving a great deal to what is sometimes referred to as the length of the judge's foot.—That is so, my Lord, but I think that the consensus of opinion in Scotland is that the discretion should be left

to the judges of the Supreme Court—they all live in fairly close contact. Admittedly, there would be some divergences of standard, but I think that it would be preferable to leave the matter to the judge's discretion.

6291. If that discretion existed it might be another argument against spreading the jurisdiction too widely. I understand you suggested that?—Yes.

6292. (Lord Keith): Following up that point, Professor, the courts in Scotland have never operated a discretion in divorce. Is that not so?—That is so.

6293. Do you think it desirable that that element should be introduced? Why should it not be left, as my Lord Chairman said, to a question of considering how far the adultery had influenced the deserting spouse in refusing to go back? If it did not influence him at all, and he did not really care twopenny about it, what is the point in asking the court to exercise a discretion?—In that case, I do not think that the court should consider the matter at all unless the defender suggests that his continued desertion was influenced by the adultery.

6294. Supposing the defender did come forward and say that, and the court decided that this defence was not genuine, and that the defender had not been really influenced at all by it. Is that not just considering a defence, not exercising a discretion?—You might get the case in which the deserting spouse's mind had been influenced by the pursuer's adultery, but, on the other hand, it was the circumstances in which the pursuer had been left that had resulted in her committing adultery. In that case, I do not think it would be desirable that the defender should be in the position to divorce on grounds of adultery, but the pursuer would not be entitled to divorce for desertion.

6295. It comes to this: the discretion which you want is a discretion that should be exercised where the adultery was an influencing cause on the mind of the deserting spouse, but not otherwise?—Yes.

6296. (Mr. Justice Pearce): May I intervene with one question? If in fact the adultery influenced the deserter so as to keep him away when he would otherwise have returned, there is no desertion because he is not deserting without reasonable cause. Therefore if you are going to give a judge a discretion you are giving him a discretion to find desertion where it is known there is no desertion. Do you follow what I mean?—Yes, I do.

6297. That would seem to be wholly wrong?—I am not quite sure that I would agree on that. As the law stands, admittedly the party deserting would have reasonable grounds for refusing to return. (Mr. Justice Pearce): I am only putting this—this is an example of how this provision works in England, so it is not an academic question. If a wife deserts and then a husband commits adultery, if that did not affect his wife or was not known, then of course it is a matter for the court's discretion to grant the decree. But if the wife knew and objected, and that was her reason for not returning in the last year, the court would decide that there had not been desertion for three years. There had been desertion for two years which terminated when the husband, so to speak, kept his wife away by committing adultery. (Chairman): In the latter case there would be no room for discretion.

6298. (Lord Keith): I am not sure, Professor Smith, that you are not getting into a maximum of complication here by introducing two conceptions—one, adultery as a defence, and the other, the idea of the discretion in the court to waive the adultery. Do you not think that it is better to come down on one side of the fence or the other?—In that case, I come down on the side of adultery as a defence, but only when pleaded and established to have influenced the defender not to return to the pursuer.

6299. I do not know whether that would be more in line with Scots practice or not, but that is your view. Would you come to paragraph 3? What you are suggesting here is that the law should be clarified to establish what reasonable grounds there may be for refusal to adhere, apart from the grounds that would justify separation, namely, adultery and cruelty?—Yes.

6300. You examine the legal position here very fully, but what I want to know is—to what would you apply

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[Continued]

this clarification—if it could be clarified—as to what conduct less than cruelty or adultery would justify non-adherence? What bearing would it have on the law of divorce, let me say? I could understand it, you see, if you said that some other conduct, perhaps of a less serious character than cruelty or adultery, should be a ground for divorce. But that is not what you are saying. You are saying that it should be declared what other conduct would justify a refusal to adhere. Now I cannot see that that has any bearing in divorce except as a defence.—As a defence in the present context.

6301. To an action on the ground of desertion?—Yes.

6302. In other words, not as a positive ground for getting a decree of divorce but as a ground for stopping a decree of divorce?—In paragraph 3, yes, my Lord. In paragraph 5 similar conduct, I would suggest, would found an action of divorce.

6303. That we will come to in a moment, because I think that is really an extension of the definition of cruelty.—With respect, my Lord, I agree that it might be so construed. I had an opportunity to read briefly, coming down in the train, the evidence which was given by the English Bar and their proposed statutory definition came very close to what my Lord has suggested. But my suggestion would be that it should not be treated merely as an extension of the law of cruelty.

6304. Then you are just saying again that it should be treated as a defence?—In paragraph 3, as a defence.

6305. As a defence in an action of divorce for desertion?—Yes.

6306. Therefore if the conduct, which you suggest we should clarify, was a cause of the spouse leaving the matrimonial home, and the spouse who had been left brought an action of divorce for desertion, the deserter would say, "Your conduct was such as really to compel me to leave the matrimonial home". Is that right?—Yes, that is so.

6307. That seems to me to approximate rather closely to the English conception of constructive desertion, except that you are applying it differently—as a defence to an action of divorce, whereas in the English law, as I understand it, it is a substantive ground for the spouse who has left the matrimonial home to raise an action of divorce against the other for desertion?—Yes, that is so.

6308. I am not quite clear whether you are suggesting that this should work both ways—I am suggesting so. I am suggesting that instead of adopting constructive desertion as a ground, or straining "cruelty" beyond its natural limits, there should be a general clause justifying divorce in certain other circumstances.

6309. I see.—Which would be covered, indeed, by the type of case which in English law founds a petition on the ground of constructive desertion.

6310. Therefore, in Scotland, under your new definition the spouse who had been affected by this conduct could bring an action of divorce based not on any view of desertion but based on the actual conduct that had been perpetrated against him?—Yes.

6311. That approximates much more nearly to divorce on the ground of cruelty?—In England, constructive desertion and cruelty seem in many cases more or less to run into each other.

6312. (Chalmer): Might I just add something while we are on this subject? I think that Mr. Justice Pearce would probably agree with this—you can get divorce in England on the ground of cruelty, and I will not go into the definition because it has been defined in several cases. But where you get conduct short of cruelty as defined—conduct such that a reasonable spouse could say, "Really, I cannot be expected to live any longer with this man or this woman"—then that sort of conduct operates in this way: the spouse who has been suffering from conduct of that kind can say, "I am going away". Not only is that a ground for defence in an action of desertion by the other spouse, but the spouse who has been compelled to leave by the conduct of the other, is entitled to bring an action for desertion, on the ground that the break-up of the home was caused by the other spouse, although the pursuer in fact was the person who went away. I will not use the words "constructive desertion" because to my mind that suggests something artificial and there is nothing artificial in this scheme, whether it is right

or wrong. Would that commend itself to your mind or not? You do not alter the definition of cruelty but you have as a ground for raising an action for desertion, or even for bringing an action for desertion, conduct of the kind I have suggested. The result is not that you give an immediate divorce for that sort of conduct, but that at the end of three years, if there is no reconciliation and no coming together again, you get a divorce for desertion. And that does give the parties time for reflection and possibly for making it up. What do you say to that scheme?—I recognise its merits, but I also feel that the law of "cruelty" has been over-strained in cases, such as I mentioned in my opening statement, where a man may be found guilty of cruelty which imports moral turpitude, and may be made responsible in his estate to the pursuer, although his acts were not of volition.

6313. That is rather a different point—the question of whether you should consider his mental state. That is a rather separate point from defining cruelty.—If you will take the case of the epileptic in *McLachlan*, whose conduct would have endangered his wife had cohabitation continued. Although justice was done on the facts, I was not very happy that that type of case should be described as cruelty.

6314. Assume for the moment that the definition of cruelty wants overhauling and altering—assume that that is done. Would you think that the scheme I put before you, which is, I think, the scheme operating in England, was a good one or not?—I think that there are merits, when the defender had conducted himself in such a way as to make it unreasonable to require the pursuer to return, that a period of reflection, such as your Lordship has suggested, might be added as a qualification before bringing the action. But as to whether it should be brought within the heading of desertion, I prefer to maintain my view that my suggestion of a general clause is better.

6315. (Lord Keir): Professor Smith, could we turn now to paragraph 4? Here you wish the law altered to the effect that where cruel conduct affects or endangers bodily or mental health, proof of this should be a sufficient ground of divorce, irrespective of whether or not the defender can establish that he has reformed by the time of the action. In other words, you wish to have a vested right to divorce in respect of cruelty?—That is so.

6316. And, therefore, the court will only look at what has happened in the past and will have no regard at all to whether the cohabitation could be resumed with perfect safety to the spouse?—That is so.

6317. That view has been put before us in other memoranda, and that, of course, would be quite a substantial change in the law as far as Scotland is concerned?—It would.

6318. I will say nothing about the law of England—I am not quite clear how the law of England stands now in that matter. I see you say in further elaboration of the point in the last sentence of the next paragraph:—

"It would be an even more remarkable situation if a man who, by reason of factors outside his own control such as injury or imprisonment, had been deprived of the capacity to commit further brutal assaults on his wife, could successfully defend an action for divorce on grounds of cruelty because it was no longer in the defender's power to continue his cruel conduct."

You are not suggesting, Professor, that at the present time in Scotland that would be a defence to an action based upon cruelty?—I sincerely trust not, my Lord, but if one considers, for example, the case of *Macfarlane*, which I think is reported in the 1952 *Scots Law Times*, page 8, one can find some authority for that view.

6319. Perhaps you can give us a short summary of what the case was and how it was decided?—May I start at the case of *McLachlan* in 1945, where there was an epileptic who was not certifiable but whose frenzies were calculated to recur? A judicial separation was granted and in his judgment Lord Macneil pointed out that the law had to do something to protect the pursuer. The position would have been different if this man had actually been certifiable, because the pursuer would already have had the protection of his being in an asylum and, therefore, had these circumstances arisen, it would have been unnecessary to grant the decree. In *Macfarlane* these circumstances did arise—the defender had been guilty of violent conduct and he was in an asylum, and—I think

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it was before Lord Blades—his counsel successfully maintained the defence that the pursuer was consequently not in danger. I believe that there is another case *sub judice* at the moment.

6320. The case of *Macfarlane*, to which you referred, was a single judge decision?—Yes.

6321. So far, at any rate, it has not come before the Inner House. We do not know yet what the law would be if it did, shall I say. Let me put it in this way: is not the test at the present time this—not whether in fact there is an improbability or impossibility of the two parties cohabiting, but whether if they did cohabit there would be danger to the wife from the husband's conduct? Is that not the test?—I hope that is so. It certainly was the one mentioned by Lord Normand in *Janinson* and by Lord Justice Clerk Aitchison in *McDonald*.

6322. Can we go now to your next paragraph, because I want to see where this is leading us? You want to remove the occasion for causing and forced interpretations of certain specific grounds of divorce, and in order to do this you suggest the introduction of a general clause. Is the general clause you have in mind supposed to be going to cover both the illustrations you have given, namely, unreasonable refusal of marital relations and serious conduct short of adultery?—Yes.

6323. You refer to a clause that you have taken from the German Civil Code—perhaps I might read it:—

"A spouse may bring an action for divorce if the other spouse, by reason of a serious violation of marital duty, or by reason of dishonourable or immoral conduct, is responsible for disrupting the foundations of the marriage to such an extent that restoration of common life in the true conjugal sense can no longer be expected."

It is a clause of that kind that you have in mind?—Instead of such cumbersome phraseology, if I might suggest an adaptation of one which was suggested to the Commission—a variation of what was suggested by the English Bar—which would read:—

"Such conduct by one spouse as would make it unreasonable to require the other to continue cohabitation."

6324. Yes. That is a little more general and perhaps wider than this definition that we have before us?—That is so. It would largely depend on what the Commission decided should be included in this clause which would determine how precisely it should be drafted.

6325. Have you seen a definition that the Law Society proposed to us?—I have not it in my mind.

6326. I will read it to you:—

"It is suggested that there are good grounds for asserting that one spouse should be entitled to divorce (or separation) where the other . . . and here are the material words—

" . . . has been guilty of a course of conduct wilfully persisted in towards the pursuing spouse or towards the children of the marriage of such a nature as in the opinion of the courts shown on the part of the defender an unwarrantable indifference to, or disregard of, the normal obligations of marriage, and renders the married life of the spouses intolerable to the pursuing spouse."

—That alone, in my opinion, would not be the complete answer to what I had in mind, because I envisage that this general clause would include cases where there was no volition on the part of the defender, and therefore he could not, strictly speaking, be said to be guilty or wilful.

6327. I see. In other words, the distinction between your definition and this definition is that this one is subjective, in the sense that it has regard to the intention of the offending spouse, whereas yours is objective and has regard simply to the conduct irrespective of the question of intention?—That is so, and also under my clause the conduct would not necessarily be directed against a spouse.

6328. That, I think, would follow if the test was objective. There is no intent there, and of course the question of direction against the other spouse disappears. I think I see the difference that lies here, and you prefer the objective test of looking to the conduct, irrespective of intention?—Yes.

6329. Now might I pass to paragraph 6, where you deal with presumption of death? You point out here a difficulty—referred to by other witnesses—where the person

presumed dead reappears, and it may be that the wife, who had brought a petition of presumption of death, has re-married.—That is so.

6330. And you suggest that the wife, for example, should have a right of election?—That is so.

6331. Either to reduce, I suppose, the decree that has been pronounced, or to leave it standing. Supposing she reduces the decree and then finds that her first husband is not willing to come back and live with her. That would not be very much help to her, would it?—It would not.

6332. And you could not compel him to come back?—You could not compel him. (Lord Keith): All you could rely on then would be an action for desertion. (Chairman): Before making up her mind the lady could consult the first husband and say, "Do you want to come back?" and then she could make up her mind after that.

6333. (Lord Keith): It might be that she wished to get rid of her second husband, and did not very much care whether she went back to the first one or not—I agree that there might have to be a safeguard regarding that contingency.

6334. I am not quite clear how the safeguard would be introduced. At any rate, you would just leave the matter to her election?—I would. I suggested, since obviously this must not be allowed to trail on, that the time of the election should be exercised within a period of six months. On reflection, it might be better to make it rather longer in case a period of gestation were involved.

6335. (Chairman): Perhaps twelve months from the time the first husband reappeared? Would you agree with that?—Yes, I would.

6336. (Lord Keith): In paragraph 7, you say that you wish to introduce as a ground of nullity the fact that the defender was at the time of marriage pregnant by some man other than the pursuer. We have had that very fully canvassed before us, Professor, and I think there is nothing that I wish to ask you further on that matter. Do you wish to add anything on that point?—I have nothing to add.

6337. And then, under paragraph 8, I think that you, in effect, approve of the recommendation of the Mackintosh Committee?—Yes.

6338. It was suggested yesterday by one legal society that legal rights should be retained, but with an additional power to the court to award alimony where there were no legal rights worth having. Have you any views upon that matter?—Frankly, no. I think that those who have practical experience could answer this question better than I can.

6339. You would not very much mind so long as some provision is made for the care of the party whose legal rights were valueless?—Yes.

6340. (Chairman): Lord Keith has put all the questions that I meant to put, save one. In the last paragraph of your memorandum, you do add something which is not expressly mentioned in the Mackintosh Report, though it may be implied. You suggest that the court should have power to vary the terms of marriage settlements. You think that would be useful?—I think so.

6341. (Mr. Justice Pearce): May I return to paragraph 1 of your memorandum? I gather that you feel difficulties about this question of an offer to resume cohabitation where there has been a breach. Are not the difficulties really caused by talking about "a genuine offer" without saying, "a genuine offer which it is reasonable for the other person to accept"? If you put in those words does not the whole thing become perfectly simple as a rule to apply? (Admittedly, of course, it is one of the most difficult things to apply the rule to the particular facts—that is a matter for the judge.) Now, the test of an offer to resume cohabitation is, firstly, that it must be genuine; secondly, it must be reasonable for the other person to accept. If, though genuine, it springs from a piece of penitence which everybody knows will vanish the next day, then it is not reasonable that that offer should be accepted. Thus, you have to look at all the surrounding circumstances and see whether the offer was one which the other party ought to have accepted. If it was reasonable, yet he or she did not accept it, then the desertion ceases to run. Is that not right?—Yes, if I followed you correctly, that is right.

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[Continued]

6342. You see, you have to make that limitation, because, until you consider all the surrounding circumstances, you do not know whether it was right or wrong for the person to refuse the offer.—Yes.

6343. You did agree with Lord Keith that the objective test of cruelty should be applied, regardless of the intention of the doer?—I did, with this qualification, that where there was no volition on the part of the doer it would be better covered by some other ground than that of cruelty.

6344. (Lord Keith): You mean that you retain the law of cruelty, where volition comes into the matter, but where volition does not come into the matter, you introduce some other ground, an objective ground of conduct?—That is so.

6345. (Mr. Justice Pearce): With volition do you also include intention, because if you look at the intention of the doer you get into deep seas, do you not?—That is so, yes.

6346. But when talking of volition you are dealing with the case of the person who is insane? That is at the back of your mind?—Yes.

6347. But is it really worth dealing with that at length, because it is cruelty, although to those who know the facts the man was insane? The case which you are worrying about is, I think, the case of *Lisack*, of a man who deliberately murdered his wife's child, knowing that it would break her heart. Is there any reason why that should not be called cruelty, though he was held to be guilty but insane when he was tried for the murder?—With respect, I would say that with the law as it stands the just solution was reached by extending what one would expect to infer from cruelty.

6348. But it is rather a small point, really, is it not, because the number of people who are guilty of cruelty through mental defect, through insanity, is fairly small, is it not?—That is so. The number of cases is small, but the point is not unimportant.

6349. (Mr. Beloe): I gather from your memorandum that on the whole you are content with the law of Scotland with regard to divorce, subject to certain modifications?—Yes.

6350. Modifications rather than alterations?—That is so.

6351. So that you do not feel that it would be right to import into Scotland the principle of *Mrs. White's Bill*?—I myself would not press for it, no.

6352. You feel that where a person has made a contract, and the other person is unwilling to release him, the latter person should carry the day?—To be quite frank, it is a matter on which I prefer to reserve my opinion, and confine my remarks merely to dealing with the law more or less as it is, without suggesting much in the way of reform.

6353. But on the whole that is your considered opinion, that that is the right thing to do for Scotland at the present day?—If I am to express a view, yes.

6354. My next question is about the children of divorced parties. You have not mentioned custody at all. Are you satisfied, as an observer, and obviously an informed observer, that the law of Scotland works in the interests of the children as regards custody?—There, again, I feel that those in daily contact with these cases can express weighty opinions, whereas mine would not carry much weight on that point.

6355. Could I put to you just one question? Do you feel that where the parents have decided what is right for the children—we will not say why they have decided it, there may, of course, have been some form of bias—gun in the background—where they have decided what is right for the children, and there is no question of custody before the court, do you feel that the matter should be left entirely to the parents?—That would be my first impression, yes.

6356. You feel that the parents should be trusted entirely to look after the welfare of the children, and that no outside person should come in and see whether the parents are doing the right thing or not?—This includes removing the children from the parents' jurisdiction?

6357. I left the whole thing quite open.—I must confess I would like to hear it argued on both sides before. . . . (Chairman): May I venture respectfully to make a suggestion to the Commission? Professor Smith is a very learned lawyer who has come here to suggest certain changes in the law, but he does not profess to have had any great practical experience in the courts. I do suggest that perhaps it is not quite fair—although I know Mr. Beloe did not for one moment mean to be unfair—to ask him his opinion on these rather far-reaching matters, in which perhaps he has not given his best attention. They are not mentioned in his memorandum.

6358. (Mr. Beloe): I was rather interested as to whether an academic lawyer took a view of principle about what should happen to children, as to whether it was the job of the parents alone or whether the State should intervene. But I am perfectly happy to leave it where it is.—I may say that I shall read with great attention the Report of this Commission on the matter.

6359. (Lady Bragg): May I turn to paragraph ?? I did not quite understand one sentence there, Professor Smith. You say:—

"We consider that the justification of recognising pregnancy *per aliam* as a ground of cruelty is not because consent is vitiated on grounds of the wife's unchastity, but because account must be taken of the third life. . . ."

Does that mean that it is not the pregnancy you are considering, but the actual birth of the child? If in fact no child is born—the pregnancy ceases—would that be a good defence?—I had not considered this aspect, and I think it is a very material point, that the pregnancy might cease. I think, however, that the time at which one would have to consider the matter would be at the date of marriage itself. The reason I included that sentence, which might have been more happily phrased, was that hitherto this matter has been largely discussed in connection with contracts impetrated by fraud, and if one goes back to the *Testament of Stair*, the greatest of our legal writers, he points out that if one marries believing one's wife to be chaste, whereas in point of fact she is an unchaste woman, that in itself, once the marriage is complete, will not forfeit the contract of marriage. Therefore, what I am saying here is that it is not because the contract has been induced by error, that we say that this marriage should be annulled, but because there is a possibility of a third life coming into being, of which the husband is not the father.

6360. Does it matter, then, if that possibility is taken away—I can imagine circumstances in which the wife might get rid of that condition?—I feel that one would have to decide at a particular time whether the marriage was null, and that the time which one should consider is the time at which the contract of marriage was completed.

6361. (Chairman): I gather that you do not suggest that it should make any difference whether the child is born or not?—No, my Lord.

6362. And, of course, there might be a great danger in taking any other line, because if the wife, as Lady Bragg has said, wished that the marriage should stand, she might possibly take certain steps. . . .—To terminate the pregnancy, yes.

(Chairman): Thank you very much for your memorandum, and for coming to help us this morning.

(The witness withdrew.)

PAPER No. 75

MEMORANDUM SUBMITTED BY THE ROYAL SCOTTISH SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN

(A) SUMMARY

1. This Society is concerned with the status or position of children as affected by the law of Scotland relating to marriage and divorce. With regard to marriage, it is considered that two instances of the old Scottish practice of irregular marriage, namely, (a) by habit and repute, and (b) *provisio subsequente copula*, have much to commend their retention. Each provides a measure of protection for the parties concerned and any children of the union.

2. We maintain that the first principle of marriage, namely, the procreation and suitable upbringing of children, should be kept in the forefront, if necessary by the introduction of pre-marriage regulations designed to safeguard and protect the health and well-being of future children. For instance, the age and suitability of two persons to enter a contract of marriage, the making of ante-nuptial marriage contracts denying to unborn children their full legal rights, are matters which seem to call for amendment. With regard to dissolution of marriage or other matrimonial causes, there appear to be few grounds for recommending any alteration in the law of divorce in Scotland, but many for changes in the administration and in the powers of the courts. The weight of evidence required in proving cruelty or insanity in actions for divorce would seem to require revision and the jurisdiction of courts in Scotland restricted by docket should be extended in matrimonial causes. There is ample justification for seeking that in matrimonial causes where there are children, the rule in other actions affecting children should be introduced and emphasised, namely, that primary consideration be given to the well-being of the children. It is evident that existing practice falls lamentably to assess the needs of children materially, morally and financially. To this must be added some sanction criminally or quasi-criminally to deal with a party to an action failing to obey a decree of the court.

(B) MARRIAGE

3. Marriage considered (as in Scots law) as an interchange of consent between a man and a woman is in effect a contract. While the statutory marriageable age is sixteen years it would seem reasonable that approval and consent be obtained for this as for any other contract undertaken by a minor.

4. It is suggested that consent and approval might be made available by application to the Sheriff and granted by him after due enquiry extended to include medical reports "on soul and conscience". The purpose of the Sheriff's enquiry would assure that no incapacity of consent to marriage exists either from non-age or mental infirmity and that both parties are capable of undertaking full conjugal duties. The health and well-being of future children might also thereby be safeguarded.

5. Any ante-nuptial marriage contract which restricts or denudes any unborn child of the enjoyment of his full legal rights should be void. It is not unknown in ante-nuptial marriage contracts for the income to be allocated between each spouse and the capital divisible on the dissolution of the marriage with small provision for any child in full satisfaction of legal rights.

(C) DIVORCE AND OTHER MATRIMONIAL CAUSES

6. Divorce and other matrimonial causes should fall within the jurisdiction of the Court of Session and Sheriff Courts in Scotland when the contract of marriage has been entered into in Scotland. This would obviate the necessity for either spouse having to seek a remedy farth of Scotland. It seems reasonable that those who enter into a contract of marriage in Scotland should have the protection and remedies afforded by the law of Scotland through the Scottish courts. The principle has to a limited degree been introduced by the Maintenance Orders Act, 1950.

7. Divorce or legal separation on the ground of cruelty (including habitual drunkenness) places on the pursuer a duty which is not easily discharged owing to the limited

manner in which the courts apply the rules of admissible evidence. The incidence and effect of cruelty is really a question of fact rather than one of law and possibly the introduction of a jury in the hearing of such cases would widen the scope of enquiry.

8. Again, in actions of divorce on the ground of insanity the scope of admissible evidence is extremely narrow and it is suggested that it should not be restricted to statutory insanity but extended to include persons who have been voluntary inmates of mental homes.

9. In actions for separation and divorce the court has the widest and most general discretion to make interim and final orders as to custody, maintenance and education of pupil children of the marriage during pendency but only before decree of divorce or separation is pronounced. It is only too evident that the court is failing to exercise its discretion according to the whole circumstances, and the practice has developed of making no order concerning the children in the absence of any plea thereabout. This is perhaps the most serious criticism of procedure in Scotland in divorce and other matrimonial causes. There has been in the law of Scotland no general rule that the guilty father shall be deprived of his common law right to the custody of the children and this has no doubt given rise to the practice of requiring a plea as to custody. When the mother is the guilty party the position is even worse. Seldom is there any other than the most cursory enquiry as to the children's care and well-being and they are not infrequently left in the care of a mother whose behaviour as a wife has been proved to be such as to lead to the dissolution of the marriage and in effect shows her to be incapable of properly carrying out her conjugal duties. A father divorced for cruelty as a habitual drunkard may be left with the custody of the children.

10. It is recommended that in divorce and matrimonial causes, where there are children of the marriage, the court direct at a preliminary hearing that a full report be submitted by an independent commission on the whole circumstances relating to the children and the provision to be made for their future, and receive and consider such report before considering the merits of the cause and pronouncing decree.

11. Review of the awards of alimony for children in divorce actions and in actions of legal separation is long overdue, as the present sums awarded as weekly alimony are far from sufficient. According to the law of Scotland a father "in the lower ranks" was bound to give alimony till the child was able to earn a livelihood and "in the higher" still longer. His responsibility for alimmenting a daughter was in certain cases more onerous. No standard appears to be operative today other than a more or less fixed rate, which appears to have been arbitrarily fixed some years ago in an Outer House decision and largely followed in that and the inferior courts. The standard payment by local authorities in respect of what was formerly known as "the poor law child" (and might be considered as analogous to the "lower ranks") was always very much higher than that fixed by the courts in awards of alimony. Rates approved by the Scottish Home Department and paid by local authorities for children boarded out by them are almost double that fixed by the courts. It is not unknown for mothers to have to seek supplementary assistance (public relief) in spite of having successfully obtained payment of an award of alimony from the court.

12. Non-compliance with court orders in divorce or other matrimonial causes should be considered and treated as a criminal or quasi-criminal offence, and prosecuted either *ex proprio motu* by the court making the order not complied with, or summarily on receipt of a complaint by or on behalf of the injured party. The practice of leaving the injured party to proceed further by civil action has given rise to hardship and it would appear unreasonable that the court providing a remedy takes no action to provide enforcement of that remedy other than by further civil process. It has been found that criminal action against a father for failing to provide for his children

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has been prejudiced by the existence of a decree of divorce with an order for maintenance which the mother has been unable to enforce.

13. Alimony for the wife who has been successful in an action for divorce is suggested where there are children of the marriage. Where the successful litigant has been the husband but the court, looking to all the circumstances, has left the children with the mother, it is also suggested that the measure of alimony awarded for the maintenance of the children should be such as to include an allowance for the mother in respect of her care of the children. It is contended that to a wife and mother her existing rights of property on divorce may prove illusory and she may be

no better off than if she had been the guilty party. Her position and the children might be regarded extrajudicially and considered in the light of the person who has the charge and care of the children and the alimony assessed accordingly. The decree of divorce or separation awarding custody of children to either spouse should warrant any necessary transfer of tenancy of the house formerly occupied by the family.

14. It is suggested that all awards of alimony in divorce or other matrimonial causes be paid into court to the clerk of court or other court official appointed for this purpose.

(Received 22nd December, 1951.)

EXAMINATION OF WITNESS

(MR. C. A. CUMMING FORSYTH, representing the Royal Scottish Society for Prevention of Cruelty to Children; called and examined.)

6363. (Chairman): Mr. Forsyth, you are the General Secretary of the Royal Scottish Society for Prevention of Cruelty to Children. Before I ask you any questions, do you wish to add anything to your memorandum?—(Mr. Forsyth): May I just give the Commission some idea of how I prepared the memorandum, and from what sources I received my evidence?

6364. Yes, that would be very interesting.—The Society has about thirty branches throughout Scotland, and about a hundred district committees. When the questions were put to me by the Commission I sent a letter to all the district committees asking them for their views. In addition, we have some sixty inspectors, with a concentration of inspectors in Glasgow, Edinburgh and Dundee, where we maintain training schools for inspectors. I also wrote to these inspectors to ask them to give me cases illustrative of points in answer to the questions raised in the Commission's letter. The memorandum was then compiled by me from the various replies, and circulated to the members of the Council of the Society. I consider that I am myself responsible for the first paragraph, which is based mainly on my experience at the Edinburgh Legal Dispensary, and upon cases referred to me by inspectors for advice. The Society, of course, as is mentioned in the memorandum, is concerned with the status or position of children, and any recommendations which I received from district committees which did not to my mind seem primarily concerned with the effect on children have been excluded. On the reference to marriage of minors, the suggestion which I received was to increase the age of marriage to eighteen years, or to require consent to the marriage of any minor. I have used the analogy of the law of Scotland relating to the contractual obligations of minors in this instance.

On my reference to domestic, this, I think, properly relates to actions for custody of children arising from divorce or other matrimonial causes.

In paragraph 9 the suggestion is made that the question of custody and maintenance of children of the marriage should be considered before pronouncing decree. It has been suggested to me that it would be wiser, and would perhaps save expense and time, if the question of custody and maintenance of the children of the marriage were not enquired into until after the court had decided to dissolve the marriage, instead of setting up a commission prematurely to enquire into the well-being of the children.

In paragraph 11 the implied criticism relates more particularly to the Court of Session. The Sheriff Courts have recently been awarding much higher amounts for the maintenance of the child.

6365. But the Court of Session, you think, is awarding rather low amounts?—Indeed, yes, my Lord.

6366. I shall leave Lord Keith to deal with that paragraph.—I have obtained from my inspectors a brief note of cases available, in order to illustrate most of the points which have been incorporated in the memorandum. I do not know whether you would wish me now to take each paragraph, as it were *seriatim*, and refer to the cases illustrating them, or perhaps leave them until the questions arise?

6367. I think that the best plan would be for the Commission to ask questions—are the cases numerous?—No, and they are very briefly stated.

6368. Then I think the best plan would be, as we reach each point where you think a reference to a case would be helpful, for you to refer to it. Then we shall see the drift of the cases more easily. Is that all you wish to say by way of introduction?—Yes, my Lord.

6369. You start by saying:—

"This Society is concerned with the status or position of children as affected by the law of Scotland relating to marriage and divorce. With regard to marriage, it is considered that two instances of the old Scottish practice of irregular marriage, namely, (a) by habit and repute, and (b) *promissio subsequente copula*, have much to commend their retention. Each provides a measure of protection for the parties concerned and any children of the union."

I appreciate that this suggestion might benefit the children of such a union, if any children are born, but is it not better to encourage church or registry office marriages, because then, at any rate, the matter is clear and definite and everybody knows that the people are married? Do you not think on balance that it is perhaps better to leave old forms of marriage in the realm of forgotten things? But I think that Lord Keith would like to add something. (Lord Keith): Mr. Forsyth, you do know that these old forms of Scottish marriage have now been abolished?—Not marriage by habit and repute, my Lord.

6370. Habit and repute still stands, but the declaration *de present* and the *promissio subsequente copula* have gone.—Yes, that recommendation should have been to re-introduce *promissio subsequente copula*.

6371. (Chairman): You want to re-introduce a form of marriage which no longer exists?—Yes, solely for the protection of the child.

6372. I think that the proposal is clearly outside our terms of reference, although we are described as a Royal Commission on Marriage and Divorce, but I did want to know whether you had considered the counterbalancing advantages of these forms of marriage being done away with?—I think that I was basing my recommendation mainly on the idea of contract, which has always been present in the idea of marriage in Scotland.

6373. I see. Then, in paragraph 2, which is of a general nature, you say:—

"We maintain that the first principle of marriage, namely, the procreation and suitable upbringing of children, should be kept in the forefront, if necessary by the introduction of pre-marriage regulations designed to safeguard and protect the health and well-being of future children."

I am afraid the Commission take the view that these matters are not within their terms of reference, but we have always gone on the principle of noting suggestions made to us, and it may be that we can refer to them in our Report. In the third sentence you say:—

"With regard to dissolution of marriage or other matrimonial causes, there appear to be few grounds for

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recommending any alteration in the law of divorce in Scotland, but many for changes in the administration and in the powers of the courts."

Then, I think, each of the matters which you deal with in regard to administration or the powers of the courts is dealt with *separately* below?—They are, indeed.

6374. In paragraph 4 you say:—

"It is suggested that consent and approval might be made available by application to the Sheriff and granted by him after due enquiry extended to include medical reports 'on soul and conscience'. The purpose of the Sheriff's enquiry would ensure that no incapacity of consent to marriage exists either from non-age or mental infirmity and that both parties are capable of undertaking full conjugal duties. The health and well-being of future children might also thereby be safeguarded."

I was not quite sure whether you meant that to apply to all marriages?—No, my Lord, that only applies to minors.

6375. You mean that that should be so in the case of all marriages of persons under twenty-one or under some other age?—Under twenty-one.

6376. In paragraph 5 you deal with ante-nuptial contracts, and you consider that it should be unlawful for children to be deprived of the enjoyment of their full legal rights by such contracts. If that could not be done I imagine that there would be many fewer ante-nuptial contracts. Do you think that on the whole they are good things, or do you not like them?—Again, my Lord, the memorandum is directed to the protection of the child; the whole bias of this memorandum is obviously directed to that.

6377. (Lord Kelvin): I was a little surprised at this paragraph, Mr. Forester. It seemed to me to be a little outside your line of country. You do not deal with many children of wealthy parents, parents who are so wealthy as to be able to enter into marriage contracts, do you?—Our work, of course, is not restricted by questions of wealth at all.

6378. It is not, I quite agree; it is restricted to cases of cruelty to children.—But the answer there, my Lord, is that this suggestion came directly from a committee, most of whom are practising lawyers.

6379. (Chairman): If we may turn to paragraph 6, you say in the opening sentence:—

"Divorce and other matrimonial causes should fall within the jurisdiction of the Court of Session and Sheriff Courts in Scotland when the contract of marriage has been entered into in Scotland."

The purpose of that is made obvious by the next sentence:—

"This would obviate the necessity for either spouse having to seek a remedy forth of Scotland."

But are you incidentally making a suggestion that the Sheriff Court should have divorce jurisdiction?—No, my Lord, that was badly phrased. It was not intended to mean that the Sheriff Court should have divorce jurisdiction.

6380. Thank you for clearing that up. The next paragraph states:—

"Divorce or legal separation on the grounds of cruelty (including habitual drunkenness) places on the pursuer a duty which is not easily discharged owing to the limited manner in which the courts apply the rules of admissible evidence."

Would you mind expanding that? To what are you referring in the phrase "the limited manner"? Were you referring to the necessity for corroboration?—No, I think that again the paragraph is not particularly happily worded. It was really intended to recommend that the court should have wider powers in interpreting cruelty.

6381. I see. In paragraph 10 you say:—

"It is recommended that in divorce and matrimonial causes, where there are children of the marriage, the court direct at a preliminary hearing that a full report be submitted by an independent commission on the whole circumstances relating to the children and the provision to be made for their future, and receive and consider such report before considering the merits of the cause and pronouncing decree."

I understood from your opening statement that you have changed your views on that, and you think that first of all the court should hear the case for divorce or separation, then, as I understand it, get the report by the independent commission and then decide about the children. Is that right?—That is correct, yes.

6382. I want to ask you one or two questions on that. First of all, would you suggest that that should be done in every case where there are children, even if the parents are agreed, for example, that the child should be with its mother? Or are you suggesting that the court should have a discretion either to refer the matter to the independent commission or not?—I think that perhaps in every case the court should decide, whether or not there is a plea by the parent as to custody.

6383. When you say, "the court should decide", that was not quite the question I asked. The court must decide, of course, but I was asking, do you think that there should be a reference to this independent commission in every case, even if the parents were agreed, for example, that the child should be with the mother?—I think that there should be a reference to an independent commission in every case. May I also say in connection with your statement there, my Lord, that the court must decide—in our experience the court does not always decide as to the custody of the child, in Scotland?

6384. You misunderstood me, or I did not express it properly. What I meant was that any decision which is taken with regard to the child must be the decision of the court and not the decision of the independent commission.—Indeed, yes.

6385. The next question is, what do you mean by an independent commission? What had you in mind? Had you in mind more than one individual, or just one individual who was specially trained and available for the purpose?—I think that more than one individual was intended. It was a recommendation by one or two district committees, and in each instance it was intended as more than one individual. I should imagine, on the question of the type of commission which might be set up, that it would be very similar to, say, the constitution of a juvenile court. There, there must be at least one woman who has some knowledge and experience of the care and upbringing of children, not necessarily somebody who by sundry qualifications in child psychiatry or psychology is supposed to be qualified to know about the children, but a person who has had some practical experience of and concern for the upbringing of children.

6386. I am sure you appreciate that that independent commission could not do its work without, for example, finding out about the home and the financial arrangements being made?—That could be done. When the Sheriff Court is acting as a juvenile court and a child is brought before it, information is had before the court as to the child's home circumstances, educational standard and so on, so the machinery does in fact exist in the lower courts for that.

6387. What I do not understand is this: why should not the judge hearing the case refer it direct to the person who makes this enquiry and finds out about the home and education and anything else? Why interpose this independent commission, which would very greatly add to the delay, not to say the expense, of the court proceedings? I do not see the point of this further commission.—I think, my Lord, that I might amend my reply to your previous question. What it was undoubtedly intended by the committee who sent in this suggestion that a commission should be set up, I do in fact myself think that procedure similar to that in the lower courts, whereby the court receives the information from a qualified person, would be quite sufficient.

6388. It seems to be simpler, less expensive, and shorter, and also, instead of getting hearsay information through the commission the judge would get the information direct from the man or woman who made the enquiries.—Yes.

6389. In the third sentence of paragraph 13 you state:—

"It is contended that to a wife and mother her existing rights of property on divorce may prove illusory and she may be no better off than if she had been the guilty party. Her position and the children might be regarded extra-judicially and considered in the light of the person who has the charge and care of the children"

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[Continued]

and the aliment assessed accordingly. The decree of divorce or separation awarding custody of children to either spouse should warrant any necessary transfer of tenancy of the house formerly occupied by the family."

I have two questions on that. First of all, would your Society agree with the recommendation made by Lord Mackintosh's Committee, that, on any decree of divorce, the court should be given power to review the position generally—putting it shortly—and make such provision for the innocent party by way of capital or income, as seems fit? Would that meet your views?—That would largely meet the views of my Society.

6390. Then, there are certain difficulties in a transfer of tenancy, which I would call to your attention. I suppose that you contemplate that if one spouse, let us say the wife, has got the children, and the tenancy is in the name of the husband, the court should have power to transfer the tenancy to the wife?—Yes, my Lord.

6391. There are certain practical difficulties about that. Let me mention two: one is that as long as the tenancy is in the name of the husband, he is liable for the rent and for any repairs which the tenant is liable to do, whereas if you transfer the tenancy to the name of the wife, the landlord would be entitled to look to her for these matters. That might not be altogether an advantage. The other is that from a landlord's point of view, you are substituting for a tenant who is able to pay the rent, one who may not be able to pay. Do you think possibly that some less drastic solution might be found, for example, some provision that the husband shall not assign the tenancy and shall permit the wife to live there? You are not a lawyer, are you?—I am, Sir, but not practising.

6392. Possibly these practical difficulties were not very fully present to your mind?—No. I can see the practical difficulty there, and possibly the alternative suggestion which you have made would be quite a suitable one. Of course, I also know that in so many of our cases the wife and children are debarron from the asylum of the house in which they have lived all the time.

6393. That has been brought to our attention, and we are very fully conscious of it. It results in really great hardship in many cases—I have a very brief note of a case here, though I do not know that it really gives any additional help on the point. It refers to a father who won a considerable sum of money, presumably on the football pools—about £50,000; he was drinking to excess, and was believed to be driving a motor vehicle whilst under the influence of drink. The wife's nerves broke under the strain; she taunted him and reviled him until he gave her several hundred pounds to leave the home. This happened on more than one occasion, because she returned at intervals and was always given additional money; she banked all the money she got, but she went back to him, according to our inspector, for the sole purpose of trying to save the home. The point made in that case was that this man will sooner or later squander his fortune, and it appears that there is nothing the wife can do. If she had grounds for legal separation and aliment, she would still be unable to do anything to save the money, which would have been used for the children. Therefore if the house could be put in her name, then, in the event of her being successful with any action and having the house transferred to her name, at least she could give the children a considerably greater measure of protection than is likely to be afforded to them in due course, in view of what is likely to happen in this case.

6394. Do you mean that in that case there is likely to be a divorce? You have not stated any grounds for divorce.—I presume there is that likelihood, my Lord.

6395. (Lord Keith): That would seem to be a very good case, Mr. Forestry, for the wife taking a divorce and claiming her legal rights out of this £50,000. She would then have a substantial sum of money and could go and buy a house for herself.—I quite agree.

6396. (Chairman): Is it a freehold house, or is it held on a tenancy?—A tenancy, my Lord.

6397. That of course is rather a special case.—It does not illustrate the point under discussion very soundly, perhaps.

6398. I am sure we appreciate the point that you make, that it is very often a great hardship on the wife if she has to leave the matrimonial home, although she has got

custody of the children. That is very fully before our minds. I think that if you have notes of cases, unless you would like to read them now, it would be helpful if you handed them to the Secretary, and we could then have them copied for the use of the Commission.—I will do that.

6399. In the last paragraph of your memorandum you say—

"It is suggested that all awards of aliment in divorce or other matrimonial causes be paid into court to the clerk of court or other court official appointed for this purpose."

That would mean, would it not, that the wife would have to go to the court every week to collect the money? Do you think that that is better than the present arrangement, by which it is paid direct to the wife?—Yes, my Lord. I believe that this follows the system in operation in England.

6400. That may be, but what was your reason for thinking that it should be introduced into Scotland?—Because so frequently husbands who have to pay aliment in respect of their children fail to do so, and frequently we have to chase them down into England, have them sent there and try to persuade them to make some provision for the children. The difficulty arises if we turn to the mother and say to her: "You have a civil right of recovery here". And in fact it is what happens in many instances when our inspectors report such a case to the Procurator Fiscal. Where there has been a divorce, the Procurator Fiscal invariably takes the attitude that this is not properly speaking a case for him to deal with under the criminal law, because there has been a civil decree of divorce with an award of aliment against the man, therefore the wife should take her civil remedy and recover the aliment. She is very seldom able to take that remedy in Scotland, when the husband has absconded to England, and invariably it means coming back to our Society and our asking the English Society to sue the man. But we feel that if the award of aliment made by the court were at the same time ordered to be paid into or through the court, the difficulties which mothers experience in these cases would be largely obviated.

6401. I think what you really have in mind is that not only should the money be paid into court, but it should be the duty of the court to collect it, instead of that task falling on the wife?—We had that also in mind, because I think we have said in a further paragraph that we would like to make it almost a criminal offence for the parent to fail to pay aliment if ordered to do so by the court. It is a sort of extension of contempt.

6402. (Lord Keith): Just to follow up this last paragraph, do you think that there would be any less difficulty in a court official collecting the aliment, than in the mother or the mother's solicitor collecting the aliment?—In practice it would be, I think, much better if the court official were to collect the aliment.

6403. One can see that it might be better for the court official to collect it, but the question was: do you think that he would be able to collect it any more easily than the mother?—I think that he would have the sanction of the court behind him in making his collection, whereas the mother, having to go to a solicitor, and having to pay the solicitor . . .

6404. I see the expense point.— . . . is not only more reluctant in that respect, but I feel that the official of the court would have a certain sanction of the court behind him in collecting that money.

6405. You think that the husband would be more ready to pay into court?—I think he would, because so many of these cases are left to our Society, again because of the sanction that rests in the phrase "the crutty man". In many of these cases, where a man has had an award of aliment made against him, the mother tries to recover aliment, and either by reason of delay or expense is unsuccessful in doing so; she then comes to the R.S.P.C.C. and complains to the inspector that her husband is not providing for his children, which of course is a presumed offence of wilful neglect. The inspector then sees the husband, and the very fact that it is a "crutty man" who sees him has a social sanction, as a rule, to persuade him to fulfil his obligation and pay the money.

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6406. Then you are really doing the work which you want the clerk of court to do?—Indeed we are, in this particular instance.

6407. Is not that a very good piece of work for your Society, Mr. Foreyth?—In respect of these cases of failure to provide, over a long period of years we have been doing the work of the local authorities in collecting alimony or recovering money which they have paid out under public assistance—and today which the National Assistance Board has paid out. A great number of these cases are referred to our Society because of the presumed offence of wilful neglect. But our work could be narrowed down very considerably, we are not debt collectors so much as a Society for dealing with neglect and ill-treatment of children. In many of these cases referred to us, of failure to provide, there is really no evidence of neglect or ill-treatment suffered by the children. That has been safeguarded by the State through national assistance. That is why, as a matter of principle, I think that much of this work of debt collecting should not properly be placed on the shoulders of a Society such as ours.

6408. Formerly, under the Poor Law, if a father deserted his wife and children and refused to maintain them, he could be imprisoned?—He could.

6409. Has that power gone?—No, it still exists, under the National Assistance Act, 1948, but the machinery, of course, is slow in operating and a great deal of that work has been put on to us. Frequently we charge the man with an offence under the Children and Young Persons Act—the remedy is very much more readily available than that which exists under the National Assistance Act, and the machinery is very much more quickly put into operation.

6410. Have you considered this, Mr. Foreyth: what would be involved if the Sheriff Clerks—I suppose they are the people?—They would be the people, yes.

6411. . . . bad to collect the alimony in all the alimony cases throughout the country? You would need a very considerable augmentation of the Sheriff Clerks' staff, would you not?—Indeed, I am afraid we should, my Lord.

6412. That is a practical consideration.—Yes. I think perhaps it could be dealt with in such a way as this, that the Sheriff Clerk would have the right of receiving the money from the responsible parent; in other words, the court would decree that the alimony would be so much, that it would be paid by A.B. into the court at regular intervals, and also that he should notify the court of any change of address—that is a very important point—and the Sheriff Clerk, failing to receive such money, could then notify our Society, or the police, for that matter.

6413. I see all these possibilities, but what I am saying is that that is going to involve a very great deal of work, which the present staff of Sheriff Clerks could not possibly tackle. It could be done only by a very large augmentation of the staff of the Sheriff Courts—I thought that surely if it is done in England there is no reason why it should not be done in Scotland.

6414. Yes, but the system of magistrates and magistrates' clerks is quite different, and the separation and maintenance cases in England are vastly greater in number than the separation and alimony cases in the Sheriff Court?—Yes, I can appreciate that.

6415. There is a practical difficulty, and that is all I am pointing out. I think you agree with that?—Yes, I appreciate that. (Mr. Macdowell): In England, of course, on a magistrates' order, the amount of the order is paid through the court and it is the duty of the chief clerk of the court to enforce payment after a certain period, if it is not made.

6416. (Chairman): That is, I suppose, what you would like to see in Scotland?—Yes, indeed.

6417. (Lord Keith): I see the desirability of it, Mr. Foreyth. I am just wondering how the authorities would react. Now may I ask one or two questions on the rest of your memorandum? As I understand paragraph 6, what you are suggesting is that wherever a marriage has been made in Scotland the divorce should take place in Scotland.—That is correct, yes.

6418. That is a very big innovation into international law, is it not?—That is a suggestion made by one or two committees and which I have phrased in this particular way, but I should imagine that what these committees may have had in mind was directed mainly to the questions of custody arising from such actions.

6419. That might be, and that would raise different questions. I do not want to enter into the legal aspect of the matter. You have explained paragraph 7, which I was not clear about.—May I say, my Lord, in connection with paragraph 7, into that recommendation I should think would readily fall the extension of divorce for cruelty to include such cases as a mother who has been put in a state of alarm because of the cruel conduct of her husband towards her child? I have one or two cases here illustrating one of those suggestions, that, not perhaps a first conviction of a father for cruelty to a child, but at least a second conviction, should be regarded as sufficient ground for divorce for cruelty.

6420. You are suggesting that cruelty to children, at least if there has been a second conviction of cruelty to children, should be a ground of divorce by the mother or by the father?—Yes, where there is evidence led to show that the mother has suffered by her intervention, or her physical or mental health has been affected.

6421. You do not take only the cruelty to the children, you include the effect on the mother?—The mother, of course, would be the parent.

6422. Yes—or it might be the father?—It might be the father, yes. There is one case which I have noted here, where the father had been guilty of lewd practices to the child of his marriage; he was convicted of this, and the mother subsequently forgave him. He returned to her, and she tried to save the home, but she had lost all sense of love or affection for him, in fact her attitude amounted more or less to one of contempt. One can imagine the dreadful effect on children who had to be brought up under such circumstances. The mother did in this instance try to raise an action for divorce on the ground of cruelty, but of course was quite unsuccessful. So that is another aspect of the effect on the children having repercussions on the law of divorce for cruelty.

6423. Yes, we have had that aspect of the matter brought before us by other bodies, Mr. Foreyth, and I think we quite appreciate that. You have one rather remarkable suggestion in paragraph 7, that a jury should be introduced into cases of cruelty. Is that a considered suggestion?—It is made by myself, my Lord. I think that the suggestion arose mainly from this point of view, that from the experience gained by myself and by the inspectors of this Society, it seems so wrong that cases of cruelty are, as it were, judged by a fixed measure laid down in a statute, whereas so many of these cases of cruelty—and this I know from practical experience in the Legal Dispensary—are entirely a question of fact, and there are so many aspects of cruelty which, however learned the judge may be, may not always appeal to him as they would if he had the assistance of a jury.

6424. Then you think that twelve people would decide these cases better than one?—They might assist the one.

6425. Now may I ask you to look at paragraph 9? You say that there are many cases where no order is made with regard to the custody of children.—That is correct.

6426. And you say: "This is perhaps the most serious criticism of procedure in Scotland in divorce and other matrimonial causes". Do I understand that what you are saying is that in every case where there are children, whether custody of children is asked for or not in the divorce proceedings, there should be an enquiry into the position of the children?—Yes, my Lord.

6427. You press it all that way?—Every time, yes. I have numerous cases and numerous illustrations where there has been a real hardship, not only to the wife concerned but to the children.

6428. I just wanted to know how far you pressed it. I think that in fact the same proposal is made by the English Society?—Indeed? I have not seen their evidence.

6429. Now may I ask you to turn to paragraph 11? You have some reference here to the amount of alimony awarded being out of touch with the allowances made

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[Continued]

by the National Assistance Board. I think you said that the Sheriff Court rates had recently been increased?—They have recently been increased.

6430. Can you tell me what the awards made in the Sheriff Court run to?—I think, and I am quoting from Dundee, that they run from 16s. to £1.

6431. For one child?—For one child.

6432. If there are a number of children, does the rate tend to average at the lower figure?—It does.

6433. What is the national assistance rate?—I cannot recall that. (Mr. Moddocks): It is 17s. 6d. a week in England.

6434. (Lord Keith): Then what rate do you say is awarded in the Court of Session?—I think that it is 15s. for the first child, and 12s. 6d. for each additional child—and that is a high award.

6435. Is 16s. to £1 a general rate throughout the Sheriff Courts in Scotland, or is it only in Dundee that you have heard of this?—I have heard of it in Dundee, and I understand that it is gradually being applied in other Sheriff Courts.

6436. I think I can say that certainly there seems to be a tendency to increase the rate in the Court of Session, too. Are you aware of that?—I was not aware of that. Some time ago the Public Assistance Association—that was before the war—asked me if I would press the Court of Session, and give it evidence in support thereof, to increase its allowances, and it was then that I ascertained the manner in which the allowances were fixed. In the Society's memorandum, my Lord, I referred to the amounts paid by local authorities for boarded-out children; I think that the minimum rate is about £1, irrespective of the number of children. There is no question of averaging out, and I think it is made clear in the paragraph following that, that if the wife is to be regarded as being in the same position as a person with whom a child has been boarded out, then she should get not less than what is the amount recognised by local authorities for boarded-out children.

6437. I quite appreciate the point. Of course, sometimes local authorities might be regarded as rather more affluent than indigent fathers—I have a feeling that the courts very seldom assess the amount in proportion to the income or the standard of living of the father.

6438. But surely, Mr. Forsyth, does not the court always make some enquiry into the wages earned by the father?—That is the duty of the court, I should say.

6439. It has that before it, has it not, when it tries to fix the amount of aliment?—But the amount given is very seldom varied, even although the incomes of the litigants vary, so that that would suggest that the allowance is not always related to the income available.

6440. I agree that there may be some undefended cases where the wife may not be able to speak to the earnings of the husband and cannot get an employer to come—I quite agree with that. In that case the court has simply to apply something in the nature of a standard amount, has it not?—Yes, I suppose so, under those circumstances.

(At this stage the Commission adjourned for a short period.)

6441. (Lord Keith): Mr. Forsyth, I have only one further matter to ask you about. In paragraph 12 of your memorandum you say that non-compliance with court orders in divorce or other matrimonial causes should be treated as an offence and should be prosecuted either *ex proprio motu* by the court making the order not complied with, or summarily on receipt of a complaint by or on behalf of the injured party. What I wanted to ask you is this: can you not apply to the Sheriff for a warrant of imprisonment if aliment is not paid under a decree?—I think that you are correct there, but the question that arises is, possibly, the action which has to be taken by the mother to obtain that remedy, and possibly the expense involved.

6442. Is this not taking one back to the idea of enforcement by a court official? Is that what is in your mind?—Yes, it goes perhaps further than that, in respect that when the decree is announced, that is, of divorce or legal separation or adherence and aliment, the defender should

be notified then that his failure to obtemper the decree of the court may be followed by criminal action by the court.

6443. I do not quite see what the point of criminal action is if he knows that, at the present time if he fails to pay, an order can be obtained to imprison him?—He does not know that at the present time.

6444. There is no point in changing your procedure, is there, if all you want is notice to him that he may be imprisoned? Is that all you want?—I was hoping to get some further sanction than that, because in practice, dealing with actual cases, we do find in a very large proportion of these cases that the man merely snaps his fingers at the order of the court, clears off and makes no attempt whatever to provide.

6445. I quite see that.—In effect, the mother's remedy there would be presumably to go to the Sheriff Court and ask for a warrant of imprisonment, that that involves expense for the wife. What in fact more usually happens is that she comes to the R.S.S.P.C.C. When we, having enquired into the facts, present a case to the Procurator Fiscal, he turns round and says, "The woman has a civil decree and she has a remedy". While she may have that remedy, she does not in fact avail herself of it.

6446. Does it hold down to this: instead of the wife enforcing the decree by obtaining a warrant of imprisonment, you want some other party, preferably a Procurator Fiscal or some court official, to enforce the decree and obtain a warrant of imprisonment?—That is, in effect, what it would boil down to in practice.

6447. Because, so far as criminal and civil imprisonment are concerned, there would be no practical difference between the two?—Not today, except that the latter remedy would be more readily available if it were immediately applied by the court without the intervening necessity of applying for further process.

6448. And you spoke about the man "snapping his fingers" and so on. It would not matter who was going to enforce the decree in order to get a warrant of imprisonment, if he snaps his fingers and clears out he will do that in either case?—If he were informed by the court that his failure to pay the aliment would result in his immediate arrest and imprisonment, I think that in practice he would be very reluctant merely to pay no attention to that warrant.

6449. I do not quite understand this preference for imprisonment at the instigation of a court official instead of at that of the wife?—We cannot get the man sent to prison because most of the Procurators Fiscal say, "No, you should get the woman to take action, she has a civil remedy". But in practice the woman does not do that. Our proposal is really for a short cut to give immediate sanction to an order of the court.

6450. (Dr. Robertson): To return for one moment to paragraph 9, Mr. Forsyth, are you telling the Commission that your Society is seriously concerned about this omission of interim or even final orders with regard to custody?—Yes, we are.

6451. You feel that that is a serious difficulty?—We are very concerned about that. It comes up with great frequency in reports from inspectors.

6452. Then with regard to offences against children, of which you have already spoken, is it your experience that very often the mother is reluctant to report such cases? That it is often very difficult to secure conviction because of her hesitation to report the offence in full, particularly with regard to cases of incest?—To report cases to us?

6453. To the court, or possibly to your officers.—They are reluctant to report immediately to the officers of the court. They may readily report to our inspectors.

6454. Do you find that the "cruelty man" gets as much work from the National Assistance Board nowadays as he did formerly from the public assistance authorities and parish councils?—Not quite so much.

6455. Then with regard to the co-ordination of the various officials concerned with the care of children, is it usually the children's officer who acts as co-ordinating officer, or do your officials sometimes undertake that co-ordinating work?—The children's officer always acts as the co-ordinating official, I think.

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6456. But each local authority has the right to make its own rules?—Indeed, yes.

6457. (Mr. Young): I would like, first, to follow up the difficulty about imprisonment for alimony. Does your experience lead you to believe that our present system for securing alimony is not effective?—It does, indeed.

6458. Is that due to the fact that it has to be done at the expense of the individual who is seeking it?—That is correct.

6459. Do you think that there would be a big difference if that were done at the expense of the State?—There would, yes.

6460. You say in your memorandum that you would like to restore the old Scottish practice of irregular marriage, namely, by habit and repute, and *promissio subsequens copula*. The position in Scotland prior to 1940—correct me if I am wrong—was that there were three forms of irregular marriage, namely, declaration de present, *promissio subsequens copula*, and habit and repute. In 1940 the first two, de present and *promissio subsequens copula*, were abolished?—Yes.

6461. But there is still in existence, and this is what I want to make clear, marriage by habit and repute. So there is no question of having to restore that?—No, it is left. I wonder if I could add to that, my Lord, because it occurred to me that to Lord Keith, who questioned me on that earlier today, I did not perhaps give a clear picture as it appeared to me from my experience of the marriage *promissio subsequens copula*? I can recall a case from Stirlingshire where the inspector wrote me to tell me that he had a case of some difficulty, a young woman, engaged to be married, who was going to have a baby. She was in great distress and her people were in great distress. He wrote to me that he had been asked to advise on the case. I suggested to him that he should see the fiancé and point out to him that this young woman had a right to go to the Court of Session and ask for a declaration of marriage, therefore he should morally at least assume the responsibility for the child when it came. That advice was acted upon, but I am not able to give any information as to the outcome, because inspectors, when they write for advice and get it, very seldom write back and tell me what has happened. But on another aspect of the same question, I have not infrequently known of cases where the putative father is in England and we receive a complaint from the mother that the man had promised to marry her and had gone off and left her. One of my difficulties here when we write to the English Society and ask them to interview the putative father, is that they are very reluctant to do so because of the law of criminal libel in England, and invariably we have to send them an assurance by the mother. In one or two instances of this kind before the war—there are not very many, I admit—I have taken the course of suggesting to the English Society that they should point out to the man in question that, according to the law of Scotland—as it then existed—the mother had a right to go forward to the Court of Session for a declaration of marriage and therefore that he should face up to his responsibilities. That is an indication as to the use to which the old form of Scots marriage was put in our case.

6462. May I return to the question of alimony? Speaking from your experience, do you think that it would be an advantage in Scotland if we were to introduce a summary method of obtaining alimony by a procedure rather like our small debt procedure?—Yes, it would, I think.

6463. Do you find from experience that our present system takes rather a long time?—It does, yes.

6464. And is expensive?—And is in my experience so seldom resorted to by the mother in question.

6465. Further, when a woman wishes to recover alimony by means of arrestment, she has of course to bear the expenses of the arrestment in the first instance?—Yes.

6466. In addition to that, even if she recovers these expenses from her husband, do you find in your experience that the recovery of these expenses sometimes affects the recovery of the alimony?—It is invariably swallowed up in the first instance in payment of legal dues.

6467. So that in the end, even though you recover the expenses, you do not recover the alimony, and vice versa. Is that the practical result?—That is the position, yes.

6468. Lord Keith discussed with you earlier the question of the prosecution of a father who has neglected his children. Do you find from your experience that prosecutions at the instance of the Procurator Fiscal do not take place unless the case is an extreme one?—Yes. It has to be extreme—well, not necessarily extreme, but it has got to be very well documented by evidence before the Procurator Fiscal will accept such a case from us—that is, cases of failure to provide.

6469. Yes, I want to get that clear. It is not until you have almost exhausted every other remedy and the man is very badly in arrears with alimony that you can get the Procurator Fiscal to move?—That is true, and there is another point arising out of that. A Procurator Fiscal will not accept a case unless we can prove that the man is earning. If the decree of the court had the sanction of almost criminal proceedings, then the difficulty that so frequently arises in persuading a Fiscal to accept a case would not be there because the Fiscal would be able, first of all, to tell the man that he had the necessary evidence of the man's earnings over the period of the charge. That is not always available at the moment.

6470. May I ask a final question? You have experience of both the Scottish and English systems of recovery of alimony?—Very little in England.

6471. Do you think that the English system of getting the order is preferable to the Scottish?—I do not quite follow that.

6472. I was just wondering if you could say out of your experience whether you could get an English order for alimony more quickly and less expensively than a Scottish order?—In England you can get a maintenance order as easily as anything, in Scotland you cannot.

6473. That is what I wanted to know. Now may I turn to a question quite different from any that you have been asked, arising out of your experience of the Children and Young Persons Act? Under the Act of 1937 you can get control of a child in need of care or protection, and further, once an order has been pronounced under that Act an application can be made at a later date for its revocation. Have you in your experience heard it suggested that all that a court needs to consider when revocation is asked for, is that the original conditions which resulted in the pronouncement of the order no longer obtain?—Yes, I have heard that put forward.

6474. Following from that, do you not think that it would be a wise thing to have a general provision in the law that in all cases where any court has to consider the care and custody of a child it should have in view that the paramount consideration is the interest of the child?—That is said expressly, I think, in our memorandum, and certainly is our view without any doubt whatever.

6475. Whether it is under the Children and Young Persons Act, or custody in a divorce or a straightforward custody case, there ought to be a general provision that the only thing that the court should keep in view is the interest of the children?—I thoroughly agree, yes.

6476. (Mr. Beale): I think that you have already agreed to an amendment of your proposal in paragraph 167?—I have.

6477. You do not want the court to call for a report on the children before the case is settled?—Before the decree is pronounced. That is, after the court has decided upon a dissolution of the marriage, but before giving pronouncement to a decree.

6478. I gather that you want an investigation to be made in every case where there is a child of the marriage?—Indeed, yes.

6479. Have you realised that there is a very considerable number of undefended cases where the children are not at present referred to?—There is, yes.

6480. And that would mean that there would have to be someone to whom the question of the welfare of the children is referred. In Scotland there is no experience of this procedure, is there? It would be introducing an entirely fresh element, would it not?—I think that I did give an illustration in the Sheriff Court acting as a juvenile court. This has information with regard to children brought before it, so that the machinery does, in fact,

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[Continued]

exist in Scotland for providing the court with information as to the children's background, educational attainments and so on.

6481. That report comes from the local authority, does it not?—Yes.

6482. Would you be satisfied if that was the information provided to the Court of Session?—Well, I had hoped that it would be left to the Court of Session to say whether it was satisfied on the general principle. My Society would say that there should be an enquiry into the well-being of the children before the decree is made final.

6483. Would you be happy if that report was automatically made to the judge wherever there were children of parties who were seeking divorce?—Or separation.

6484. May we deal with divorce for the moment?—Yes.

6485. And then it was left to the judge to decide whether he wanted further enquiry made?—Yes, I think that would be very sound.

6486. And you would like the same done in the Sheriff Court in cases of separation?—Yes.

6487. (Lady Bragg): May I refer to paragraph 9, in which you say, "When the mother is the guilty party the position is even worse"? Would you agree that even a mother who has been guilty of some matrimonial offence, who might even be called a bad woman, might still be a good mother and the sort of person you would want young children to go to rather than, shall I say, to a good father?—Yes, indeed, I would agree. There is no doubt that many mothers who are in fact charged by us, and from whom we propose to move their children, still have that essential spark of love and affection for the children. Even the worst of the mothers whom we have to bring before the courts have a certain amount of that.

6488. So you would be quite inclined, if you had to decide a custody case, to give those small children to the mother?—With suitable safeguards. This is rather a general question, but assuming that the court obtains a report—on the lines proposed—about the children, and that it takes that into account, as well as the personality of the mother concerned, whatever her offence may be, then I would agree that the court might quite suitably award the custody of the children even to such a mother.

6489. (Chairman): I am not quite sure that the answer is related exactly to the question. I thought that Lady Bragg's question was directed to this: a mother might be guilty of a matrimonial offence, such as adultery, and yet might be a perfectly suitable mother to have charge of small children. You are answering on the footing that the mother in question was one who had been charged by your Society for not being a good mother. I do not think that you quite understood the question.—I quite agree that I did not give a correct answer. (Chairman): Would you answer the question which Lady Bragg in fact asked—a mother who has committed a matrimonial offence such as adultery, would you consider that she might still be a suitable person to whom small children, especially, might be committed? That was your question, Lady Bragg?

6490. (Lady Bragg): Yes. And you agree?—Subject to suitable safeguards.

6491. Am I right in thinking that you said the maximum award of alimony for the children is £1? I thought you said 16s. to £1, and I wondered if that was laid down somewhere?—No, I do not think that there is any award laid down anywhere. What I said was that I do know that in one Sheriffdom in Scotland the awards by the Sheriff for alimoning children are from 16s. to £1, and I think that, in answer to Lord Keith, I said that this would be averaged out if there were more than one child—that is, £1 for the first child, 16s. for the next and subsequent children.

6492. What I want to know is whether there is anything to prevent a Sheriff from giving 30s. for each child, which is the maximum by law in England?—Nothing that I know of.

6493. (Lord Keith): He might give 40s. or 50s. in a suitable case?—I think that during our previous discussion on that very point, I rather diffidently referred to the position of a boarded-out child. I gather that where a local authority board out a child with a foster-mother they

are limited to £2 per week—that is their upper limit. There is no lower limit. Therefore I suggest that a similar standard could apply, where the court left the child with that child's natural mother.

6494. (Chairman): As I understand it, your answer referring to 16s. to £1 was only referring to the general sort of sums that were awarded in a particular Sheriff Court and have no reference to any maximum?—That is correct.

6495. (Lady Bragg): If the Sheriff has a discretionary power and can award as much as, say, 60s. per week, you are better off than in England where we cannot award more than 30s.—I am glad to hear that in some respects we are better off.

6496. It is better left without a specified sum?—Much better. I think that I have already indicated the underlying principle—the amount of the award ought to be related in some way to the position and income of the responsible parent. (Chairman): I think that the maximum to which Lady Bragg refers in England applies in a magistrates' court. There is no such limit, as far as I am aware, in the High Court.

6497. (Mr. Lawrence): Mr. Forsyth, would you look at paragraph 9 of your memorandum again, please? The reason I want to ask you a question or two is because in the middle of that paragraph you say:—

"This is perhaps the most serious criticism of procedure in Scotland in divorce and other matrimonial cases."

Is there not some contradiction in that paragraph? Would you look at the sentence just before that?—

"It is only too evident that the court is failing to exercise its discretion according to the whole circumstances, and the practice has developed of making no order concerning the children in the absence of any plea thereabout."

That seems to indicate, to my mind at any rate, that in both the Court of Session and in the Sheriff Court actions are raised in which the pursuer makes no plea with regard to the custody of the children. Is that right?—That is correct, certainly as regards the Court of Session.

6498. Do I understand you to say that there are a substantial number of cases in the Court of Session where the pursuer makes no plea with regard to the custody of the children?—According to my information and experience, yes.

6499. And are you saying that in those circumstances the court leaves the matter of the custody of the children, so to speak, in the air, by making no order because none is asked?—That is correct.

6500. And the same thing applies in the Sheriff Court, where you have actions for separation and alimony?—Yes. It does apply in the Sheriff Court, but not with such frequency as it does in the Court of Session. In the Sheriff Court, where a plea is made for custody, the Sheriff Court may, and in fact frequently does, refer the matter to the Court of Session particularly or solely on the question of the plea as to custody.

6501. Yes, thank you. Now would you look at the sentence which follows the sentence in which you make the remark with regard to criticisms of procedure? You go on to say:—

"There has been in the law of Scotland no general rule that the guilty father shall be deprived of his common law right to the custody of the children and this has no doubt given rise to the practice of requiring a plea as to custody."

What I do not follow is how you can talk about the practice of requiring a plea, if it is a fact that there are a substantial number of cases in which no plea is made, and on which the court accepts the absence of a plea and makes no order.—I think that the cause of your uncertainty there is the use of the word, "requiring", which you have interpreted in perhaps a more legal manner than it was meant to indicate. Perhaps the word, "expecting" would be better than the word "requiring". The court does not "require", but it may, as a result of what is previously stated—that there is no general rule—the court may expect or anticipate that if there is to be any question of custody arising at all, there will be a plea as to custody. It is the use of the word "requiring" that is wrong.

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MR. C. A. CUMBERLEY

[Continued]

6502. That is what led to my difficulty in that paragraph. But what I really wanted to establish was if it really is a fact that there are a substantial number of cases where the court in fact makes no order about the custody of children because the pursuer has not asked it to do so?—That is correct. A large number of these cases arise where the pursuer may be the father of the children and he applies successfully for divorce. He never makes any plea for the custody, being well content to leave the children with the natural guardian, the mother. He then has no order made against him as to contributing for the support of these children, because no plea has been advanced to the court as to custody.

6503. The gravamen of your criticism is this, is it not, that notwithstanding that in some cases the court is the custodian of the children upon the inception of a suit for divorce, yet it takes no thought for the destination of the children except in those cases where it is moved to do so by a plea made by the pursuer?—That is perfectly correct. This in fact is quoted from Bell's *Principles of the Law of Scotland*, and perhaps the Court of Session has not been so familiar with them recently as when that work was first written. It was laid down that before decree of divorce or separation the court has a general discretion to make enquiries as to the well-being of the children, and in our experience the court does not in fact exercise that discretion unless there is a plea as to custody. (Mr. Young): May I interrupt here? It is not accurate to say that the court will not deal with custody if there is no plea by the pursuer, because a defender also has a right to come into court and put in a minute asking for custody. In that case the court will deal with the question even though the pursuer has not asked it to do so. (Chairman): The correct way of putting it is, "unless one of the parties raises the question of custody". (Mr. Lawrence): I have in mind, of course, the preponderance of undefended cases in the Court of Session, where presumably the defender did not put in any appearance at all.

6504. (Mr. Young): Time and again in these undefended cases the defender does put in a minute so as to get a formal decree of court on the question of custody.—That very seldom occurs, within the knowledge of my Society.

6505. (Mrs. Jones-Roberts): May we go back again to paragraph 12? I think that it would help the Commission if we knew exactly what you are pressing for in this case. Are you saying that although the courts know that the man could pay more, they are in fact fixing an inadequate allowance? Or are you saying that if you had a statutory maximum, say, in the Sheriff Court, such as we have in the magistrate's court, it would be some guide towards which the courts could work in fixing their award?—We are in fact recommending that the answer to the first part of your question should be in the affirmative.

6506. The courts are in fact awarding inadequate sums, although the men could pay more?—Exactly.

6507. Would it be some guide to the courts if a statutory maximum were fixed and then they could work with that in mind? Or do you feel that it is better to leave the matter to the courts' discretion and to use propaganda to try and influence the courts?—If a statutory amount were to be fixed at all, I think that probably it would be better to fix a statutory minimum rather than a maximum.

6508. (Chairman): Do you want either?—I do not think so, my Lord. I do not think that, so far as my Society is concerned, and my own experience, there should be any fixed amount laid down.

6509. (Mrs. Jones-Roberts): At the end of the paragraph you compare the amounts awarded with the cost to a local authority of maintaining a child who is boarded out. You have already mentioned the average figure of £2 per week which an authority may spend in respect of a boarded-out child, and from your experience you no doubt know that the cost of maintaining a child in a children's home might be anything from £5 or more per head. When a local authority comes to fix a charge against the responsible parent it always has regard to its ability to pay?—Yes.

6510. In my experience—I do not know how other members of the Commission would answer this—I have rarely known a father in these circumstances to be asked to pay more than about £1 a week per child. The local

authority is concerned with the welfare of the child regardless of cost, but in fixing the amount of the parental contribution it must have regard to the ability of the parent to pay?—That is probably why I would say that there should be no fixed amount laid down, because the court must look to the ability of the father to make payment.

6511. This is really the inevitable result of the broken home and the difficulty of maintaining two sections of the family. Even if the father is living in lodgings it costs more than living at home. That is your difficulty?—That would be the difficulty of assessing any fixed amount.

6512. (Mr. Maddocks): What information is put before the juvenile courts in Scotland—the information that you referred to in answer to a question by Mr. Beloe—what information does the juvenile court in Scotland get as to the child?—Information as to the child's home circumstances, background and education.

6513. In England—Mr. Beloe will correct me if I am wrong—a juvenile court gets a report from the child's school. The school, being under the control of the local authority, is, of course, compelled to supply such a report, but if the parents will not co-operate it is impossible to get reports of home circumstances, is it not?—I may be wrong here but I was led to understand that in England the probation officer was used to no small extent for getting information for the court as to the child's background and home surroundings.

6514. You are right to this extent, that it is the duty of the probation officer to obtain such information as he can, but neither a probation officer nor anybody else in England has any power to require entry into the home of the child in order to get such information.—No, quite.

6515. Turning to the vexed question of the desirability or the utility of a court enquiring into custody by referral in every case to some person for a report, I want to ask you a hypothetical question which has been asked of three witnesses before this Commission. Different answers have been given. What would you say to this? Suppose the mother wants the children and is fond of them. The father says, "I do not want the children and I cannot look after them". Suppose that you got an independent report from somebody which said, "But the mother is not a suitable person to have the custody of the children". To whom do you think the court should give the custody of the children?—In these circumstances, I would suggest that the court should direct the juvenile court to consider that these are children in need of care or protection, and that the children's officer of the local authority be asked to receive them into care.

6516. Suppose that there was no evidence that the children were in need of care or protection?—You have a father who does not want them and a mother who is considered by the investigator to be unsuitable. The mother has presumably put in a plea to have the custody of the children. The court then, looking to the age of the children, may yet upset the views submitted by the independent investigator.

6517. (Chairman): Might I ask a question arising out of that? Would it not depend rather upon the grounds which the investigator gave for thinking that the home was unsuitable? For example, if the child was being brought into thoroughly dangerous contacts by living in the home, the court might take one view. If, on the other hand, the investigating officer thought that although the mother was fond of the children and doing her best, the home was not a very good one, the attitude of the court might be different. It would depend, would it not, upon the nature of the report it got?—Most assuredly, my Lord, it would.

6518. (Mr. Maddocks): I am putting the very simple case, the kind of thing that happens every day, where you have a poor home, the mother living in poor circumstances. Maybe she drinks a little, maybe her morals are not very good, but she is a good mother in as much as she is fond of her children, looks after them well and sends them to school. Would you take her children away from her and send them to a local authority, who would send them to a foster-parent?—You have cut out that possibility because you say that there is no evidence that they are in need of care or protection. The only alternative, in my view, then would be for the court to leave the children with the mother and instruct our Society to keep that case under supervision.

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MR. C. A. CUMMING FORSYTH

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6519. And your Society—I am sure you work in Scotland as we do in England—can do it quite unassisted without, possibly, the mother ever knowing?—Yes, we even have an advantage over you in England in that our inspectors are not in uniform.

6520. Sometimes ours are not. There is just one other question on which I want to ask you for some information. Prior to 1940, could a girl who was pregnant by a young man bring a declarator of marriage in the Court of Session if there was nothing else to it beyond the fact that she was pregnant by him?—No, he must have promised to marry her.

6521. (Chairman): I think that there is a qualification, is there not, that the promise must have been made before the intercourse took place?—Yes, and the intercourse must have been permitted on the strength of that promise. There was there a contract, an obligation followed by what is known in Scotland as *rei interventus*, which completed the obligation and confirmed the contract.

6522. (Lord Kail): The real difficulties were in proving the promise, but I think that the question is now academic. Mr. Forsyth, I was a little surprised at a statement you made that, with full knowledge of the means of the father, the courts gave inadequate amounts of aliment to children. Have you concrete cases in your mind, or is this just a general impression that you have? Mark you, I say, "with full knowledge of the means of the father"—It was that point which I was going to question—whether the court has in fact full knowledge.

6523. That I can understand. I think you did say, and I want to know whether you perhaps assented unconsciously to this statement, that, with full knowledge of

the means of the father, the courts were in the habit of giving inadequate awards of aliment. Did you mean that?—Not if the question is prefaced by the remark, "with full knowledge", although I would again say this—that in my experience and in the experience of my Society, I cannot recollect any case where the aliment granted in respect of the maintenance of a child by the Court of Session has ever been very much more than, say, 15s., so that if the court had full knowledge of the father's position and income it does not seem to me that it was acting upon that full information.

6524. Take a father who has a weekly wage of £5. There are four children. What aliment do you suggest should be awarded against him in respect of these four children?—That is a most difficult question which no doubt you, as a member of the Court of Session, have had to face.

6525. That is why I want your view on it.—I would suggest that he should give something in the region of £3 a week, anyhow.

6526. £3 a week for the four children and leave himself with £2?—It would be a nice deterrent to his desire to go forward for divorce in order to free himself of his obligations, because that is what divorce amounts to in most instances.

6527. £3 for the four children and £2 for himself?—Yes.

(Chairman): Thank you, Mr. Forsyth. We are much obliged to the Society for its memorandum, and to you for coming to help us.

(The witness withdrew.)

PAPER No. 76

MEMORANDUM SUBMITTED BY THE SCOTTISH BRANCH OF THE NATIONAL ASSOCIATION OF PROBATION OFFICERS

1. The Scottish probation officers, through the Scottish Branch of the National Association of Probation Officers, welcome the opportunity to submit to the Royal Commission on Marriage and Divorce observations on the possible development of matrimonial conciliation work in the Scottish courts.

2. The Scottish Branch of the National Association of Probation Officers is the representative body of the probation service in Scotland, and has in membership ninety-five per cent. of the full-time probation officers in the country. It is part of the National Association of Probation Officers (London), which has already submitted evidence to the Royal Commission on matters within the scope of the work of its members in England and Wales.

3. We do not propose to make any comment on the divorce or marriage laws, but suggest below the introduction to Scotland of machinery in the courts to facilitate conciliation in marriage, and to assist the Divorce Court in matters concerning the welfare of the children of divorced parents.

4. It is at present no part of the duty of probation officers in Scotland to intervene in matrimonial proceedings, but many of our members have, from time to time, been called upon by their English colleagues to make enquiries in connection with conciliation proceedings being carried out in England, when one of the parties concerned was resident in Scotland. They are therefore aware of the nature of the work involved in such cases. They also have ample knowledge of the work being done by the probation service in England and Wales not only in connection with conciliation proceedings but also in connection with the welfare of children whose parents are involved in divorce proceedings.

5. The Scottish probation service had the opportunity of extensive experience in conciliation during World War II when, at the invitation of the Army, Naval and Air Force welfare authorities, the service undertook enquiries in a large proportion of the domestic problems affecting H.M.

Forces personnel. In this field considerable success can be claimed in conciliation, and on the cessation of hostilities the service was highly commended on the effectiveness and efficiency of its efforts.

6. In the light of this knowledge and experience, and in the belief that facilities for conciliation work have proved their effectiveness and value elsewhere, this Branch would suggest that it is highly desirable for machinery to be introduced into Scotland similar to that existing in England, to enable conciliation to be considered, and in appropriate cases attempted.

7. This would necessitate the use of trained social workers, skilled in assessing personal difficulties and dealing with social problems. We would suggest that if it is agreed that such a service is desirable, the situation should not be met by the establishment of any new service, but that the probation service should be asked to undertake this work.

8. This proposal does not conflict with the suggestion, which we endorse, that encouragement be given to the voluntary work of the National Marriage Guidance Council which, in its educational and advisory capacity, must do a great deal to prevent breakdown in many marriages.

9. At present the probation service in Scotland has no statutory duty or authority to attempt conciliation or take any other part in matrimonial cases, but such duty is placed on the probation service in England and Wales by the Summary Procedure (Domestic Proceedings) Act, 1957, and the extension of that Act to Scotland, or the passing of a similar Act for Scotland, would place the same duty on the Scottish probation service. The Act of 1937 in fact recognised the already established use of the probation service in conciliation work, and in Section 7 provided that any act by a probation officer in this field shall be deemed to be acts done by him in the performance of his duties.

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10. The officers taking part in conciliation work should be attached to the Sheriff Court and the Court of Session and may be seconded to this work, or they may, as is the general custom in England and Wales, undertake this duty as part of their normal duties as probation officers.

11. There should on no account be any suggestion of compulsory submission to conciliation attempts; but in all cases where the judge considered on a preliminary survey of any application for separation or for maintenance, or at any later stage in the proceedings, that a possibility of conciliation existed, the court should have the power to adjourn the case for a reasonable period, advise the applicant to see the probation officer, and instruct the probation officer to make a report to the court on the possibility of conciliation. This officer would then after a talk with the aggrieved party, arrange also to see the other party in the case if it were possible or desirable to do so; and if possible to see both parties together at a later stage with a view to effecting reconciliation. On the resumption of the hearing of the case the report of the probation officer should be called for by the court, if the applicant continued the case; and if the applicant wished to withdraw the case, the court should be informed of that and should agree to the withdrawal if the probation officer's report satisfied the court that this was a satisfactory way of terminating the proceedings.

12. We believe that the provision suggested above would also encourage the voluntary approach to the probation officers by people with domestic difficulties so that in many cases (as in England and Wales) difficulties may be settled without any recourse to the courts. The Denning Committee (Cmd. 7024) referring in paragraph 16 to the work of the probation officers in regard to reconciliation said:—

"The probation officers have done their work so well that they have gained the confidence of the public. The applicant . . . sometimes approaches the probation officer direct, on being referred by a friend or by some social agency."

The figures submitted to the Royal Commission by the National Association showed that in 1950, in approximately half of the matrimonial conciliation cases dealt with by the probation service, one of the parties concerned had made a direct approach to the probation officer.

13. We believe that officers of the probation service should also be available to the Divorce Court in Scotland, for use by the direction of the court even at this late stage of matrimonial disagreement, where the court considered that a possibility of conciliation remained. In this case the procedure should be similar to that suggested above for use in separation or maintenance proceedings.

14. The Denning Committee (Cmd. 7024) suggested that these officers should be designated court welfare officers, and while we would accept this suggestion we should prefer

the retention of the title, probation officer, to embrace all the duties undertaken by the members of this service.

15. The probation service should also be available to the Divorce Court for the purpose of making investigations and offering such advice and information as the judge may call for, in cases involving the welfare of children of parties seeking or granted divorce.

16. The welfare of the child or children must in all these cases be a paramount consideration in any ruling about the custody of the children, or access to them by divorced parents. Prior agreement by the parties concerned about custody arrangements should not rule out the requirement by the judge of an investigation and report into the suitability of the proposed agreement. The practice of using a probation officer in this way has been established in the High Court in London and tribunes to the value of the work being done have been paid by judges who have presided in that Court. Lord Merriman, speaking in the House of Lords on 14th February, 1951 (House of Lords Official Report, Vol. 170, No. 30, Col. 339) said:—

"The Lord Chancellor has arranged that a whole-time officer shall be available to His Majesty's Judges dealing with this difficult question of custody. Admittedly, the plan is experimental. It is in its initial stage, but I wish to say at once . . . that I am wholeheartedly in favour of it, and I believe it will work well."

And the Lord Chancellor, in the same debate, said (Col. 350):—

"I agree . . . that this experiment has proved itself to be a useful one. I hope and believe that slowly, but surely . . . more and more use will be made of these officers";

and in reply to a Question in the House of Lords on 18th March, 1952 (House of Lords Official Report, Vol. 175, No. 37, Col. 766), the present Lord Chancellor said that the judges were making increasing use of the service of the court welfare officer in divorce cases and added that this officer "has also helped the Court to effect reconciliations in appropriate cases".

17. We believe the extension of this work to Scotland to be eminently desirable and suggest that the Royal Commission should make a recommendation to that effect.

18. On behalf of the members of this Association we should add that we not only consider the adoption of the proposals we make to be urgent and desirable, but that if they were adopted the Scottish probation service would readily undertake the duties implied, and would do its utmost to make an effective contribution to the maintenance of marriage where this is reasonably possible.

(Dated September, 1952.)

EXAMINATION OF WITNESSES

(NOTE.—The witnesses representing the National Association of Probation Officers gave evidence before the Royal Commission on Thursday, 12th June, 1952, and the memorandum and supplemental note submitted by the Association (Papers Nos. 31 and 32) and the oral evidence (Questions 2612 to 2718) appear in the Minutes of Evidence for that day (Eleventh Day).)

(MISS J. S. PEARSON, MR. T. F. HENSHILWOOD and MR. D. R. KEIR, representing the Scottish Branch of the National Association of Probation Officers; called and examined.)

6528. (Chairman): We have before us Miss Pearson, who is a senior probation officer in Glasgow, Mr. Henshilwood, who is a probation officer in Glasgow, and Mr. Keir, a probation officer in Lanarkshire. I have very few questions, firstly, because your memorandum is extremely clear, and, secondly, because you are suggesting the introduction of a certain system in Scotland and I think it is perhaps better to leave most of the questioning to the Scottish members of the Commission, who know how your proposal might fit into the existing framework. Before I ask any questions, do you wish to add anything to your memorandum?—(Mr. Henshilwood): We should like to express our appreciation for being asked

to come before the Commission; and possibly, in supplementation of the memorandum, and to emphasise the points which we have made, I could give you a few notes which I have made. In Scotland we are particularly concerned about the question of conciliation, because since 1937 there has been a growing need, as we see it, for legislation similar to that which obtains in England. I refer in this instance to the Summary Procedure (Domestic Proceedings) Act. For one reason or another, spouses who are in domestic difficulties are applying to the probation officers in Scotland for assistance, and whilst we are only too happy to give that assistance we do feel that we must act very cautiously, because in fact we have no

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[Continued]

statutory authority such as is provided for our English colleagues. The position there, I think, is very clearly demonstrated in Section 7 of the Act to which I have referred, and which provides that acts done by a probation officer in terms of that Act come within the ambit of his duties. The sort of situation we have in mind is where we are approached by a spouse in difficulty, and after we have learned the difficulties we decide—and I use this word advisedly—to risk an approach to the other party. We can very easily be sent about our business, and if any attempt to effect reconciliation is repelled, we must allow the chapter to close at that stage.

We do feel that our colleagues in England can at least say if they meet similar circumstances: "Why not let us discuss this situation now, because if it does go to the court the possibility is that the presiding judge will ask you to see the probation officer with a view to effecting a reconciliation." Unfortunately, the administration of the probation service in Scotland has not taken account of the number of the domestic enquiries which we get, and I must confess that my Association up to now has not seen the need so to do, so I am not in a position to give you any statistics as to the number of enquiries with which we have to deal from time to time. But perhaps I may make some reference to the situation of wife assault, as it appears in the Glasgow probation area, to which I belong. We feel as an Association that wife assault is in fact the reconciliation case in essence, so far as the probation officer is concerned. I have taken the period, just for survey, from 1st January, 1951, until the 30th October of this year. I have split it into four parts in order that some indication may be given of the rise of the figures in this type of case.

6529. You are giving us figures over a period of twenty-two months?—Yes, from 1st January to 30th June, 1951, the number of cases of wife assault in Glasgow was 26; 12 of those were interviewed by the probation officer and in fact 8 of them were placed on probation, the presumption being in all these cases that the court had decided that the probation officer could make a contribution, and that by that means a reconciliation could be reached. From 1st July to 31st December of the same year we had 33 cases of wife assault, of which 23 were interviewed by the probation officer and 14 placed on probation.

6530. Does he interview both parties?—Yes, my Lord. From 1st January, to 30th June, 1952, 68 cases of wife assault appeared before the court, and 48 were interviewed by the probation officer and 31 placed on probation. From 1st July to 30th October of this year, 78 cases were before the court, 50 interviewed by the probation officer and 35 placed on probation. It is our opinion, my Lord, that in many of these cases of wife assault, which were dealt with either by way of probation or in other ways, if there were legislation in Scotland similar to England they would not in fact reach a court where criminal proceedings were instituted.

I would now like to refer briefly to paragraph 4 of our memorandum, in which we refer to the work done by the Scottish probation service for our English colleagues, and I will read the following letter, dated 20th October, 1952, which will give some indication of the kind of duties which we have to perform in assisting our English colleagues under the Act to which I have already referred. This letter is addressed to the principal officer in Glasgow, and reads in the following terms:—

"I should be very grateful for your kind help with regard to the above-named man. At the Tottenham magistrates' court this morning the wife summoned him on the ground of his detention, and the case was found to be proved. However, the husband did not appear and as there was no evidence as to his means the magistrate adjourned the case for fourteen days until 30th November, and directed me to communicate with you with the request that the husband be interviewed and an enquiry made as to his present means.

The circumstances of this case are particularly difficult as the husband deserted the wife some five to seven years ago and his whereabouts have been unknown until recently. He has even moved since the service of the summons, but the address given is the new one. He

has been living with a woman throughout this time, who, it is understood, has changed her name by deed poll and is known as Mrs. A—M—, but of course is not the real wife. I should be very grateful for your kind help."

We have these enquiries from time to time from our English colleagues, whom we have assisted to the best of our ability, but we still have the feeling that without statutory backing we are being, if I might use the word, frustrated in our efforts.

6531. You find that it is difficult to carry out the requests without any statutory backing?—We do, my Lord. I think that possibly I might now leave the matter to one or other of my colleagues—Miss Pearson, who, if I may be permitted to say so, has some twenty-eight years' experience as a probation officer, would, I am sure, be happy to add to what I have said.

6532. Yes, would you like to add anything, Miss Pearson? We should be glad to hear you.—(Miss Pearson): I must begin by endorsing what Mr. Henshilwood has said, as it is a situation that applies to us all. As the senior woman officer in our area, most callers for advice are referred to me, and we have been doing this work for a very long time, but purely on a guidance and voluntary basis. As Mr. Henshilwood has pointed out, we can only go so far without statutory backing. Most of the callers are spouses—wives and mothers. These come to us quite voluntarily, sent mostly by friends who themselves have had connections with the department and have probably had some help. We have also had people sent to us from the police, from the Ministry of Labour, and from various other associations.

Just recently, within the last few weeks, a woman came asking advice—I always try to interview the women applicants—and informed me that she had been sent to the department by the periodical, *John Bull*, to which she had written. I presume they had advised her to see the probation officer, knowing that that is the custom which prevails in England. I feel that, with the experience we have of the home life of delinquents, the probation officer is very well equipped to carry through this work of conciliation under statutory authority. It may interest the Commission to know that in 1951 pre-trial investigation reports for juvenile courts numbered 3,979 cases. This was made up as follows: children and young persons, 3,080; in the age group seventeen to twenty-one, 748; and adults, 151. The Commission may know that in making these reports we get right into the home and see the entire background, and I think that with that knowledge we can readily lay claim to be experienced practitioners in the art of reconciliation.

I think that the housing question looms very largely in the break-up of young marriages. Most of these people who come to me I have found to have been sharing homes with their "in laws", and that is very seldom satisfactory. I find, too, that another cause for the break-up is the unpreparedness of young people for the responsibilities and obligations of married life. We have youths coming into the juvenile court who, by all appearance, give the impression of being young men of marriageable age. Indeed, there was a youth tried in our juvenile court quite recently who on investigation we found was a married man. We had another case of a young girl under Section 68 of the Children and Young Persons (Scotland) Act, who was deemed to be outwith the control of her parents. As in probation cases, a report was called for, and between the time of the probation officer calling on the home, making the report and submitting it to court, the bones of marriage had been called, and when she was brought before the court she was to be married two days hence. The magistrate found difficulty in placing a married woman under the care of the probation officer and deeming her to be outwith the control of her parents, so that the petition was withdrawn. I would like to see some means whereby some educational instruction might be given to young people in the way of preparation for marriage. I do not know how this is to be done, but if it were done I feel it might obviate the setting up of training homes, such as the R.S.P.C.C. have had to set up, for the neglectful mother.

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[Continued]

I mention these matters, my Lord, because I do feel that probation officers, with their very wide experience, are very suitably equipped to be considered as the reconciliation officer of the court.

6533. Thank you very much. Do you wish to add anything, Mr. Keir?—(Mr. Keir): No, my Lord, I think the ground has been covered.

6534. I want to ask you only one question, which occurred to me in reading through the memorandum. In paragraph 10 you say:—

"The officers taking part in conciliation work should be attached to the Sheriff Court and the Court of Session and may be seconded to this work, or they may, as is the general custom in England and Wales, undertake this duty as part of their normal duties as probation officers."

Would you tell me which you think is the better plan, to have people specially seconded for this work, or to have it dealt with by officers as part of their normal duties?—(Mr. Henshilwood): My Lord, we have revised our deliberations in that connection, and we have now come to the conclusion that the latter would be the better course, that is, that probation officers generally should undertake this duty.

6535. And not specially seconded ones?—Not specially seconded ones.

6536. (Lord Keir): Mr. Henshilwood, how do you contemplate that if probation officers are given this duty of trying to effect reconciliation they are going to get into touch with the people who require to be reconciled?—In the first place, as I have already said, the people have got into touch with us so far, because we have no statutory duty in this respect. We feel that possibly the situation would emerge in the same way as it does in England, so far as I know it. I am not well versed in the English position, but, as I understand from my colleagues in England, application is made to the court for a summons in the case of any spouse in difficulty, and in some instances, in fact, before the court considers the matter at all, the clerk to the court advises the applicant that he should get into touch with the probation officer, whereupon discussion emerges and it may be that the case never arrives in court. We do feel that similar machinery could probably operate in Scotland.

6537. If you were given the statutory duty of trying to effect reconciliation, do you contemplate that you would have cases where the husband or the wife came to a probation officer to see if he could help, without going to a court at all?—We do, my Lord, it is happening at the present time.

6538. But you have not got any statutory power?—No.

6539. The other situation is the one which you have indicated, which operates to some extent in England—I am not entirely familiar with it—where some official of court directs a prospective litigant to go and see a probation officer before starting proceedings. Is that right?—If I may propose the word "suggests", rather than "directs"—the clerk of court suggests.

6540. Yes, I see that. Then that means that, so far as the inferior courts are concerned, that would be a duty which would fall upon an official in the Sheriff Court?—Yes.

6541. Presumably the Sheriff Clerk?—Yes.

6542. Does it not very rarely happen that the litigant comes personally to the Sheriff Court?—I have not known it, within my experience.

6543. No, what happens is that she goes to a solicitor?—Exactly.

6544. And the solicitor takes an initial writ, a petition in the Sheriff Court?—Yes.

6545. Now, assume that that is the general procedure at present. The wife's solicitor has served a petition against the husband and proceedings are started in the

Sheriff Court. How is anybody in the Sheriff Court going to get at the wife before proceedings are raised?—I think that in such circumstances they could not get at the wife, but, as I understand the situation to be, the proceedings would probably be interrupted at one stage, when the matter would be referred to the probation officer, not compulsorily by the judge, but at his suggestion.

6546. Of course, I can see that that is a possibility, but I suppose you would agree that we are getting very near the dangerous stage for reconciliation, once proceedings have been initiated?—Yes.

6547. It would be much better, if you are going to have reconciliation machinery, to have recourse to it before proceedings are ever raised?—Yes.

6548. Do you contemplate that the solicitor who is asked by a client to take proceedings in the Sheriff Court should advise his client to go to a probation officer and see if something can be done about the matter without proceedings?—I would be prepared, I think, to hazard the suggestion that that may in fact have been done in Scotland by solicitors. I think it would very much depend upon what the solicitor felt, whether he considered that the case was such as should go to court, or whether he thought that it was such a trivial matrimonial dispute that it should be referred to the probation officer.

6549. The decision would be in his hands?—Yes.

6550. A suggestion which has been made to us is that where parties apply for legal aid to raise proceedings, the applicant should be directed, through some machinery or other, to someone such as a probation officer who would undertake at any rate the preliminary investigation, with a view to reconciliation. You have that method in contemplation?—Yes, it did occur to me.

6551. You will appreciate that my difficulty is to see how conciliation can be undertaken before legal proceedings are initiated?—Yes, that is quite true; we do realise that it seems to be on a voluntary basis even so far as England is concerned.

6552. So far I have dealt with the Sheriff Court. Now, if you will come to the position in the Court of Session, I suppose that you would agree that there the difficulties of reconciliation are multiplied many times, because once you get a litigation started in the Court of Session it is not very easy to stop it?—Quite.

6553. And the difficulties of making a preliminary approach to a person who is going to come to the Court of Session are also increased compared with, say, a local court, like the Sheriff Court?—Yes.

6554. Perhaps my English colleagues will be able to develop some of this, because they are familiar with the system in a way that I am not, but may I ask you one last practical question: this statutory duty would of course have to cover the whole of Scotland?—It would, my Lord, yes.

6555. I think that I am right in saying that the probation service in Scotland is not developed to anything like the extent that it is in England?—That is perfectly correct.

6556. When I was last in touch with the probation service, there were areas in Scotland which had no salaried probation officer at all, and where probation work was really undertaken by voluntary workers.—I think that situation has been considerably improved. There may still be a few probation areas in the rural districts where there is in fact no full-time salaried probation officer, but I think I can say with complete confidence that there is at least a part-time probation service in all probation areas in Scotland.

6557. By part-time, you mean a part-time salaried officer?—Yes.

6558. One last matter. If one could introduce a satisfactory reconciliation procedure into the Court of Session, do you contemplate that the work would be undertaken by one or more probation officers attached to the court,

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[Continued]

or would you use the Edinburgh probation service?—Might I refer to what I understand to be the position in the High Court in London? I believe that an experiment has been tried there, and that a number of selected probation officers—just who did the selecting I cannot say—are attached to that Court. Possibly there would be need for careful selection, in that you would have to have experienced officers on such work.

6559. And that is what you contemplate?—That is what we contemplate.

6560. Obviously they could not be expected to travel all over Scotland to interview the parties with a view to reconciliation?—No.

6561. There would have to be some delegation, I suppose, to the local probation officers?—I think that the position would be similar to that which obtains at present in England—application would have to be made to the local probation officer to produce the necessary information for these officers.

6562. (Dr. Boyd): On the question of the custody of children, Mr. Henshelwood, do you think that before the custody of children is decided, investigation should be carried out in every case, even when the case is uncontested, or do you think it should be left to the judge to commission investigation in selected cases?—My personal opinion would be that the judge should be in a position, from the hearing, to decide what cases he considered should be referred for investigation. I am not conversant with the law of evidence and what would emerge as such a hearing, but I should imagine that the judge would be in a position to make some reasonably accurate assessment as to the question of custody of the children, during the course of the hearing.

6563. You would not press for it in every case?—I certainly should not press for every case to be investigated.

6564. (Dr. Robertson): Just one question on the figures given by Miss Pearson regarding pre-trial investigations. It is understood that, at any rate in Glasgow, probation officers carry out all the pre-trial investigations for the juvenile courts?—(Miss Pearson): Yes.

6565. And in a certain number of adult cases?—Yes.

6566. Then, is there not a new development whereby, at any rate in Glasgow, probation officers are available for the justice of the peace courts—which have more limited functions in Scotland than in England—to report on truancy cases brought before the courts by school management committees?—Yes, if we are asked to appear and submit a report, we do so.

6567. And that has perhaps proved helpful with regard to avoiding the break-up of homes?—It is very helpful.

6568. (Mr. Maddocks): When a person is put on probation in Scotland, is the probation officer, or the district in which the probation officer works, named in the probation order?—(Mr. Henshelwood): The probation officer's name is placed in the order, and the area in which he works.

6569. (Mrs. Jones-Roberts): In paragraph 7 you say: "This (that is, reconciliation machinery) would necessitate the use of trained social workers", and I wondered what kind of training you envisaged that an officer of this kind would have to undergo—presumably something over and above what is required for the present probation work?—The question of training is a very difficult problem, to which my Association has bent its mind for many years, and we have not in fact decided what academic prescription is needed even for the personnel of our own service of probation officers. What we have in mind here, I think, is that rather by experience than by academic attainment should the probation officer be chosen, i.e., for his particular aptitude for conciliation work.

6570. I expect that you are familiar with the kind of work which the marriage guidance council has instituted?—I am not entirely familiar with it, but I have some idea of it.

6571. I think that a good deal of thought has been given to this matter, and a man has to go through quite a severe examination before he is considered capable of undertaking this work. I wondered whether you thought that experience in itself was sufficient without some basic training?—There is a training scheme in operation, but possibly Mr. Keir would care to give you some information on this point. (Mr. Keir): May I say that there is in operation in Glasgow at the moment, started only a fortnight ago, a training scheme run by the Marriage Guidance Council, and several probation officers are in fact taking advantage of that training course? There is also at Glasgow University at the moment an evening class devoted to the subject of mental health, in which the rôle of the family, marriage and various other subjects of that nature are discussed by prominent speakers, and later they are taken up in discussion groups. There are several probation officers taking advantage of that course also. On the matter of experience, on which Mr. Henshelwood has touched, I took last night the following notes from my own case-work. At the present moment I have a case-load of sixty-four; of that sixty-four, there are nineteen in which matrimonial difficulties have come up, and these are classified as follows: four of the children under supervision are the children of divorced parents; four are the children of parents who are living apart; one is a child under supervision, his parents having parted and he having come to live with a relative; one is a child of a man who has six previous convictions for wife assault; one is a husband on probation, living apart from his wife; and in another eight cases there have been past matrimonial difficulties, such as husband and wife parting and coming back to live together again. That represents, as you will see, nineteen cases out of a case-load of sixty-four, and is almost one-third of my total case-work at present.

6572. (Chairman): These sixty-four cases are all cases you have on hand at the moment?—On hand at the moment, yes.

6573. (Mr. Maddocks): You mean probation cases?—Yes.

6574. (Lady Bragg): I would like to ask a further question about training. Is your training for the probation service comparable with that of the training of a probation officer in England?—(Mr. Henshelwood): No, it is not, but we have what might be termed a period of in-training. The probation officer is appointed, and for a period of one year he is on trial, as it were, during which time he or she is under the supervision of an experienced colleague. But there is no training scheme in Scotland comparable with the academic and practical scheme operated by the Home Office in England. There has been for the past three years a scheme operated by the Scottish Home Department, where probation officers have had a three weeks' intensive course covering various subjects, psychology, ethics and case-work, held at Grantown-on-Spey and Kingussie. I think that all probation officers in Scotland have had the opportunity of attending these courses, and certainly within the arrangements which govern the probation service in Scotland provision is made that new appointments to the service shall not be confirmed at the end of the first year by the Secretary of State unless these officers have taken that course and have at the end of that time been interviewed by an inspector from the Department as to their suitability for the work of probation officer.

6575. Then how would you carry out training for this particular work of reconciliation? In England, we were told, nearly a third of a probation officer's time is spent on matrimonial work. And, in England, training in matrimonial work is part of the probation officer's initial training. Then, added to that, is some field work, and the representatives of the National Association of Probation Officers did say that, even so, they did not consider that sufficient training—There is within the Scottish probation service a growing number of officers who have taken the university social science diploma courses, and there has been instituted just this year, at Glasgow University, a new social welfare certificate course covering three years. The unfortunate thing about the welfare certificate course is that there is no concurrent practical training, whereas with the social science diploma course, which

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[Continued]

is one of two years covering eleven subjects, there is a concurrent period of practical training of two years. But I think we do feel, if I may add this, that the very fact that we have been dealing with this problem, possibly not in such bold relief as it now emerges, shows that we are sufficiently experienced and know the job which has to be done, because in practically every case we have dealt with, at least of youngsters between the ages of eight and fourteen, we do find that there is a very large number of the parents who have to be put "on probation," as it were. And some kind of conciliation, or readjustment of the home set-up, is necessary before we can rehabilitate the probationer.

6576. I dare say you feel that it is the personality of the probation officer that really counts for most?—Yes.

6577. Then, in paragraph 8, when you say, "This proposal does not conflict with the suggestion, which we endorse, that encouragement be given to the voluntary work of the National Marriage Guidance Council," you are not saying, are you, that they should rather do the marriage side?—I do not quite follow that question.

6578. What I really want to know is, do you think it matters which does the reconciliation work, the Marriage Guidance Council or the probation officers?—I think that we feel, as an Association, that probation officers are essentially the social instrument of the court, and that as such we should do this work, and we would, I think, be prepared to substantiate that view by the fact that a system of that kind has been operating in England since 1937, and apparently with great effectiveness.

6579. (Mr. Beloe): You would, I understand, Mr. Henshelwood, make it entirely a voluntary matter to seek the advice of a probation officer?—It is such at the present time, if my understanding of the position is correct.

6580. You would not want to make it compulsory?—No. It is not compulsory at the present time, even in England.

6581. You would not want to insist that people saw the probation officer rather than the marriage guidance counsellor?—No.

6582. Would you in the same way be perfectly happy if the court, when asking for information about children, sought the advice of the R.S.P.C.C., or the children's officer, as well as the probation officer?—You are speaking of children, where the question of custody emerges?

6583. Yes. Do you seek to be the only people to whom the court should go?—No, we do not seek to be that, but I do think that there should be a complete follow-up, since, if the probation officer is going to start at the stage of attempted reconciliation, it would surely seem to be logical that he should carry the matter to its conclusion.

6584. There are those, of course, who think that it would be useful to have a detached point of view about the children, and that people trained to sum up the position about children may be of assistance to the court. It is not a question of competition between services, is it?—No.

6585. It is really how best the court can be assisted, is it not?—I can see, if I may be permitted to say so, no objection whatever to the court seeking the services of any social agency from which it thought that there could be obtained information that would satisfy its desire to see the welfare of the children properly settled. I would not insist, but I must again come back to the point that we in the probation service consider desirable, and carry out as far as possible, the practice that the officer who starts with the case at the pre-trial investigation stage—that is, the stage before the juvenile or the young adult reaches the court—should take that case on probation when and if the court decides that probation is desirable.

6586. That is quite understood, of course. Would you welcome the introduction of a training course? Would

you welcome the introduction of trained probation officers in the future in Scotland?—Yes.

6587. You would like to have a course, not necessarily the same as, but of some such nature as, exists in England?—Most assuredly, Sir. (Mr. Keir): Might I say that we as an Association have been pressing for this over a period of years?

6588. Yes. You are rather at a disadvantage, are you not?—We are.

6589. Do you have the same age for entry to the probation service as in England?—(Mr. Henshelwood): We have. It is twenty-three years of age.

6590. (Mr. Justice Pearce): May I ask one question, arising out of your answer to Dr. Baird? You said that you would be content if it were left to the judge to have a power to refer to a probation officer any question about the custody of the children in any case where he thought fit?—That is what I said, yes.

6591. Of course, in England—I do not know how it is in Scotland—the court already has power to make any enquiries which it wants to, in dealing with children. But, leaving out of account contested custody cases, which are a very small proportion, in which the judge can deal with the matter perfectly adequately because he has the advantage of hearing the two sides, in the ordinary undefended cases in Scotland do you think that there is enough material before the judge to enable him to find out whether children are happy in the home? And if so, what do you consider is that material?—As I have already said, I have not got the complete picture of what in fact happens in these cases to which you refer. I do not know how much evidence is produced to the judge, or whether that would indicate that there is a specific difficulty with regard to the custody of the children.

6592. You see, it is just to us that there are cases where, say, the husband leaves the children with the wife, though they would be happier with him. He does that because the wife has agreed to divorce him and he does not want to upset her. If a woman who appears to be reasonably good-natured comes into the witness box and, when you ask her if the children are happy with her, says "Yes", do you think that that evidence could be of the same sort of value as a report made by one of your service after a visit to the home?—No, I do not. I would say that, in such circumstances as the judge considered left him in reasonable doubt as to who should have the custody of the children, reference might then be made to the probation officer.

6593. But does that not amount really to all cases or none? Why in one case more than another should the judge be in doubt? Suppose that the children are with the mother, who is the pursuer—why should the judge be in doubt, if she is apparently a reasonably decent sort of person?—Quite. It is rather difficult for me to place myself in the position of the judge in this matter. (Mr. Justice Pearce): It is difficult. I would only like to add this, that I have had more than one extremely helpful report from your service through our court welfare officer.

6594. (Lord Keith): I would like to bring this to your attention, Mr. Henshelwood: in England, as I understand it, in the summary courts, that is, the magistrates' courts, the woman generally comes to court in person to take out the summons, and so on, and there there is generally a probation officer available. There is then no difficulty in bringing her into contact with the probation officer before she takes the crucial step of serving a summons on her husband. That arrangement does not exist in Scotland, you appreciate that?—Yes.

6595. Therefore there is much greater difficulty in Scotland in being sure that the woman—if it is the woman—would get into touch with the probation service before litigation is commenced. Have you any solution for that very real difficulty?—If I may speak personally, from our point of view in Glasgow there would be no difficulty, because there is a probation officer or officers available at the courts. They are not there all the time, and I doubt

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{Continued}

very much if they are there all the time in the English courts.

6996. That I see, but then the woman does not come to the Sheriff Court in person, as she does to the magistrates' court. In England, it is she who comes and takes out the summons. In Scotland there is the formal procedure of a solicitor raising a petition and serving it before ever a case comes into court. I do not see the answer, and I do not know whether you do?—Possibly we may have overlooked that aspect of the situation—we may have been looking at it from the point of view that the law would ultimately

change to such an extent as to permit the woman in person to come to court. (Mr. Young): May I make a suggestion that you simply make a rule in Scotland, as you have in England, that only on the personal application of the petitioner will the warrant be given? (Lord Kerr): That would be an answer. I do not think that I will pursue the matter further.

(Chairman): We are very grateful to your Branch for this memorandum, and to all of you for coming to help us today.

(The witnesses withdrew.)

(Adjourned to Wednesday, 5th November, 1952, at 10.30 a.m.)

MINUTES OF EVIDENCE

27-2

TAKEN BEFORE THE

ROYAL COMMISSION ON MARRIAGE AND DIVORCE

TWENTY-SEVENTH AND TWENTY-EIGHTH DAYS

Wednesday, 5th November, 1952

and

Thursday, 6th November, 1952

WITNESSES

Mr. S. SHAW, Q.C.	}	representing the Muir Society.
Mr. G. STOTT, Q.C.		
Mr. J. FARQUHARSON, S.S.C.		
Dr. MARY KNIGHT	}	representing the Scottish Association for Mental Health.
Miss C. G. HALDANE, J.P.		
Mr. J. ADAIR, O.B.E.		
Mr. J. ANDERSON, M.A.		
Mr. J. ROBB, M.B.E.	}	representing the Scottish Council of Women Citizens' Associations.
Mrs. J. B. THOMSON		
Miss I. H. McLELLAND		
Miss A. HARRISON		
Mr. WILLIAM B. COLVIN	}	representing the National Married Men's Association.
Miss A. F. M. MACFARLANE		
Mrs. C. R. MACNIE	}	representing the Scottish Standing Committee of the National Council of Women.
LADY RAMSAY STEEL-MAITLAND		
Miss E. M. HOUSTON, M.A., LL.B.		
Miss B. MARTIN-STEWART		



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THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

TWENTY-SEVENTH DAY

Wednesday, 5th November, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (Chairman)

Dr. MAY BAIRD, B.Sc., M.B., Ch.B.

Mr. R. BELON, M.A.

Lady BRAGG

Mr. G. C. P. BROWN, M.A.

Mrs. JONES-ROBERTS, O.B.E.

The Honourable LORD KEITH

Mr. F. G. LAWRENCE, Q.C.

Mr. D. MACE

Mr. H. H. MADDOCKS, M.C.

The Honourable Mr. JUSTICE FRANCE

Dr. VIOLET ROBERTSON, C.B.E., LL.D.

SHERIFF J. WALKER, Q.C., M.A.

Mr. THOMAS YOUNG, O.B.E.

Miss M. W. DENNERY, C.B.E. (Secretary)

Mr. A. T. F. OGDEN (Assistant Secretary)

Mr. Dr. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 77

MEMORANDUM SUBMITTED BY THE MUIR SOCIETY

The Muir Society is a society of Scottish Socialist lawyers, and others, formed to promote an interest in legal reform. This memorandum is confined to the position in Scotland.

JUDICIAL SEPARATION

1. *First Proposition.* Three years after a decree of separation and affirmant has been pronounced, the guilty spouse should be entitled to have that decree translated into a decree of divorce in the Court of Session.

2. Under the law of Scotland a spouse can obtain a decree of judicial separation in the Sheriff Court, or in the Court of Session, on the ground of cruelty or on the ground of adultery. Cruelty and adultery are also grounds of divorce. Once a decree has been obtained in an action of judicial separation, the decree is permanent and cohabitation can only be renewed by the consent of both spouses. While no statistics on the point are available, it is believed that in each year, in the great majority of actions for judicial separation, the wife is the pursuer. Once a wife has obtained a decree of judicial separation, she is entitled to aliment for the rest of her life, whilst being entitled to live apart from her husband. For the period from 1933 to 1937 final judgments in actions of judicial separation in the Court of Session did not exceed six in any one year: the number of final judgments in each of the years 1946, 1947 and 1948 was two. The Civil Judicial Statistics for Scotland do not make clear the position in the Sheriff Courts because the heading is a stump heading, namely, "Actions relating to marriage, i.e., as to separation and aliment, adherence and aliment, etc." Actions ended by final judgments under this heading in the Sheriff Courts were, beginning with the year 1932 and ending with the year 1951, as follows, 276, 278, 294, 292, 279 and 241 or an average of 275: while for the five-year period 1944-48 the total figure was 1,441 or a yearly average of 288. Should the remedy of judicial separation be retained in its present form, or in a modified form, or should it be abolished altogether?

3. It is submitted that in its present form this remedy is socially and morally undesirable. To allow a wife, who has obtained a decree of judicial separation, to draw aliment for the rest of her life, while escaping all the duties of a wife, is surely wrong. Not infrequently it leads to the husband cohabiting with another woman, and to the birth of illegitimate children. Total abolition of the remedy is not, however, advocated. The present law should be modified by allowing the party against whom decree has been pronounced, to apply to the court to have the decree of separation translated into a decree

of divorce, not less than three years after the date of the decree of judicial separation. The court should be required to grant such an application even if the innocent party objected. Such a reform would retain the real object of judicial separation, namely, to allow tempers to cool and to pave a way to ultimate reunion. If at the end of three years the separated spouses have not reunited, there is little likelihood that they will ever do so and it is in the interests of society that the guilty party should then be entitled to have the marriage tie completely severed. It should be noted, in passing, that under the present law, a spouse who has obtained a decree of judicial separation on the ground of cruelty or adultery, can at any time bring an action of divorce on the same evidence which was used in the separation action. Before a decree of translation is granted the guilty spouse should be required to prove that he had in fact paid all the aliment due to the other spouse, under the decree of judicial separation. If the guilty spouse has not done so, he must remedy his default, before the court will grant the decree of translation. Whether the original decree of separation was obtained in the Court of Session or in the Sheriff Court, only the Court of Session should be enabled to pronounce a decree of translation. The final termination of a marriage is always a serious matter and it is felt that it should only be terminated in the supreme civil court.

PATRIMONIAL CONSEQUENCES OF
TRANSLATION

4. *Second Proposition.* Where a decree of separation is translated into a decree of divorce, the innocent spouse should continue to receive aliment (unless and until remarriage) the amount being a matter for the discretion of the judge.

5. In the event of the separation decree being translated into a decree of divorce on the application of the guilty party, what financial or patrimonial consequences should follow? The question of legal rights is dealt with more fully below, but it is clear that if the application of the guilty party is granted, the guilty party should not then be allowed to claim his or her legal rights. If the application of the guilty party is granted, should the innocent party then be able to claim his or her legal rights? It is contended that the innocent party should be entitled to do so, if desired, subject to the qualification mentioned in the next paragraph. The guilty party would suffer no handicap, because he would bring his application for translation in the full knowledge that a possible consequence would be that the other spouse would claim his or her legal rights, or an award of aliment.

6. What, however, of the much more important question of aliment? Is the guilty spouse, who obtains a translation, to be automatically freed from the obligation to aliment the innocent spouse laid upon him by the decree of separation? The answer is no. After a decree of translation has been pronounced, the innocent spouse should be required to elect between (i) his or her legal rights or (ii) an award of aliment. If aliment were chosen, the right to aliment would fall on re-marriage. The amount of aliment to be awarded would be a matter within the discretion of the judge. One exception to the complete freedom of choice of the innocent spouse would appear to be desirable. If the guilty spouse's income is derived from his own business, the operation of legal rights on that business might entail considerable hardship. This is particularly so where goodwill is an important element in the value of the business. It is suggested, therefore, that if the guilty spouse can satisfy the court that the innocent spouse's choice of legal rights would entail considerable hardship, the court should be entitled to make an award of aliment in lieu of legal rights. This question cannot, however, be viewed in isolation; it leads on to the question of legal rights.

LEGAL RIGHTS AND ALIMENT AFTER DIVORCE

7. *Third Proposition.* Where a spouse ignores the preliminary remedy of separation, or it is not applicable to the facts, and obtains a decree of divorce, the innocent spouse should be entitled (a) to exact his or her legal rights or (b) to claim an award of aliment, the amount of aliment being within the discretion of the judge, and the award falling off in the event of re-marriage.

8. In Scotland the wife's legal rights are *ius relicte* and *terce*; the husband's *ius relicti* and *courtesy*. *Ius relicte* means that on the death of the husband the wife is entitled at common law to one-third of his free moveable estate, if he leave lawful children, or one-half if there are no children, or no surviving children. *Terce* is the life-entail enjoyed by a widow of one-third of the income of the heritable estate in Scotland in which the husband died testate. *Ius relicti* is the right conferred on the husband, by an Act passed in 1881, of enjoying the same share in the wife's moveable estate, as she enjoys under her right of *ius relicte*. *Courtesy* is the right of a husband whose wife died intestate in Scottish heritage to a life-entail of her lands. If a wife obtains a decree of divorce she can claim her legal rights as if her husband were dead. The husband on obtaining a decree of divorce can claim courtesy but not *ius relicti*. Legal rights are of course worthless where there is no heritable or moveable estate on which they can operate. In Scotland, under the present law, where a decree of divorce is pronounced, the innocent spouse is not entitled to an award of aliment. In England, on the other hand, legal rights, as understood in Scotland, are unknown, but after decree of divorce has been granted, the English court may make a continuing award of alimony to the innocent spouse.

9. It is clear that the present position in regard to the patrimonial consequences of divorce in Scotland is inequitable. Take a concrete example. In a marriage without children, a wife whose husband's whole income of £600 is derived, say, from £20,000 in 3 per cent. War Loan, on divorcing him can claim £10,000 as her absolute property. But if her husband's whole income is £600 per annum by way of salary, she gets nothing. From the point of view of abstract justice it is difficult to defend this result, and justice appears to require that the innocent spouse should have a right to claim aliment, where there is no estate on which legal rights can operate. The problem is, however, one of real difficulty. From the angle of public policy it is desirable that a divorced husband, who subsequently re-marries, should have to pay aliment to his ex-wife as well as supporting his second wife. The answer would appear to be so. But the experience of England seems to show that the apparent undesirability of such a double burden is theoretical rather than substantial. There are two possible solutions. First, to abolish the right to claim legal rights on divorce, thus putting all innocent spouses in the same position whatever the source of the other spouse's income. Secondly, to give the innocent spouse the right to elect between (i) his or her legal rights or (ii) an award of aliment. If the innocent spouse chose aliment, the court would be bound to make an award of aliment, the amount of the award

being a matter for the discretion of the court. The right of the innocent spouse to aliment would fall automatically on re-marriage. It is submitted that the second solution is to be preferred. One exception to the complete freedom of choice of the innocent spouse would appear to be desirable. That exception is set out in paragraph 6.

ADDITIONAL GROUNDS OF DIVORCE

10. *Fourth Proposition.* Imprisonment for ten years or more should be a ground of divorce.

11. It is urged that imprisonment should be made an additional ground of divorce. If a spouse is sentenced to a term of imprisonment of ten years or more, this should be a ground of divorce, after the criminal appeal, if any, has been disposed of. What of the case of the spouse who receives sentences of imprisonment, each of which is for less than ten years? In such a case, when, and if, the various sentences of imprisonment add up to ten years, or more, the innocent spouse should be entitled to divorce. It is surely inequitable that an innocent spouse should continue to be tied to a man who is sentenced to a long term of imprisonment. It is equally objectionable that an innocent spouse should be tied to a spouse who is constantly being sent to jail. The matter is made worse if there are children of the marriage who, under the present law, are brought within the influence of a parent who may be a habitual criminal. A spouse who knowingly and wilfully commits a criminal act is aware that one of the consequences of that act may be a term of imprisonment and a withdrawal from the company of the other spouse. By so doing he or she wilfully accepts a period of absence, which is tantamount to being in wilful desertion. In the case where one spouse is sent to prison, and this gives the innocent spouse a ground of divorce, it shall be a defence to such an action, that the pursuer concurred in the crime or connived at it. Any sentence imposed prior to the marriage of the parties would be ignored in determining the ten-year period. Imprisonment is a ground of divorce in Holland and the three Scandinavian countries.

12. *Fifth Proposition.* Persistent cruelty to children of the marriage should be a ground of divorce.

13. Where a spouse is guilty of persistent cruelty to children of the marriage (or step-children) under the age of eighteen, of a nature likely to injure their health, mental or physical, it should be a ground of divorce, without any onus being placed upon the innocent spouse to show that his or her own health, mental or physical, has been affected. Such an action would only lie at the instance of a spouse who had not been guilty of cruelty to the children or step-children, and who had actively protested against the actions of the spouse alleged to be guilty of cruelty. The action would only be competent if brought within three months of the last act of cruelty complained of. If it be regarded as too radical a reform, such cruelty should at least entitle the innocent spouse to a decree of separation and aliment.

14. *Sixth Proposition.* If a spouse is convicted in a criminal court of lewd and libidinous practices towards his children, the other spouse should be entitled to a decree of divorce.

15. If one spouse is convicted in a criminal court of lewd and libidinous practices to the children of the marriage, or to step-children, it may have unfortunate effects upon the child concerned, and must be a source of great anxiety to the other spouse. The innocent spouse should be entitled to sue for divorce.

THE LAW OF WILKINSON v. WILKINSON

16. *Seventh Proposition.* In an action of divorce for desertion, adultery by the partner within the three-year period should not invariably be a bar to decree being granted.

17. The House of Lords in the Scottish case of *Wilkinson v. Wilkinson*, 1943, S.C. (H.L.) 61, decided by a majority of three to two that in Scotland a pursuer who has committed adultery within the three years founded upon as constituting the period of desertion, is in no circumstances entitled to decree of divorce. In two English cases, *Herod v. Herod* (1939) P.11 and *Earnshaw v. Earnshaw* (1939) A.E.R. 698, it was held that where the fact of the pursuer's adultery within the three-year period was shown not to have influenced the defender it was

not a bar to the pursuer obtaining a divorce for desertion. In *Widdowson* the majority of the court, from a consideration of the legal implications involved in the conception of "willingness to adhere", declined to adopt the English view. It is felt that the law of Scotland should be altered so that where the fact of the pursuer's adultery within the three-year period is shown not to have influenced the defender it should not be a bar to the pursuer obtaining a divorce.

DIVORCE ON THE GROUND OF INSANITY

18. *Eighth Proposition.* *Insanity should be a ground whether the patient has been certified or is a voluntary patient.*

19. Section 6 of the Divorce (Scotland) Act, 1938, defines a person as being incurably insane if he has been under treatment as an insane person for the five years preceding the raising of the action, and goes on to say that a person under treatment as a voluntary patient is excluded. It is believed that it is the policy of those entrusted with the care and treatment of the insane to encourage persons being admitted as voluntary patients even where they are certifiable. The distinction between a certified and a voluntary patient is therefore frequently one of administrative method rather than one of fact, yet in the one case a divorce is possible and in the other it is not. Not only so, if after the expiry of many years, the possibility of cure disappears, the five years' period will commence to run from the date of the subsequent certification, which may well be after five years or more of separation, for insanity, have already run. Section 6 (3) of the Divorce (Scotland) Act, 1938, should be amended by the deletion of the words "and not otherwise" at the end of the Section—it being thus left open to a pursuer to establish by any competent evidence that the defender has for the five preceding years been under care and treatment as an insane person in any country in the world.

ACTION OF DISSOLUTION OF MARRIAGE BY MUTUAL CONSENT

20. *Ninth Proposition.* *The legislature should institute an action of dissolution of marriage based on the mutual consent of both spouses. It should be incompetent to raise such an action during the first three years of the marriage.*

21. In order to constitute a valid marriage, both in the eyes of the Church, and the law, there must be consent by each party given freely, genuinely, and seriously. Mutual consent is essential to validity, and is the basis of the marriage. When both parties to the marriage later find that neither of them has any longer any desire to cohabit, the whole basis of the marriage vanishes, and in logic it is difficult to see how a continuance of cohabitation can be justified. Where such a situation arises it is believed that the spouses should be able to raise an action of dissolution of marriage based on mutual consent.

22. There is, however, another ground on which the institution of such an action is urged. At present the law provides no honourable remedy for spouses who have decided that they have no longer any desire to live together and wish the marriage dissolved. The result is that spouses in such a position not infrequently obtain divorce on perjured evidence. In the opinion of many lawyers, familiar with court practice, many actions of divorce based on adultery, or on desertion, are arranged divorces or proceed upon perjured evidence. In cases based upon adultery, the evidence led is frequently intended to prove that the allegedly guilty spouse has spent the night in a hotel bedroom with a third party. It is difficult in many cases not to view such evidence with marked scepticism. In an action of divorce based on desertion the innocent spouse must prove that the guilty spouse has been in wilful desertion for at least three years, and that during this period the innocent spouse has been willing to adhere. The simplest way of proving willingness to adhere is to produce letters written within the three-year period by the innocent spouse urging the other spouse to resume cohabitation. It is often difficult to believe that such letters are in any way sincere. Letters apart, it is believed that in a considerable number of desertion cases, there is collusion between the parties with a view to obtaining divorce. This is also true of cases based on

adultery. Those who are opposed to the remedy of an action of dissolution should face the fact that its absence will not deter spouses who are determined to sever the marriage tie. They will have no alternative but to endeavour to avail themselves of another form of action of divorce and will arrange a divorce, or lead perjured evidence, thus bringing the law into general disrepute. It is to be noted that in Scotland the vast majority of divorce cases are not defended, thus making it more difficult to test the truthfulness of the evidence led. The choice is between providing an honourable remedy, namely, an action of dissolution, and the continuance of the present system under which otherwise honourable persons are compelled to resort to perjury to obtain their freedom.

23. But while the introduction of an action of dissolution of marriage based on mutual consent is urged, it is essential that such an action should be hedged with reasonable safeguards. In the first place, it should not be competent to raise an action of dissolution of marriage during the first three years of the marriage. Secondly, the parties, before being entitled to come into court for the first time, must in fact have been living apart continuously for at least nine months. The first appearance of the parties should be before a judge in chambers, where the parties would require to state on oath that they had in fact been living apart for at least nine months, and that each spouse had ceased to have any desire to cohabit. Not less than nine months after this first appearance both parties would require to appear in open court, and swear that they still had no desire to cohabit and that they had lived apart continuously since their first appearance. In addition, the court would require to be satisfied by other evidence that the parties had in fact been living apart continuously for eighteen months. If the court were satisfied, a decree of dissolution would then be pronounced. The appearance in chambers might be before a Sheriff Substitute, or a judge of the Court of Session. It is felt, however, that the appearance in open court should be before a judge of the Court of Session only, and that only the Court of Session should have the right to pronounce a decree of dissolution of marriage. It is believed that an action of dissolution, on the lines indicated above, will provide an urgently needed remedy and will rescue this branch of the law from the disrepute which many people feel it has fallen into. Further, such a remedy would not lend itself to use by spouses in a sudden fit of temper, given the safeguards suggested above. In Denmark an action of dissolution of marriage by mutual consent has, it is understood, been competent for many years and appears to have worked satisfactorily. There is also divorce by mutual consent in Belgium and Norway.

DISSOLUTION OF MARRIAGE ON SEVEN YEARS' SEPARATION

24. *Tenth Proposition.* *Either spouse should be entitled to raise an action of dissolution of marriage in the Court of Session, where the parties have lived separately for a period of not less than seven years immediately preceding the raising of the action.*

25. Cases occur where spouses separate, and live apart over a long period, without either spouse having been guilty of any matrimonial offence, and without either party having been willing to adhere during this period of separation. If at some later date one or other of the spouses wishes to dissolve the marriage tie, the law, as it stands at present, provides no solution. To require the spouses to remain in a state of nominal matrimony in such circumstances serves no useful purpose. It should be open to either of the spouses to raise an action of dissolution of marriage, if the parties have been living apart for a period of not less than seven years immediately prior to the raising of the action.

26. Further, cases not infrequently occur where one spouse is guilty of a matrimonial offence which warrants the other spouse in living apart. The innocent spouse does in fact live apart but declines to raise an action of divorce, perhaps for religious reasons. In such a case the guilty spouse may have to live in a state of suspended matrimony for the rest of his or her life. This is plainly undesirable, and if the tenth proposition were given effect to, it would provide a necessary remedy.

EXCLUSIVE JURISDICTION OF THE COURT OF SESSION

27. *Eleventh Proposition.* *The Court of Session, and the Sheriff Court, should continue to have a concurrent jurisdiction in actions of adherence and aliment and separation and aliment, but the Court of Session should continue to enjoy exclusive jurisdiction in all other consistorial causes.*

28. The Court of Session, which is the supreme civil court in Scotland, does not go on circuit, but is always located in Edinburgh. Only advocates have the right of audience in the Court of Session. The Court of Session, with the exception mentioned below, has exclusive jurisdiction in all consistorial actions. Broadly speaking, there is a Sheriff Court in each county of Scotland. The Sheriff Court ranks immediately below the Court of Session. Both advocates and solicitors have a right of audience in the Sheriff Court. The Sheriff Substitute, who presides in the Sheriff Court, is a whole-time professional judge. The Sheriff Court has concurrent jurisdiction with the Court of Session to hear actions of separation and aliment, based on the ground of adultery or cruelty, and actions of adherence and aliment.

29. Are there any serious objections to the present exclusive jurisdiction of the Court of Session in divorce actions? Proposals have been made from time to time to extend original jurisdiction in consistorial causes to the Sheriff Court, and such a proposal was considered by the Royal Commission on the Court of Session, which reported in 1927. Their recommendation was negative, and proceeded on two considerations: (1) the importance of uniformity in administering the consistorial law; and (2) the danger of a one-sided presentation if undivided cases were tried in the Sheriff Court. The validity of the first of these grounds may be doubted, since experience shows that the possibility of divergence in the administration of the law is no greater among Sheriffs than among the judges of the Outer House of the Court of Session. Without doubt, however, there is advantage in the employment of counsel in consistorial causes—not only because, as the 1927 Report points out, counsel are separated from immediate contact with the litigant, and discharge an office which puts them under a special duty to the "College of Justice" of which they are members, but also because advocates are specialists in pleading, whereas most solicitors must inevitably devote the greater part of their time to other aspects of the law and have neither the time nor the opportunity to acquire the specialised knowledge which is the peculiar attribute of counsel. To permit consistorial causes to be pleaded by solicitors would not only open the door to the possibility envisaged by the Royal Commission of 1927, but might, by faulty pleading, damage the litigant's case beyond hope of repair even in the appeal court, and deprive him of the right or remedy to which he is entitled. These difficulties could doubtless be overcome by reserving to counsel the right of audience in consistorial causes in the Sheriff Court as in the Court of Session. Since, however, the ground upon which the granting of concurrent jurisdiction to the Sheriff Court is usually urged is that of the saving of expense to litigants, it is apparent that such a proposal would do nothing to remedy the supposed evil—rather the contrary. It is only in a small proportion of cases that the expense incurred in bringing litigants and witnesses to Edinburgh form any substantial part of the expense of the case; and in appropriate cases such expenses are met by the provision of legal aid. Experience has not revealed any complaint on the part of litigants against the trial of consistorial cases in Edinburgh; and so far as we are aware there is no public demand that they be tried in the Sheriff Court. In addition to the matters already referred to, it is thought that the degree of solemnity inherent in Court of Session proceedings is not inappropriate in consistorial cases, involving as they do alterations in status and the whole range of personal relations; and it is to be borne in mind that difficulties might arise in international law if decrees affecting status came to be pronounced by courts other than a supreme court. There is the further consideration that in some Sheriffdoms the Sheriff Substitute are at present fully occupied and have not the time to cope with the additional burden of divorce work, while the appointment of an additional Sheriff Substitute in such Sheriffdoms would hardly be justified. It is appreciated

that in a number of cases the decree of the Court of Session will be little more than a formal act of administration, particularly if effect is given to the proposal submitted in our first proposition. Under the present law, however, it is competent (though not common in practice) for the court, in an action of divorce, to treat a Sheriff Court decree of separation as sufficient proof of the adultery or cruelty in respect of which the decree was granted; and for the reasons stated it is thought that it is right that the final act of dissolving a marriage, with all its weighty and serious consequences, should be reserved to the jurisdiction of the supreme court.

LEGITIMATION BY SUBSEQUENT MARRIAGE.

30. *Twelfth Proposition.* *The doctrine of legitimation by subsequent marriage should be extended to cover all children of the parents born prior to the date of the marriage.*

31. It is undoubtedly the law of Scotland that a child is not legitimated by the subsequent marriage of its parents if there existed at the date of the child's birth a legal impediment to the marriage; and the balance of authority appears to favour the view that this bar extends to the case where the legal impediment exists at the date of the child's conception. It is submitted that this rule of law, whether in the wider or in the narrower form, is both inequitable and illogical. It is inequitable that, while a man and a woman who have been cohabiting illicitly are permitted to regularise their position by marriage when they become free to do so, the position of the innocent offspring of the cohabitation cannot be so regularised. It is illogical that, while legitimation is recognised as a just and proper corollary of the subsequent marriage of the parents, the operation of the law is limited by circumstances with which the child—in whose interests the doctrine of legitimation is recognised—has no concern.

RIGHTS IN HUSBAND'S SALARY

32. *Thirteenth Proposition.* *Where a husband is earning a salary or wages, and the wife is entirely occupied in running the home, the wife should be entitled in law to a proportion of the husband's earnings, which should be regarded as her salary for running the home.*

33. A husband is legally bound to supply his wife with necessary food and clothing but the law of Scotland places no further duty upon him, and confers no right upon the wife to an exclusive share of the husband's earnings. Marriage is a partnership under which, in the normal case, the husband works outside the home, earning wages or a salary, or running a business, while the wife works inside the home, running the house, but receives no payment. The work done by the wife in the home is certainly as onerous and important as the work done by the husband outside the home. Modern opinion believes that there should be equality of treatment as between the sexes. This being so, it is surely indefensible that the law fails to provide that the wife is entitled, as of right, to a share in the husband's earnings, for her own exclusive and personal use. It is believed that in some homes the husband's exclusive right to his earnings leads to preventable unhappiness. A husband may consistently refuse to give his wife anything at all for her own personal use; even if he does not, he may be close-fisted and his wife may frequently be forced to plead with him for some money for her own personal use. No wife ought to be exposed to such an indignity. It is thought that there are three major claims on a husband's salary, (1) the cost of running the home, i.e., feeding and clothing the family, (2) the husband's need for a proportion of his earnings to spend as pocket-money and to save something, and (3) the wife's need of a proportion of the husband's earnings as a salary for the work she does in the home. The law already makes provision for (1), although it is appreciated that the machinery for ensuring that the husband makes over the necessary housekeeping money is probably both slow and inadequate. It is also appreciated that under the present law, in the vast majority of homes, there is no friction in regard to money. But if, in even five per cent. of homes, the husband's exclusive right to his earnings leads to friction it represents a very considerable sum of human unhappiness. It may well be that some husbands are deterred from making over a percentage of their earnings to their wives each week

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by a feeling that it is unmanly to do so, or that they will be jeered at by their fellows if they do so. If, however, it was the law of the land that a wife had a right to a percentage of her husband's earnings as her salary for running the home, it would probably greatly ease the path of reluctant husbands.

34. If the right of a wife to a percentage of her husband's earnings is conceded, what form should that right take? On the first view the simplest method would appear to be to enact that a wife has a right to a proportion of her husband's earnings, leaving it to the discretion of the court to fix the precise percentage. Such a method would, however, largely fail on the score of vagueness. It is submitted that the first essential, if such a reform is to achieve its object, is that everyone should know the minimum proportion which a wife is entitled to in law. It is undesirable to encourage litigation in the courts on this issue if it is possible to avoid it. Litigation is both slow and costly and is likely to exacerbate feeling in the home. It is submitted that there should be immediate certainty, followed by a limited discretion. Where a husband's gross earnings do not exceed £1,000 the wife should be entitled to a minimum of one-tenth of the husband's earnings, as her salary for acting as housekeeper. The wife should be able to get this one-tenth by sending a registered letter to her husband's employer claiming this one-tenth. It should then be the duty of the employer to set aside the one-tenth each week, or month, to be called for by the wife, or to be posted to the wife, the wife bearing the cost of postage. Failure on the part of the employer to set aside the one-tenth, on receipt of a registered letter from the wife, should be an offence, punishable summarily by a fine. It is believed that such a method would largely obviate recourse to the courts. But while it is essential to prescribe a minimum proportion, it is conceded that there may be cases where ten per cent. would, in the whole circumstances, be too low. The wife should therefore have a right to raise an action asking the court to exercise its discretion and award her more than ten per cent. Such an action should be in as summary a form as possible and should be confined to the Sheriff Court. The Sheriff should have the right to order the husband to lodge a certificate from his employer showing the husband's gross wages over the last year, and apart from that certificate there should be no written pleadings, the hearing being confined to oral evidence from the spouses and supporting witnesses.

35. Where the husband's gross salary is in excess of £1,000 per annum, the rule of a minimum ten per cent. should not apply, and the Sheriff should enjoy an absolute discretion to award the wife a salary out of her husband's earnings, according to the particular circumstances of the case.

AFFINITY

36. *Fourteenth Proposition.* The ten statutory exceptions to prohibition of marriage owing to affinity, should operate whether the marriage is dissolved by death or by divorce.

37. In Scotland the prohibitions to marriage arising out of affinity are analogous to those regarding relations in blood. The view of the common law on this matter is that parties in the married state are to be held as identified, and that those related to the one in any degree, are to be held as related to the other in the same degree. But there are now ten statutory exceptions arising out of the Deceased Wife's Sister's Marriage Act, 1907, as amended by the Deceased Brother's Widow's Marriage Act, 1921, and the Marriage (Prohibited Degrees of Relationship) Act, 1931. It is to be noted, however, that where marriages between parties in the relationships stated in the Acts become possible through the dissolution of an existing marriage, not by death, but by divorce, the marriage of those persons remains prohibited during the lifetime of the divorced spouse of either of them. It is submitted that there is no good reason for this prohibition, and that it should be abolished.

MEDICAL EXAMINATION

38. *Fifteenth Proposition.* Before a marriage ceremony, whether civil or religious, is performed, each spouse must produce a medical certificate stating whether or not he or she is suffering from a venereal disease, or from tuberculosis.

39. The law of Scotland does not require either party to a proposed marriage to undergo medical examination before the marriage ceremony is performed. Cases occur from time to time where, after marriage, one spouse discovers that the other spouse is suffering, or has suffered, from a venereal disease, or from tuberculosis. The suffering spouse may have been unaware of the condition at the date of the marriage, or may have deliberately concealed the fact from the other party. When the healthy spouse discovers the truth, he or she may suffer a great shock, and the future happiness of the marriage may be seriously affected. Moreover, the fact that one spouse is diseased may radically affect the issue of the marriage, or the question of having issue. It is submitted therefore that it is most desirable that before marriage each party should be examined by a fully qualified medical man who would be required to issue a seal and conscience certificate, stating whether or not the party examined is suffering from any venereal disease or from tuberculosis. A duty should be placed on the local registers of marriages to ensure that each party is made aware of the contents of the medical certificate relating to the other party, not later than say ten days before the date of the proposed marriage. If the medical certificate reveals that one party is suffering from a venereal disease, or tuberculosis, it is not suggested that that fact should constitute a bar to the proposed marriage. It would be for the parties themselves, in the light of the contents of the medical certificate, to decide whether or not the proposed marriage should be proceeded with. It is believed that in a considerable number of European countries the production of medical certificates is required. This is certainly true of Norway and France.

(Dated 15th December, 1951)

EXAMINATION OF WITNESSES

(MR. S. SHAW, Q.C., MR. G. STOTT, Q.C., and MR. J. FARQUHARSON, S.S.C., representing the Muir Society; called and examined.)

6597. (Chairman): We have been this morning as representing the Muir Society, Mr. Sinclair Shaw, Q.C., Chairman of the Society; Mr. Gordon Stott, Q.C.; and Mr. James Farquharson, Solicitor at the Supreme Courts. Before we ask you any questions, do you wish to add anything to your memorandum, Mr. Shaw?—(Mr. Shaw): Perhaps I might begin, my Lord, by thanking the Royal Commission for allowing us to come here to give oral evidence in support of this memorandum. We appreciate your kindness in allowing us to do so. I should perhaps also add that our Society is comprised both of solicitors and advocates, and that in drawing up this memorandum we were able to take advantage of the experience of both sides of the profession. The only other thing I would say is that, as this memorandum points out, we do believe that certain grounds of divorce are present available to

bigamists in Scotland are not working very satisfactorily, and we also feel very strongly that there is room for additional grounds. We would demur very strongly to the view which I think has been advanced, at least by certain Scottish witnesses, that the Acts of 1937 and 1938 are in any way to be regarded as definitive. That view, I think, is historically inaccurate. The changes brought about by the Acts of 1937 and 1938 were due in the first place to the efforts, almost unaided, of Mr. A. P. Herbert. The Act of 1937 resulted from a Private Member's Bill, and Mr. Herbert had to put into the Bill not what he thought was required to bring the law of England up to date to meet public opinion, but to put into it the very minimum in order to beat the clock and in order to ward off the attacks of various interests, which were opposed to any reform at all.

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[Continued]

6598. We have all, I think, read the speeches made when Mr. Herbert's Bill was before the House. Some of us may also have read a book which he wrote on the subject. I certainly have. Before I come to your proposals, I want to know a little more about the Mair Society. You tell us that it is a Society of Scottish Socialist lawyers, and others, formed to promote an interest in legal reform. Who are the "others"?—The Society was formed in 1939 by a group of Socialist lawyers who decided to follow the type of organisation of the Fabian Society. There are ordinary members—if you join as an ordinary member it means you are a member of the Labour Party; if you join as an associate member it means you are not a member of the Labour Party and do not hold Socialist sympathies, but you are interested in questions of legal reform. We have both associate members and ordinary members.

6599. I am glad to know that, but what I asked you was, what others besides lawyers are members?—Perhaps it is not very happily phrased, but we are confined to lawyers.

6600. What are your numbers of ordinary members and associate members, respectively?—I am not the treasurer, and I cannot answer.

6601. Can one of your colleagues answer it?—(Mr. Farquharson): I should say, my Lord, that the numbers are, roughly: ordinary members, thirty-five; associate members, five.

6602. Thank you. Do you publish any annual report?—(Mr. Shaw): We have given evidence from time to time before various public bodies. We gave evidence, for example, before the Royal Commission on Capital Punishment.

6603. May we take it that this memorandum represents the general view of the members of your Society? It has been brought before a general meeting, has it?—That is so, my Lord. It has been discussed, I think, on no fewer than three occasions. (Mr. Stott): In certain matters it represents the view of the majority.

6604. It is hard to expect unanimity in any body, is it not? If I may now turn to the memorandum, the first question you pose is to be found at the end of paragraph 2: "Should the remedy of judicial separation be retained in its present form, or in a modified form, or should it be abolished altogether?", and your answer is to be found in paragraph 3.—

"Total abolition of the remedy is not, however, advocated. The present law should be modified by allowing the party against whom decree has been pronounced, to apply to the court to have the decree of separation translated into a decree of divorce, not less than three years after the date of the decree of judicial separation. The court should be required to grant such an application even if the innocent party objected."

First of all, the party against whom decree has been pronounced for separation is always a party who has been found guilty either of cruelty or adultery?—(Mr. Shaw): Yes.

6605. And I see you say earlier: "... It is believed that in each year, in the great majority of actions for judicial separation, the wife is the pursuer."—Yes.

6606. For convenience, and to avoid referring to both husband and wife throughout, may I refer to the guilty party as the husband, without prejudice to the fact that it may be the wife on occasions?—Yes.

6607. Now I am going to put to you certain objections to this proposal, which have been suggested to the Commission. First, have you in Scotland got the doctrine that a man is not to be allowed to take advantage of his own wrong?—Yes and no, I think perhaps is the answer—in certain cases, yes. (Mr. Stott): Without conceding the relevance of the question to this matter, I think the answer is, yes.

6608. Then perhaps I will develop the relevance, as I go on. May I take the case of a decent woman who has tried to be a good wife? This suggestion does enable a cruel or adulterous husband to put an end to the marriage by her will, does it not?—(Mr. Shaw): Undoubtedly, but then may I put the counter view, with respect?

6609. Certainly.—I do not think that it is any longer a doctrine widely held in Scotland, even by the most extreme religious sects, that it is right that any man should be subject to perpetual punishment. That seems to me a fundamentally un-Christian doctrine, yet the law as it stands amounts to this, that once you have granted a decree of judicial separation you are going to say: "The man shall be punished for the rest of his life". For perhaps a single act of adultery. We demur to such a proposition.

6610. I am interested to have your view. I do not know that it turns out of the question, but the answer to that question was, it does enable that to be done?—Undoubtedly, at the end of three years, if the parties have not come together.

6611. That is, is it not, an example of a man taking advantage of his own wrong? Let me show you what I mean. He says: "I entered into a life-long partnership with this woman. I promised"—whether it was in church or a registry office—"that I would take care of her and refrain from adultery. I have broken that agreement; because I have broken the agreement I shall be allowed to put an end to it against the will of the party who has not broken it". Is not that taking advantage of his own wrong?—Let me concede it is, but what exactly does that matter particularly? You have to put against that, which I respectfully suggest is a technical and legal argument, the known facts of the situation, at least in Scotland: is it desirable on any ground of public policy that something like 200 people each year should be driven into a state of what I can only call suspended matrimony? The result is, I am quite sure, in many cases, that after a time the man says: "I have no remedy, because the law gives me no remedy". He goes and lives with another woman and has illegitimate children. If there were the remedy proposed here, that man could get married again and his children would be legitimate. And if I have to choose between the doctrine of a man benefiting by his own wrong on the one hand, and the legitimisation of scores of children on the other, then I come down on the side of the children every time.

6612. May I ask you this: are there many cases within your own experience, or the experience of your colleagues, where men are waiting to take advantage of this provision, if it were made law?—With respect, Sir, I do not think that it is possible really to answer that question.

6613. It may be difficult, I quite agree. But, after all, the question was limited to your own knowledge. I was not asking you how many such cases there were in Scotland, because you could not possibly know that. I was asking you, in your experience as lawyers, how many cases you know of where men are waiting to take advantage of this provision, if it becomes law?—I would prefer not to found it on my experience as a lawyer, but on my experience as an ordinary human being, going about quite a lot in certain circles, and I have no doubt whatsoever that there are men who are living with other women and having illegitimate children, who are perfectly happy except in one respect, that they want to give the woman with whom they are cohabiting a proper legal status, and they want their children to be legitimate and not illegitimate.

6614. One other matter arises out of that. Reading this proposal in conjunction with your tenth proposition providing for divorce after seven years' separation without necessarily any matrimonial offence having been committed, it struck me that perhaps this proposal was a little illogical. Does it not lead to this, that a man who has committed a matrimonial offence is to be given the right to divorce his wife at the end of three years, but the man who has separated from his wife but has not committed any matrimonial offence, is to be given the right to divorce his wife at the end of seven years? What was the purpose of that? It seems to me a curious half-way house.—We must, I think, in framing such a memorandum, proceed upon the view that Proposition A may appeal to the Royal Commission and Proposition B may not, and A and B are not necessarily logically reconciled.

6615. They are really alternatives, perhaps?—Alternatives, yes. (Mr. Stott): I think, if I may say so, that they can be reconciled by looking at the matter not so much from the point of view of one of the parties, but looking at the matter as the Commission might do, on

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the general social principle. In the one case, the court has in fact brought the marriage to an end, therefore it is a recognised fact, by decree of the court, that the marriage for all practical purposes is at an end, and one can say that the court then would be entitled to bring the marriage completely to an end by divorce. In the seven-year proposal there has not been any decree of court, therefore it might be thought that there has not been such a complete termination of the marriage as would entitle the court to intervene.

6616. On the point of general social benefit, is there this drawback perhaps to both of these proposals? It has been said by witnesses that they tend to encourage illicit unions, for this reason: at the moment a woman knows when she marries that if she commits no matrimonial offence she is at least secure in her position as wife, she cannot be divorced. On the other hand, another woman, to whose attractions a husband's fancy may have strayed, knows that she can never be anything but his mistress so long as the wife is not guilty of a matrimonial offence, and that any children she has by him will be illegitimate. Are you not encouraging illicit unions by making it within the power of a man and his mistress, at the end of a specified period, to deprive the wife of her position as wife, to put the mistress in her place, to entitle the mistress to all the wife's pension rights on the husband's death, and to make legitimate the children of that union? Are you not presenting the prospective mistress with all these advantages and the man with the certainty that he can marry her after a period? Are you not encouraging rather than discouraging illicit unions, and is that a good thing from the point of view of the community?—(Mr. Shaw): I think, with respect, it depends very largely on what view one takes of human nature. Personally, I would very much doubt whether there is a lot of cold-blooded calculation on the part of a husband, on the lines that you have perhaps suggested. I think that in most cases the husband, rightly or wrongly—and, we all agree, most unfortunately—is deeply attracted by another woman; his marriage to his legitimate wife may have been a profound mistake from the beginning, and I think he goes ahead irrespective of the legal consequences. I do not believe for one moment that if you made the change suggested in this memorandum it would be an encouragement to many husbands to calculate in the fashion suggested and then go off and live with another woman. I do not think human nature is like that.

6617. But what about the other woman? If the law stands as it is, she is not so tempted to enter into the illicit union because, as I have said, she knows that she can never be more than a mistress and the children can never be anything but illegitimate. Whereas if you bring in this proposal the prospects for a woman like that, who may or may not have brought about the separation, are greatly improved. Is it not encouraging her to join in, whereas with the law as it is, however much the husband wanted to make her his mistress, she might say: "There is no future in this, I will not do it"?—Perhaps that act is on rather a different footing, but may I point out this, that after all one of the grounds on which one can get a decree of judicial separation is cruelty? That decree having been obtained, the husband having been put into a state of suspended animation, matrimonially speaking, for the rest of his life, four or five years later he may meet a perfectly decent and respectable woman and fall in love with her—and who can blame him, in the circumstances? And because of their mutual attraction they decide to live together, and they ultimately have illegitimate children. In that state of affairs it seems to me that the proposition enunciated here is fully worthy of support. (Mr. Stott): But surely also a woman who looks at the matter from the point of view that you, Sir, suggest, if the law were altered to make a union between her and the man licit after a period of three years, or it might be seven, a woman who was concerned to look at the matter in the light you have suggested, would she not wait, knowing that the future did hold something for her, until the union could be entered into legitimately, before beginning cohabitation? At the present moment the woman is almost bound to cohabit with the man, knowing that at no time in the future is she likely to be able to have a licit union. Therefore it would appear even from the woman's point of view that the present position encourages rather than discourages illicit cohabitation.

6618. There might be some women who took that view, but if they were prepared to start an affair with a married man at all, do you think that there would be many of them?—If you know a man is about to be released from his wife by a proper legal process, a woman who considers these matters at all—and we are dealing, I suppose, with the ordinary decent woman whose conduct matters to us—would no doubt be prepared to wait.

6619. With regard to your phrase, "the ordinary decent woman whose conduct matters to us", may I turn your attention for a moment to the position of the wife? In the first place, she may have religious scruples—I gather you do not think that that is a very good reason?—I quite respect that, but of course, once having conceded that marriage is dissoluble, I am afraid we must just proceed on that basis. If one concedes on religious grounds that a marriage is not dissoluble, that is a different matter.

6620. I am not suggesting that religious scruples should prevent all divorce. I am suggesting the point of view that a woman who has committed no matrimonial offence, and who entered into the bargain on the footing that it was life-long, is entitled perhaps to have her religious scruples considered, and not to be divorced against her will. That is a very different thing from saying that, because the Church thinks so, there should be no divorce. You appreciate the difference, I am sure, Mr. Stott?—I am not sure that I do. I do not see how religious scruple enters the matter. If a woman is divorced, that is an action of law, it is not something for which the woman is responsible.

6621. As the law now stands, a woman cannot be divorced against her will if she has committed no matrimonial offence. You are suggesting that she shall be able to be divorced against her will when she has committed no matrimonial offence, without even the safeguard that if it was against her religious view she would not be divorced. Is that fair?—I do not see myself how the question of "against her will" enters into the religious scruple. I can quite see that a woman marrying and intending, for religious reasons, that the marriage should never be dissolved, is injured by any law which alters that state of affairs. But I cannot see how a religious scruple can affect the question of being divorced against one's will. Surely the religious scruple must be against divorce. I do not know of any religious scruple against divorce against one's will. I do not see how that could arise.

6622. One further question about the wife's position: pension rights are a very important thing to any woman nowadays, are they not? I observe your financial propositions in paragraph 4. I observe and appreciate all the provisions you make there for the wife who is divorced against her will—but what about the pension? The provision presumably would not last after the husband's life, and the person who would be entitled to the pension would be the second wife. How do you propose to deal with that?—(Mr. Shaw): That surely would be a matter for further examination. I see nothing particularly illogical, if you preserve the wife's right to aliment after the decree of separation has been translated into a decree of divorce, while she remains unmarried, if you preserve that right I do not see why there should not be some provision in regard to pension rights. If at a subsequent date the freed husband does re-marry, it does not seem to me that there is any strong reason why some share in the pension rights should not go on the husband's death to the first wife.

6623. Then that would be a variation on your suggestion, because there is nothing about pension rights in it?—I confess that we had not considered the question of pension rights in framing this memorandum.

6624. What has been said is this. The wife marries, she enters into a life-long contract which carries with it the right to a pension if her husband pre-deceases her. You are, by this proposal, taking it away from her. That is the point, of course.—It would depend on legislation, I think. May I make one final comment before you leave this paragraph? I may be wrong, but I think that the original idea of judicial separation was simply this: first of all, it was given on the ground of cruelty, which was not a ground for divorce; the main object of judicial separation, I think, was to allow tempers to cool, and

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to allow parties to come together again. If in fact the parties quite clearly are never coming together again, then you have a social situation—whether you like it or not it is there—a social situation in which some 290 people each year in Scotland have decrees pronounced against them, and they are left in the position that they can remain bachelors for the rest of their lives or they can be driven into illicit cohabitation. I would add this, if I may, that now that both cruelty and misconduct are grounds for divorce, it may very well be that there is no good reason at all for retaining the action of judicial separation. It may be that the best policy is to abolish it altogether. We have not gone as far as that, we have suggested a three-year interval. But, speaking subject to correction, I think that I am right in saying that the Royal Commission of 1911-12 were so impressed by the evils of this remedy that they proposed that immediately a decree of separation was pronounced the husband should be entitled to ask for its translation. We do not go as far as that, we say three years. (Chairman): But was it not a discretionary remedy? I do not think it was that the husband should be "entitled", was it? (Lord Keith): Yes, the court was given a discretion: "We recommend that the court should have power, in its discretion, when a decree of separation is asked for on grounds found by the court which would justify a decree of divorce, to make a decree of divorce on the application of the respondent". It is a discretion in the court.

6625. (Chairman): May I now pass to the third proposition? At the end you set out two alternatives:—
"First, to abolish the right to claim legal rights on divorce, thus putting all innocent spouses in the same position whatever the source of the other spouse's income. Secondly, to give the innocent spouse the right to elect between (i) his or her legal rights or (ii) an award of alimony."

Then you go on to elaborate that, and you say: "It is submitted that the second solution is to be preferred". Of course, another view is that the proposal, of putting it entirely in the hands of the court to decide what provision is right, put forward by the Mackintosh Committee, is simple and logical. Let me give you an example of where your proposal might work out wrongly. I gave it to a witness yesterday. It was not my own idea, it was suggested to me. It is said that there are cases known of a young woman marrying a man of considerable means, making his life (as it was put to me) "a hell", until he gives her cause for divorce; she divorces him, takes one-third of his estate, and then goes and marries the man she really wanted to marry all the time. I am assured that instances have been known of that. Would it not be better, to cover such a case as that, simply to adopt the principle that the discretion shall be in the court to give such provision either by way of capital or alimony as is appropriate to the circumstances of the case?—I do not know that I would necessarily quarrel with that view, but I do feel that it is a situation which will arise in an ever-decreasing number of cases, thanks to death duties and so on. The number of rich men will presumably vanish entirely in our lifetime, and I cannot myself see that, whatever the Academic meets of the proposition are, it is a situation which will apply in very many cases.

6626. I think that is very possibly the case, but I did not quite follow why you preferred the elective suggestion to the Mackintosh Committee's suggestion simply to leave it to the court to do what was just and right under the circumstances.—(Mr. Stott): I think that we were dealing with it on the law as it stood. Of course, if a general alteration were made in the law of legal rights in accordance with the Mackintosh Committee's report, then it follows that in divorce the alteration would also be made. So long as legal rights remain on death, we see no reason to alter them in regard to divorce. The same situation would arise in death.

6627. As regards the seventh proposition, you say:—

"It is felt that the law of Scotland should be altered so that where the fact of the pursuer's adultery within the three-year period is shown not to have influenced the defender it should not be a bar to the pursuer obtaining divorce."

You contemplate that if that is the fact, there should be no discretion in the court and the pursuer should have a divorce?—(Mr. Shaw): That is so.

6628. Your ninth proposition deals with divorce by mutual consent. The objections which have been put to that come to this, I think. The husband and wife, whether in church, or in a registry office, have agreed upon a life-long union, and if divorce by consent is brought in it would have two consequences. First, it would induce people to enter upon marriage more lightly, with the feeling, "If this is a success, we will go on with it, and if it is not a success, after all we can get a divorce by mutual consent". It is suggested that this is not the best attitude of mind for those on the threshold of marriage. Secondly, such a provision would destroy or impair the incentive for a couple to make up their quarrels, settle their differences and get over any trouble that may have arisen in their married life, on the footing that they have got to make a success of it somehow. If, at any time after three years, they can get a divorce by consent they would be very apt to say: "I am finding this man (or woman) intolerable, I cannot stand it any longer, let us have a divorce by consent". I would like you to deal with these two objections—if I may say so, with respect, my own reaction to theoretical objections is this, that while I concede their force, I look round in order to discover whether in fact these theoretical objections have been proved in practice. My understanding is that in a number of other countries there is divorce by mutual consent, that it is acceptable to public opinion in these countries, and that it works. I am informed that in Denmark, for example, and in New Zealand, since 1920 and 1922, respectively, a remedy—not exactly in the terms we have set out here, but a remedy for divorce by mutual consent, a remedy for the situation where spouses find it intolerable to live together—has in fact been practised and has not been followed by the dire consequences which some people, in theory, felt might follow.

6629. We are procuring evidence from, I think, all countries whose experience would be helpful, so I hope we shall be able to find out exactly what they have introduced and how it has worked. Do you wish to say anything more on that?—Yes, my Lord, if I may, I would press the remedy very strongly indeed. You will see that is, paragraph 21 we have ventured to set out what we feel is the logical approach—leaving out the litigious and legal consequences—to this question. We have said in paragraph 21 that mutual consent is the very essence of a valid marriage. When that mutual consent has completely disappeared on both sides, then it is very difficult to see why in logic there is any basis left for the marriage. It seems to me it has vanished, and one should recognise that.

6630. What about the position of children? Supposing the marriage has resulted in children, should it still be in the hands of the parties to the marriage to say: "We are finding this difficult, we will put an end to it and break up the home"?—Surely that must depend on the circumstances of the case? If the two parties simply cannot get on together, if they are constantly quarrelling, if the atmosphere of the home is embittered, one does not feel that that is the kind of background against which it is desirable to bring up children.

6631. Some people have found, I think, that children—so long as they have got their own bed, and their own toys, and go to school—are curiously insensitive to quarrelling in the home. They merely think that that is the sort of thing that parents do and they just accept it, but the thing they do dislike most of all is to find that the home which they know is broken up. They may be divided between the two parents and they just do not know where they stand. We have had a good deal of evidence from schools as to the after-effects upon children where they are divided between the two parents, or where they have lost their association with one parent. What do you say about that?—With respect, my Lord, may I suggest that the first part of your observation seems to me to indicate this, that one can forget the children, if one says that they do not notice what is going on in the home at all. . . .

6632. Only for so long as they have got the home and both parents in it.—I said, my Lord, with respect, the first part of your observations. One can ignore the first part of your observations because you have said that the children do not notice the quarrelling in the home. The latter part of your comment is, of course, much more serious. Children do not like to have different homes, but

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I think one is bound to remember that the court does award custody to one parent or the other. The guilty party—I suppose it is usually the guilty party—is given certain rights of access, and a certain right on occasion to take the child away for perhaps the summer holidays. I am by no means satisfied that, in circumstances like that, the child going to the guilty spouse for his summer holiday is particularly distressed. It seems to me that the child may just look on the guilty spouse as a new kind of uncle or aunt, and enjoy the holiday, without worrying particularly about the matrimonial relationship.

6633. We have evidence to the contrary effect from schoolmasters. Perhaps I might say this—I have been a Chancery judge. I have dealt with wards of court and had some opportunity of personal observation of the difficulties which arise when custody becomes a question between the parents who have been divorced. It is a case of pull devil pull baker, one tries to spoil the child, the other tries to turn the child against the other parent. I am afraid that there are certain lamentable results which may follow. It is the division between the two which makes life so difficult and perplexing for the child—I think that there is a further answer which I can advance in respect of your difficulty. I think that you rather postulate this position, that if this remedy is not introduced the difficulties will not arise. In paragraph 22 we controvert that position very strongly.

6634. Yes, I have studied that, as regards the perjured evidence which leads to divorce on the ground of adultery, but there is this comment to be made. If it is said that "the difficulty of getting divorce leads to perjury, therefore divorce should be made easier", is it not a little like saying—to take perhaps not a complete analogy—"It is the fault of people owning private property, that leads to others committing burglary and hitting them with coshes in order to rob them, therefore let us abolish private property altogether"?—Of course, in some States that view is publicly expressed and publicly carried out.

6635. Quite true.—And I am not going to say that that is necessarily wrong, though it may, of course, give the law courts a great deal less to do. But I would with great respect, my Lord, put this position, that the law as it stands is unfair to the extremely scrupulous spouse and favours the unscrupulous spouse. Two spouses who cannot live together and who in fact decide to part, neither having committed any matrimonial offence and both being extremely scrupulous people, have to sit with folded hands for the rest of their lives in this deplorable position. Two spouses who are not troubled by the scruples found by the extremely honest couple, arrange to have a divorce and, under the law as we know it, they get that divorce in a great many cases, and it seems to me that the choice before us is simply this. Do you continue to connive at the hypocrisy of the present position? Do you prefer hypocrisy to facing up to the facts and providing an honest remedy for decent people? If you refuse that remedy, then I am quite convinced that the sort of thing which goes on in our courts in Scotland and, I have no doubt, in England, will continue to go on. People will get divorces on grounds which are not really based on truth. That is the simple issue, as we see it, the choice between hypocrisy, on the one hand and, on the other hand, facing the facts and giving a decent and honourable remedy. And may I add this, that I am by no means convinced that that would greatly increase the number of divorces, because, instead of forcing decent people into this deplorable act of arranging a divorce, it would allow them to take advantage of the new remedy available?

6636. May we now turn to your tenth proposition:—

"Either spouse should be entitled to raise an action of dissolution of marriage in the Court of Session, where the parties have lived separately for a period of not less than seven years immediately preceding the raising of the action."

That is, in effect, the provision embodied in the Bill which was brought forward by Mrs. Eirene White in the House of Commons?—It is, my Lord.

6637. I know that the consideration which lay behind that Bill was a sense of deep concern for the female partner and the children of illicit unions, and, of course, for the man who was party to them. It was thought very hard that there was no way of regularising such unions and rendering the children legitimate. I think

that substantially the same objections have been put forward to that Bill as those which I have already put on your earlier proposition, so I will not repeat them. Do you, within your own experience, know of many such cases in Scotland where the husband or the wife is looking for some such relief as this?—It would not be true to say that I know of many instances, but I can say I know of several.

6638. I think reference was made to New Zealand in one of your answers. With regard to Western Australia and New Zealand, I think you will be interested to know how they have dealt with this matter. The present law of New Zealand on this point is as follows:—

"Section 10. *Grounds for divorce.* Any married person who is domiciled in New Zealand and at the time of the filing of the petition has been domiciled there for two years at least (hereinafter called the petitioner) may present a petition to the Court praying for a divorce from the other party to the marriage (hereinafter called the respondent) on any one or more of the following grounds. . . ."

Then there are several grounds set out with which I need not trouble you, but ground (i) is this:—

"That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years."

And ground (j):—

"That the petitioner and respondent are parties to a decree of judicial separation made in New Zealand, or to a separation order made by a Stipendiary Magistrate in New Zealand, or any decree, order or judgment made in any country if such decree, order or judgment has in that country the effect that the parties are not bound to live together, and, further, that such decree of judicial separation, separation order, or other decree, order or judgment is in full force and has been in full force for not less than three years."

You observe that the second of those grounds is, I think, identical with your first proposal for the transition of judicial separation into divorce after three years, and the first of them, except for making the period three years instead of seven, is identical with your tenth proposition. What was done in that case was to impose the following limitation:—

"Section 18. *Discretion of Court in certain cases.* In every case where the ground on which relief is sought is one of those specified in paragraphs . . . (i), and (j) of section ten of this Act, and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of a petition praying for relief on the ground specified in paragraph (i) or paragraph (j) aforesaid the respondent opposes the making of a decree, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition."

In cases coming within your first suggestion, the grant of the separation order would be due to the wrongful act or conduct of the husband. So under the New Zealand provision the husband would not get his decree.—Yes.

6639. Now I come to Western Australia. There, the court is forbidden to grant divorces for separation where, *inter alia*, the petitioner has during the period of five years been guilty of adultery. Thus, there again, if that limitation were introduced, the scope of your tenth proposition would be very substantially reduced. In other words, Mrs. White's Bill, with that limitation, would fail to give relief in a very large number of cases?—I think so, yes.

6640. If these limitations were introduced, the number of people who could benefit under either of your proposals would be very small?—I think that is true.

6641. The evidence—I am speaking from memory, I am afraid—was to this effect, that in New Zealand they did try out the unsatisfactory proposals which are contained in your first and your tenth propositions, and the introduction of the limitation which I have read to you was as a result of strong objection to the provision in its wider form. First, do you think that these limitations

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were reasonable, and, secondly, supposing these limitations were introduced, would you still wish for the reform of the divorce law which you have put forward?—I had a little difficulty in following the New Zealand Act. Am I right in understanding that if the guilty party, who is in fact the petitioner, has been guilty of adultery, he is not entitled to get his decree of divorce if the other spouse objects?

6642. No, it is not quite that. The New Zealand qualification was: "If . . . it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition".—If that is so, my Lord, I have great difficulty in seeing the value of the New Zealand remedy at all. It seems to be almost valueless.

6643. (Lord Keith): It would apply to the case where parties just could not get on together, and separated.—I thought that the Chairman was referring only to propositions 1 and 10. I did not realise that he was referring to divorce by mutual consent.

6644. No, he was referring, I think, to the seven years' separation. There could be seven years' separation without the separation necessarily being caused by the misconduct of either one party or the other?—Yes.

6645. It might just be incompatibility or something of that sort, and the parties have separated. The qualification which is in the New Zealand Act, as I understand it, would not apply to that case.—I see.

6646. So it might apply to a considerable number of cases?—That is so, my Lord. Perhaps I should say that the main attraction of the tenth proposition, from our point of view, is the aspect which is set out in paragraph 25. We feel it is most unfortunate that where a spouse has just cause for complaint against the other spouse and refuses to live with him, she can all back and refuse to take any action at all, although she has a good ground of action, and he is left in this state of suspended animation.

6647. (Chairman): I follow. I turn now to your twelfth proposition, which deals with legitimization by subsequent marriage. You suggest:—

"It is inequitable that, while a man and a woman who have been cohabiting illicitly are permitted to regularize their position by marriage when they become free to do so, the position of the innocent offspring of the cohabitation cannot be so regularised."

If the child was begotten in circumstances where he could not be legitimate, because the parties were married elsewhere, it may not be altogether illogical to say that he remains illegitimate, though it may be very hard on him?—(Mr. Stott): Surely the point of legitimization is that it is introduced in the interests of the child? We are not concerned with the act of the parent. If the doctrine of legitimization by subsequent matrimony is recognised at all, surely the position of the parent at the time the child was conceived or born, with which the child has nothing to do, must be an irrelevant consideration. It seems to be illogical if you are trying to benefit the child by legitimizing it by subsequent marriage. If the interest of the child is what is at issue, as clearly it is, how can one consider something with which the child is not concerned?

6648. Your thirteenth proposition is:—

"Where a husband is earning a salary or wage, and the wife is entirely occupied in running the home, the wife should be entitled in law to a proportion of the husband's earnings, which should be regarded as her salary for running the home."

That, of course, does not deal at all with the case where both husband and wife are earning?—(Mr. Shaw): No.

6649. And it contemplates that the parties are living together, of course, otherwise it would not arise?—Yes.

6650. Do you not think that it would cause considerable friction in the home if the wife were given a legal right to a portion of her husband's salary? And your concrete suggestions do not deal at all, of course, with any share of income from investments of either of them?—I see no reason why you should not extend the principle suggested here to the case where a husband is not working at all, but is living wholly on investment income.

6651. I see. In paragraph 33 you say:—

"It may well be that some husbands are deterred from making over a percentage of their earnings to their wives each week by a feeling that it is unfairly to do so, or that they will be jeered at by their fellows if they do so."

Do you know of any such case?—This is a subject on which one does not readily obtain information.

6652. As you made the suggestion, I thought perhaps that you might have come across one of those shy husbands. To go on to concrete suggestions, in paragraph 34 you say, "If the right of a wife . . . is conceded, what form should that right take?" And then you say:—

"On the first view the simplest method would appear to be to enact that a wife has a right to a proportion of her husband's earnings, leaving it to the discretion of the court to fix the precise percentage. Such a method would, however, largely fail on the score of vagueness."

Is there not another strong objection to that—that before a wife could assert this right she would have to go before the court and have litigation about it?—I am sorry, my Lord, I do not appreciate that. Why should that be so?

6653. Because you say that the simplest method would be to enact that a wife has a right to a proportion, leaving it to the discretion of the court to fix the exact percentage.—I am sorry, I see the point now. That is precisely why we rejected the suggestion made in those two sentences.

6654. Then we come to the other suggestion. You say:—

"Where a husband's gross earnings do not exceed £1,000 the wife should be entitled to a maximum of one-tenth of the husband's earnings, as her salary for acting as housekeeper. The wife should be able to get this one-tenth by sending a registered letter to her husband's employer claiming this one-tenth. It should then be the duty of the employer to set aside the one-tenth each week, or month, to be called for by the wife, or to be posted to the wife, the wife bearing the cost of postage. Failure on the part of the employer to set aside the one-tenth, on receipt of a registered letter from the wife, should be an offence, punishable summarily by a fine. It is believed that such a method would largely obviate recourse to the courts."

While there may be some justice in that suggestion, do you not think that it is calculated to embitter relations between husband and wife, to give the wife this legal right which she can enforce by writing to the husband's employer?—If this proposal does create friction I regret that it would be an extremely salutary friction. There is no reason whatsoever why the man should take up the position that he is such a mighty creature that he, entirely at his discretion, can give his wife 2s. 6d. for the picture today and refuse it next week. I do not myself suggest for one moment that in the great bulk of marriages it would ever be necessary to assert the right at all, because I am quite convinced that in the great bulk of marriages these matters are settled amicably or more or less amicably—perhaps less rather than more. But I am quite convinced also, my Lord—and here perhaps I can draw on my political experience—I am quite convinced that there is a percentage of marriages where this question of finance causes a great deal of friction, and it is with a view to ending that great preventable unhappiness that this proposition has been made. At least that is one of the grounds, but it is also made, my Lord, on a second ground. It is, I think, the law of the land now that men and women are to be treated equally. Why should not women be treated equally in this respect as in every other respect? Why should a man who goes out to work and perhaps works in pleasant surroundings like the Parliament House—why should he be entitled to retain all the money he earns, while the woman who is doing an equally essential and vital job at home has no right in law whatsoever to any proportion of the earnings. After all, marriage is, as I understand it, a joint partnership and I do not know why the law should not recognize that. Therefore, first of all on the ground of equity, and, secondly, because in our experience this problem does lead to friction, we put forward this proposal. And I would suggest, with

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respect, that even if in only five per cent. of married homes this matter leads to friction, that is a very considerable sum of totally unnecessary human unhappiness.

6655. Thank you. Your fourteenth proposition is on the prohibited degrees of affinity, and I think the matter you had particularly in mind is that a man should be allowed to marry his divorced wife's sister and a woman her divorced husband's brother?—I suppose that is so.

6656. Your fifteenth and last proposition is:—

"Before a marriage ceremony, whether civil or religious, is performed, each spouse must produce a medical certificate stating whether or not he or she is suffering from a venereal disease, or from tuberculosis."

And if I may turn to the exact suggestion which is made in paragraph 39:—

"It is submitted therefore that it is most desirable that before marriage each party should be examined by a fully qualified medical man who would be required to issue a soul and conscience certificate, stating whether or not the party examined is suffering from any venereal disease or from tuberculosis."

If you are going to have this examination at all, would you limit it to venereal disease and tuberculosis? What about epileptic fits? Is it possible to ascertain whether a man has had or suffers from these?—This proposition no doubt demonstrates our ignorance of medicine. We are under the impression that both venereal disease and tuberculosis are diseases which can be transmitted to children, and it was particularly in the light of that that we thought it desirable that there should be an examination in regard to these two matters. But I concede at once that it might be desirable, assuming that is a good proposition, to include other matters in the medical certificates as well.

6657. (Lord Keith): I have very few supplementary questions I wish to ask, but on your first proposition you did refer to the Report of the Gorell Commission, and I see that the grounds on which the Gorell Commission made the recommendation were stated thus:—

"But if separation is an undesirable remedy, and leads to immorality, and is a heavier punishment than divorce, it seems unreasonable that the judge should have no power to make a divorce decree. If a party sues, where there is ground for divorce, the remedy claimed is not one which concerns that party alone, but also the parties, the children, the State and the interests of morality, and should not be left to the caprice of the one party."

Of course that recommendation was never implemented, but then none of the recommendations of the Gorell Report received any legislative notice until 1952. What I gather you are suggesting in your first proposition is very much the same as was recommended as far back as 1912, and am I right in saying upon the same grounds?—That is my recollection, my Lord, and I would enter this rider if I may: that we have not actually gone as far, I think, as the Royal Commission of 1912.

6658. I am not sure that you have not gone further in this way—that in 1912 the recommendation was that it should be left to the discretion of the court and also that the application—perhaps this is where you say you have not gone so far—the recommendation of the Gorell Commission was that the application should be made at the time, in other words, that there should not be three years' separation?—Yes, my Lord.

6659. So that in one respect you do not go quite so far as the 1912 recommendation, in that you say that there should be three years first of all, but in another way you do go further in that you make it a right of the separated party and not a discretion of the court?—That is so, my Lord.

6660. But so far as the reasons that influenced the Gorell Commission are concerned, they are very much the same reasons as you are putting forward today?—Well, my Lord, I would modestly put it the other way—we respectfully agree with the Royal Commission of 1912.

6661. Mr. Shaw, did you have the recommendations of the Gorell Commission before you when you prepared the first proposition in this memorandum?—I certainly read them about a year ago, but I would not like at this distance of time to charge my memory with the exact recommendations or the exact grounds on which the

recommendations were made. I do not think, if I may say so, that the grounds we have advanced here are very far away from those which influenced the Commission of 1912. (Mr. Stott): I do not think that the Society, at all events when considering the memorandum in general, had the 1912 Commission's recommendations before it. The Society took the view that instead of looking at the matter from the point of view of guilt or innocence of one party—which might be difficult in some cases and not accurate, both parties possibly being to blame to some extent in very many cases—the Society took the view, looking at it from the broader point of view, that when the marriage had indeed come to an end, it was in the general interest that that should be recognised.

6662. It was then really an independent conclusion that you formed upon consideration of the facts as you saw them?—That is so, yes.

6663. The next point which I would like to ask you about is with reference to the safeguards that you suggest in paragraph 23, in dissolution of marriage by mutual consent. First of all, no party can bring such an action during the first three years of marriage?—Yes.

6664. Next, they must live apart for nine months?—(Mr. Shaw): Yes.

6665. Then, if they wish to pursue this remedy, they have to appear before a judge in chambers and state on oath that in fact they have been living apart for nine months?—Yes.

6666. And that they have ceased to have any desire to cohabit. Now, we have heard a great deal about the desirability of reconciling parties that have had matrimonial differences, and what was in my mind was this. If there was to be any reconciliation procedure set up—I am going to ask you in a moment whether you favour such a view—this would be a suitable time to try to effect reconciliation?—It would perhaps be as suitable a time as any other, my Lord, assuming that such machinery is desirable.

6667. That is the next question I was going to ask you. Have you any views upon the desirability of trying to effect reconciliation between spouses who have fallen out with one another?—My Lord, here I express a purely personal view. Theoretically, to try to effect reconciliation sounds quite attractive; in practice, one wonders where one would get a sufficient number of conciliation officers; whether one could ever hope that they would all have the tact to improve matters instead of making matters a great deal worse. And thirdly, I think one would have to be very careful to guard against what I am convinced many couples would regard as an unwarranted intrusion. After all, matrimonial matters are always very delicate matters and, speaking for myself, if I were in that unhappy position I feel sure that I should take pretty strong measures against any conciliation officer who dared to knock on my door.

6668. It is not quite a case of knocking at your door, but a case of a judge in chambers saying, "Now, look here, I would like you to discuss your difficulties with some conciliation officer, and I will adjourn the matter to give you an opportunity to do so."—My Lord, if I may say so with respect, it would depend very largely on how the judge advanced the proposition. If he pointed out that there was such machinery available and that in his opinion the parties should seriously consider using it, I would respectfully agree that that would be a desirable step, but anything beyond that seems to me to be very dangerous and perhaps very objectionable.

6669. You see, this is the sort of procedure where parties are not coming up at arm's length in a litigation; they are trying to adjust what I shall call an amicable divorce, and therefore it might be reasonable enough in the course of these proceedings for an amicable divorce that some steps might be made to produce an amicable reconciliation.—I would respectfully agree, my Lord, particularly in view of the fact that we have suggested that this first step should be in chambers where it would be entirely private.

6670. The next stage is that nine months after the first appearance before the judge in chambers, the parties then appear in open court and swear that they have no desire to cohabit, and that they have lived apart continuously since their first appearance—that means eighteen months?—Yes.

6671. Next, the court in addition has to be satisfied by other evidence that in fact the parties have lived apart continuously for eighteen months?—Yes.

6672. And if all the safeguards are fulfilled then the decree would be automatic?—That is so.

6673. Now may I turn to your thirteenth proposition, which raises a thorny problem, as you so doubt appreciate? Your suggestion is that the wife should have a legal right to a proportion, one-tenth you suggest in one case, of the husband's earnings?—Yes.

6674. Now, take it that the husband, having paid all expenses of his home and his income tax, is left with nothing but a pittance. You could hardly give the wife a tenth of his salary. Supposing he has £1,000 and after he has met all living expenses and tax he is left with only £20 or £30 savings. He could not possibly give the wife £100.—Let me say at once that the figure of ten per cent. was taken merely by way of illustration.

6675. I do not care whether it is ten per cent. or one per cent. or 0.5 per cent., you surely cannot give the wife a legal right in his gross salary? It must surely be in respect of what profit or balance he has left after he has paid all proper expenses?—That may be so in theory. I would, with great respect, doubt whether your Lordship's example very often occurs in fact, and if I may recount a personal experience—not very long ago I addressed the women's section of a Labour Party Branch in a large Scottish city. One of the matters I put before them was this proposition, and a great many views were expressed in this sense: that the husband gave a very small proportion of money for housekeeping expenses, far too small a proportion, kept the rest for himself, and the wife was left literally without a penny, because whatever was allotted to her did not adequately meet the expenses of buying food and so on. I do with great respect, my Lord, say that I do not think that in practice the situation postulated by your Lordship would arise in the majority of British homes. I quite see that the higher up the income scale you go, the more perhaps it might become applicable.

6676. But the case that you have given is rather a case where the husband is not providing adequately for the home. In other words, he is not expending the proper amount on living expenses. That is not a case of not giving his wife enough for her own personal use. It is a case of not giving enough for the maintenance of the home.—But, my Lord, the surplus left over, I was given to understand, was spent—and it was a considerable surplus—on things like beer and betting and football pools. And that is why I venture to challenge the figure quoted by your Lordship.

6677. I quite agree that there may be such cases, I do not dispute that for one moment. On the other hand, there might quite well be the case of the working man, or any other man, who gives the wife the bulk of his salary or wages for her to run the home and keeps a comparatively small sum of pocket money for himself. I suppose that does occur?—I think that would represent the majority of cases.

6678. And you see, Mr. Shaw, over and above that, you are suggesting that the wife should have a fixed proportion of the man's wages for her own personal use. It does not seem to me that that will effect even an approach to justice in perhaps the bulk of cases, because I do not think that in the great bulk of cases at the present time, looking to the cost of living and one thing and another, there will be a great deal left over, after all living expenses have been paid, out of which to pay the wife anything.—I do feel that this is very largely a matter of degree rather than of principle, and if your Lordship thinks that ten per cent. is too high—which it may very well be—then one per cent. or even one-half per cent., would at least meet one of the grounds on which this proposition is advanced, namely, that it will not do for the law to say that husband and wife or man and woman are to be equal before the law, and then to say, but of course there is an exception, which is the effect of the present law.

6679. I am fully in sympathy with the principle; I am only questioning its practical results and even with one-half per cent.—one-half per cent. of nothing is nothing, and if there is no balance the wife gets nothing.—I concede at once that, theoretically, the position advanced

by your Lordship is the better one, if I may say so with respect, that you should allot a per cent. of what you might call the net free balance, but then the practical difficulties of that seem to me to be so overwhelming. The one thing, if this is to work at all, is that the wife should know, not by recourse to the courts at all, but by common knowledge throughout the land, that the wife is entitled to a per cent., and that the x per cent. should operate on a figure about which there can be no possible dispute, namely, the amount paid to the husband by way of wage or salary. It is looking at it from the practical point of view that we suggest this particular machinery.

6680. I can see grave practical difficulties either way, but I wonder if Mr. Stott has any views on this matter?—(Mr. Stott): I am afraid not; I was in the unfortunate position of being one of the minority on this matter. (Mr. Farquharson): I was in the same position as Mr. Stott. (Mr. Shaw): Perhaps I might add this: at the meeting to which I referred a moment ago, a vote was taken on this proposition. Not a single woman, and there were between eighty and ninety present, voted against it; eighty per cent. voted in favour of it and approximately twenty per cent. abstained because they considered that they would like to think it over a bit more.

6681. I have only one further question to put to you on this. Are you suggesting that the x per cent. of the man's wages that the wife is to get would be paid to her tax free?—My Lord, again it depends very largely at which income level one is operating.

6682. I am assuming it is at a level at which the man is paying income tax—that is all I am assuming—I do not mind whether it is a low level or a high one.—If on payment of his wage or salary the tax is deducted before he receives the net amount, then I think quite plainly there is no difficulty in operating the x per cent. on the net amount.

6683. (Mr. Justice Pearce): Broadly speaking, under your proposed scheme you allow a dissolution of marriage either where both parties say that they want it, or where one says that he wants it and the other objects, subject to a seven-year veto in favour of the objector. In broad principle that is how it works out?—I would prefer, if I may, to forget about Mrs. White's Bill and simply take our first proposition—we say, subject to a three-year interval.

6684. I do not follow. Do you mean that in your scheme you are not proposing that there should be a divorce by a man who has left his wife after seven years? I want to take the framework you have put before us so as to consider it as a general framework.—Mrs. White's Bill, I understood, was an attempt to meet the case where a man had not deserted his wife, where both parties had drifted apart—which I think is rather a different case from that postulated in our first proposition.

6685. I thought you were suggesting that, where spouses had lived apart, that would be a ground for divorce after seven years without any exclusion of a pursuer who had himself caused the separation?—Yes. (Chairman): The first proposition is that the delay which can be imposed by the objector is only three years.

6686. (Mr. Justice Pearce): I am obliged to my Lord. As a matter of fact I was not for the moment dealing with the question of converting a decree of judicial separation into a divorce. In that case, in a sense the objector has gone halfway. I was dealing, however, with the other proposal, which, in my right in thinking, is that where the parties have lived separately for seven years either party can get a divorce?—Yes.

6687. So that the husband can leave home and get a divorce after seven years?—Yes. But . . .

6688. Well, why not?—I am rather demurring, if I may, to the phrase "the husband can leave home". That seems to me to indicate desertion, whereas proposition 10 rests on mutual separation.

6689. But you have to examine the scheme to see what it allows. I quite see that if both parties want to live happily together, they will go on and will not be interested in the law. But you are making proposals for widening the law to allow people who do not fit into the existing situation to better their position. Your scheme does allow

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divorce by consent or divorce against the wish of one party, subject to the objecting party's right for seven years to hold up the divorce?—That is a way of formulating it.

6690. I suggest that matrimonial law ought to be looked at as a scheme to see its general effect, because I am suggesting to you that that scheme shows rather a bias in favour of the break-up of marriage as against maintaining it.—With great respect, I differ.

6691. Let us look at something which is a partial analogy. If you allowed in the law of contract not only, of course, breaches by mutual consent which we now have, but breaches by one party against the wish of the other party subject to some limited veto by the objector, do you think that that would help or hinder the stability of contracts? It is a perfectly simple question—whether it would help or hinder the stability of contracts if you allowed one party to break a contract against the wish of the other?—I must confess that, stated as a general proposition, I am not clear that I appreciate the analogy.

6692. We have not got to that stage yet. I just want your answer whether you think it would help or hinder the stability of contracts to allow one party, subject to some temporary veto, to break a contract against the wishes of the other party?—(Mr. Stott): I should have thought the answer was, as regards contract in general, irrelevant, other than the contract of matrimony.

6693. I was not discussing matrimony at all; I was discussing legal contracts. Would it help or hinder their stability?—I would say neither; it would have no effect. I could not imagine a party making a contract, other than that of matrimony, considering what the state of the divorce law is when the contract is entered into.

6694. I was not discussing matrimony but commercial contracts. Would it help or hinder the stability of commercial contracts if one party was allowed by law to break a contract?—It would undoubtedly hinder it. There can be no two answers to that.

6695. It would in that case, as a matter of fact, ultimately destroy the contractual system, would it not?—Yes, if it were made general, that is so.

6696. It is in fact the negation of the system. I said that it was only a partial analogy for this reason—that marriage is something deeper and more important than a contract and it involves status as well as contractual rights. You would agree?—(Mr. Shaw): Yes.

6697. There is another matter which, I think, is not a close analogy, but helps one to focus one's view on this point. You and I would deplore the large number of criminals who are being sent to jail yearly and are in jail. Do you agree?—Yes.

6698. You and I both realise that if you abolish the criminal law there would be no criminals?—Yes.

6699. You and I would never contemplate that as a reasonable solution?—No.

6700. For these reasons, that first, you hope to educate the people up to the state where there will not be any criminals; secondly, you hope that the criminal law deters those who have good and bad impulses and, without the existence of that law, might act wrongly, but with it will not act wrongly. Would you think that is fair?—One might hope, if I may say so, but it remains a hope, a speculation, as to whether the criminal law does or does not have that effect, in my view.

6701. I fully appreciate the help that your suggestions would give, first, to a class of people who have had misfortune in their choice of partner; secondly, to a class whom one might describe broadly as non-monogamous—those people who do not really desire a permanent and stable marriage, who are not fitted to it by nature. On the other hand, have you considered the possible effect on a large number of people, whom one might describe as neither particularly good nor bad, but who are, like the ordinary run of men, subject to good and bad impulses? Now, if a man knows that he really ought to go on living with his wife and children, and although it will be tiresome at times, he could really make a go of it if he tried hard enough—but at the same time sees what fun it would be to live his life with some more congenial person whom he has met, then, in the case of such a man, to allow divorce by consent is making it easier for him to follow the less worthy cause, is it

not?—I am not sure that I follow that, Sir. Allowing divorce by mutual consent, you say, is making it easier. He may hold all the sentiments you ascribe to him, but, after all, the basis of mutual consent, as we have suggested here, is that both parties should find the marriage, the living together, intolerable.

6702. I am obliged that you raised that point because that brings me to another class of ordinary human beings, a very common class that one comes across. Take the case of a wife, who is really a conscientious person and wants to do the best she can for her husband, and who worries day and night as to whether she ought to consent to divorce and would probably consent in order to make him happier. There you have got, I suggest, a case which one must face, where your suggestion would help the husband to the less worthy course, instead of helping to stop him take the less worthy course.—I feel that that is a very hypothetical case indeed, if I may say so. First of all, if he has an appetite for another woman, if I may put it that way, I am not at all sure that he is going to bridge that appetite until he has persuaded his wife to agree that they shall go forward and get a divorce by mutual consent. In the second place, I should very much doubt whether even the most self-sacrificing wife is likely, if she is told by her husband, "Let us go and get a divorce by mutual consent because I want subsequently to marry Miss X"—I should doubt very much indeed if most wives would acquiesce in such a course. I concede that it is a hypothetical possibility.

6703. I would suggest that you are underestimating the ordinary human being when you talk of a man's not bridling his appetite. You are forgetting the ordinary man who has a decent and a less worthy motive running simultaneously, and is genuinely drawn first by the one and then the other. Also, I suggest that there are a large number of women who are very ready to sacrifice themselves for what they believe to be their husband's happiness. Would you not agree?—I will not agree about the large number necessarily, but I have no doubt there are some.

6704. Take, for instance, the number of women who bring divorces where they could bring separations. You said that you had not considered the question of a wife's right to a pension on divorce. But you would not disagree with a gentleman of experience, who gave evidence before us, as to how much harder it is to collect maintenance for an ex-wife when the husband has married again, than to collect maintenance for a wife whose husband has not re-married or from whom she is only separated?—Yes, I see.

6705. And I would put it for your consideration that there is a very large number of women—and men also, no doubt, but particularly women—who have a divorce when they would rather have a separation, purely out of unselfishness in considering the other spouse's position. Would you not agree?—I would query that very much. Correct me, please, if I am wrong—but I understand that an English judge can in his discretion award alimony after the divorce. In Scotland a Scottish judge cannot.

6706. Yes, but you see the problem is with the ordinary wage-earner, who is the usual person we are dealing with. The woman on the spot is always liable, is she not, to get the money and the first wife goes without? You have no experience of that?—I concede at once that it is more difficult for the first wife to get the money, unquestionably.

6707. That rather led us aside from what I was saying, namely, that your suggestion of divorce by consent might—I am merely putting the argument to you—might fail to give a help in the right direction to many married couples, where help in the right direction might result in a happy marriage.—That of course is a possibility, but we have provided a number of safeguards, and one of them is a conciliation officer at a particularly important stage. And I would say again that I am not impressed by hypothetical objections I am sure were advanced in 1920 and were not accepted, and we find that this particular provision or something like it works satisfactorily there.

6708. (Mrs. Jones-Roberts): I have only one supplementary question, Mr. Shaw, on your recommendation in regard to the transmission of a decree of judicial separation into divorce and the other recommendation as to dissolution of marriage after seven years' separation. I am quite sure that part of your difficulty in this matter is the thought of the extra-marital unions that do in fact take place in these circumstances, and I fully appreciate that you have a good deal of difficulty in trying to give any estimate of the volume of this trouble. But could you enlighten us in a general way, and tell us whether the trouble, let us say in Scotland, is of such dimensions that the public conscience is moved about it; and secondly, whether the parties to these unions make themselves vocal and ventilate their problems, say, by letters to their M.P.'s or letters to the Press or through some other medium?—We do cite certain figures in paragraph 2.

6709. Yes, those are the separation decrees granted annually, are they not, in Scotland?—Yes, broadly speaking you may say the number averages 290. Of course, there is no follow-up machinery which could ascertain in how many of these cases the husband, who is usually the guilty party, subsequently re-marries. It may be that the Registrar General could give such a figure, but certainly the Civil Judicial Statistics for Scotland do not reveal it. That is as far as I can go, I think, in regard to the first part of your question. We have this figure of roughly 290 per annum of actions of this kind, subject to the qualification that we set out, namely, that this is a lump figure which includes certain other types of related actions.

6710. (Lord Keith): You have said that you have no statistics as to how many re-marry. They could not re-marry, they are separated.—No, I meant, my Lord, how many of these people form illicit unions and have illegitimate children. It is possible that the Registrar General could give a figure for that. I do not know. In regard to the second part of Mrs. Jones-Roberts' question, about how many people make the matter vocal, I should say that very few do it by means of writing to their M.P. or the Press. The reason for that, I think, is pretty obvious—the so-called guilty husband frequently removes to another town, sets up a new household there with his illicit partner, and they are regarded by their neighbours and everyone else as really married. In those circumstances I think it is quite plain that the very last thing they would do would be to attract attention to the true state of affairs.

6711. (Mrs. Jones-Roberts): Thank you. What I want to know is how you have arrived at the position where you feel that this recommendation is urgently and seriously called for. I think it must be that in a general way you feel that a problem exists, but you are unable to give us actual figures?—That is so—other than the figures we give here. I may perhaps add this: I understand the law of Scotland to be that a decree of judicial separation cannot be recalled except with the consent of both parties or, alternatively, unless the two parties without asking for recall simply resume cohabitation. But the wife, having got her decree, has the whip hand for the rest of her life if she chooses to use it.

6712. (Lady Bragg): Mr. Shaw, I have one question on a wife's right to a share of the husband's salary, which is dealt with in paragraphs 32, 33 and 34. I gathered that your two colleagues did not agree with your recommendation?—(Mr. Stott): It was the view of the Society after hearing arguments on both sides, notably from my colleagues, Mr. Shaw.

6713. Has the idea been put to you by any women's organisations? I appreciate this meeting that you spoke of, but I gather, perhaps wrongly, that you put this idea to them and not they to you?—(Mr. Shaw): I was asked to give them a general address on the present law and the possible reforms, and I mentioned this as a possible reform. I would perhaps add, though I do not want to be in any way dogmatic about it because the difficulties of translating from one language to another, particularly when you are dealing with legal matters, are so great, that I think that there is at least some reason to believe that something of this nature has been the law of Denmark for a considerable number of years.

6714. I was only going to suggest to you that if it was put to eighty, or any number of women, without their thinking about it seriously, you would probably

expect them to vote in favour, would you not?—I think that they would be extremely foolish if they did not.

6715. (Mr. Beloe): Could I ask you about the figures in your second paragraph? Am I right in thinking that some of these people would not object to separation at all? Are you not rather assuming that all these defendants in the separation actions were wanting a divorce?—I am not sure that I follow that. The pursuer raises his or her action on the ground of cruelty or misconduct. It is open to the defender to defend if he so chooses—he may defend and he may be successful. These figures, I think, are figures of decrees actually pronounced, and the offending spouse may be fully satisfied of the fact, after taking legal opinion, that he has no defence.

6716. What I was trying to find out was whether you thought that all the defendants would have preferred divorce to separation?—One cannot really do anything but express a personal opinion there, but I should think that the great majority would. You see, under the present law of Scotland, a wife is rather driven to preferring this remedy because it preserves to her a right of alimony, whereas if she gets a decree of divorce, that right is not available.

6717. (Lord Keith): Is it not a remarkable thing in Scotland that where women get no maintenance after divorce they seem much to prefer divorce to separation? There are far more divorce actions than separation actions raised by women?—I entirely agree, my Lord, and if I may say so, I think that it says a great deal for the other sex that they show that preference. But I think one must also face the fact that because some women choose judicial separation, it is not necessarily because of the alimony question. I think that that is demonstrated by the large preference for divorce. It may very well be because, out of sheer vindictiveness, they prefer to put their husbands in a position where they have no matrimonial home, and can have no licit matrimonial home in the future.

6718. (Mr. Beloe): Could we examine this question of vindictiveness? It might not be vindictiveness, it might be religious scruples?—I accept that at once.

6719. It might also possibly be that the wife is thinking of the welfare of her children, and wants to stop her husband from marrying someone else?—I agree except that at once, but I would suggest that one should not assume too readily that the bulk of consistorial cases are cases where there are children. In the Civil Judicial Statistics for Scotland one finds that in the year 1948 out of 2,000 odd divorces where decree was granted, 1,200 were cases where there were children, and 800 were cases where there were no children.

6720. We are talking about separation, not divorces.—I accept that. (Mr. Stott): I cannot myself recollect any consistorial case in which I was ever consulted, in which either party preferred separation to divorce, except on religious grounds or, in the case of the pursuer, financial ones. Otherwise, I think invariably in my experience the party preferred divorce. (Mr. Shaw): I would concur with that, but of course one cannot always be sure that a person is giving his or her true reasons for preferring separation.

6721. But I rather gathered from you that most of these people who obtained a separation were spiteful wives?—No, if I gave that impression I withdraw it at once. I said that that is a possibility which one must bear in mind. (Mr. Stott): Finance is undoubtedly the reason.

6722. So there may well be people who have what some people would regard as quite reasonable grounds for preferring separation to divorce?—That is so.

6723. And there are, are there not, really very few separation cases every year?—(Mr. Shaw): Roughly. I would say, about one-tenth of the number of divorce cases.

6724. The corresponding ratio is, I think, about one-half in England. That is rather interesting, is it not, because in England maintenance can be obtained after divorce? I wonder whether you feel that there is any strong public opinion in Scotland that wants this particular change in the law?—I would answer that with

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respect, if I may, by saying there is never any strong public opinion for divorce law reform at all. If there was I do not think that we should witness the deplorable spectacle of private members like Mr. A. P. Herbert having to put through Bills, instead of the big political parties fulfilling their plain duty in reforming the law.

6725. There was public opinion in favour of Sir Alan Herbert's proposals, was there not?—He got his Bill through by a measure of luck and skill and tenacity, and there was a section of enlightened public opinion, but it did not unfortunately extend to any of the political parties. And the views of the latter are, to my mind, a means of testing public opinion.

6726. I wanted to know whether you felt that there was any very strong feeling in favour of this reform?—I think if I can put it thus way—amongst those who are familiar with the facts, which is after all a very small section of the Scottish population—there is amongst some of us at least very strong feeling on this issue.

(At this stage the Convention adjourned for a short period.)

6727. (Mr. Beloe): I think that just before the adjournment you used the word "familiar", Mr. Shaw. Did you mean people familiar with public opinion, or familiar with the circumstances which we were discussing?—I was referring to those familiar with the particular problem. After all, people are not aware of this problem, I think, unless they are the actual litigants, or, alternatively, unless they are lawyers or judges. It is not the sort of problem that impinges very much upon public opinion generally.

6728. But I imagine that a lawyer is very much more familiar with the divorce situation than with the separation situation, according to the figures?—I think it is true to say that the solicitor in Scotland is more familiar with judicial separations than is the advocate, because the overwhelming bulk of such cases, according to the official statistics, come up in the Sheriff Court and not in our Supreme Court. But, as I mentioned at the beginning, our Society is composed both of solicitors and advocates.

6729. And the solicitors take the view that judicial separation ought to be terminated?—I think that I can only ask my friend, Mr. Farquharson, who is a solicitor, to answer that. (Mr. Farquharson): I think that, generally speaking, the answer is, yes. Every solicitor meets with cases where nothing can be done to remedy what can be a wrong, namely, that the husband, or the wife in certain circumstances, wants to re-marry, but cannot do so because judicial separation still exists. It does develop into a social wrong, you have children born illegitimate, and the first pang of that social wrong invariably arises when a child goes to school and has to produce the birth certificate.

6730. But, presumably there are comparatively few of these cases?—There are comparatively few, and, as has been said by my colleagues already, those cases are mainly raised for financial reasons and for religious reasons.

6731. May I turn to your proposal for divorce after seven years' separation? Why did you choose the period of seven years?—(Mr. Shaw): Mrs. White's Bill had already opened the field, and seven years was, I think, the period she chose. But I see nothing sacrosanct in seven, personally I think three is nearer the mark, but seven years is a period which does seem to have received a certain amount of public acceptance.

6732. Are you aware that Mrs. White also said three?—No, I am not. (Mr. Stott): If a man has disappeared for seven years, that is the period after which the court can presume he is dead, so I think in the case of marriage that it is also the period after which one could assume that the marriage was at an end. (Mr. Farquharson): That certainly was the view of this Society when this decision was taken.

6733. What view would you take if in England a period of three years was adopted?—(Mr. Shaw): Personally, I can see no objection. I would not go below three, I think, but three or five or seven seems to me to be quite an appropriate period.

6734. How can you justify three years as distinct from two?—Logically, perhaps you cannot. (Mr. Stott): If a marriage has ceased to exist for three years then, I think

it is unlikely that the parties of the marriage will ever come back together again. I cannot recollect any case where the parties have been separated for three years and have started the marriage again. If you get below that figure you get that possibility.

6735. But supposing three years were adopted, you might well have people then pressing for two years, might you not?—(Mr. Shaw): Undoubtedly, just as you might in the case of desertion, but there would be much stronger public resistance, I think, the shorter you make the period. (Mr. Stott): But surely it is a question of fact, has the marriage come to an end? When can you recognize that the marriage has actually gone? And three years seems to be a reasonable time. For anything less than that you might say that the marriage has not worked for the last two years but it might be resumed again, but if the marriage has gone for three years—my colleague pointed out that seven years is the period which is specified here, and it would be pretty certain that after seven years of non-existence the marriage would not be likely to be resumed again.

6736. It is rather difficult, once you give away the principle, to decide what the period should be, is it not?—(Mr. Shaw): I entirely agree, but I would support Mr. Stott in saying that if parties have been living apart for seven years, or even possibly for five or three years, the chances of their coming together again, in our experience, are extremely remote, so remote as really to be outside the realm of the practical. (Mr. Farquharson): You have the additional point that the three years and the seven years have already stood the test of time.

6737. The seven years because of presumption of death?—Yes.

6738. May I now for a moment refer to your ninth proposition, which is for divorce by mutual consent? Had it occurred to you that it would be possible, if such a cause of divorce were enacted, that coercion could be put upon one of the parties to the marriage, to persuade him or her to say that he or she agreed?—I think that is theoretically a possibility.

6739. An unscrupulous partner could almost force a marriage to break up, could he not?—(Mr. Shaw): May I say that I think not? We have proposed three different safeguards, and one of them is that the court must be satisfied, by independent evidence at the second hearing, that the parties have in fact lived apart; and I think in that statement "have in fact lived apart" there is plainly implicit, "lived apart voluntarily", not under coercion? I would be very slow to agree that you could get the degree of independent evidence that the court would require, without the court becoming aware of that, that this was not really mutual consent, but was a determination on one part, and a pretended determination on the other part springing from coercion.

6740. (Chairman): But, Mr. Shaw, I confess I did not read any such implication into the conditions which you set out. I thought that they were quite clear and definite. Let us just turn to them for a moment. First of all, dealing with the eighteen months' separation, you say: "In addition the court would require to be satisfied by other evidence that the parties had in fact been living apart continuously for eighteen months". Where is the further condition that they must be so living apart by the desire of both, and why should not, for instance, a wife who wanted a divorce and was forcing it upon her husband, absent herself for eighteen months in order to comply with that condition?—With respect, my Lord, the whole basis of this proposed action is that there is true mutual consent to the dissolution, and if that be so it seems to me that it is an inevitable inference from the sentence which you have just quoted that the court requires to be satisfied that the basic concept is fulfilled, namely, that it is true consent on each side to the dissolution of the marriage, and if the court were not satisfied as to that, then I think it would be justified in refusing the decree.

6741. At any rate, we are to take it that that is implicit in your proposal?—If you please.

6742. (Mr. Beloe): I do not think that you have mentioned anything about the children in regard to this divorce by mutual consent. Would you feel that there might perhaps be a greater reason to view this with disapproval if there were children of the marriage?—I find that a little difficult to answer. One of the reasons that

we have advanced in favour of this solution is that we want to end the hypocrisy, to use a polite word, which we witness so often in our law courts. We want to give people a chance to bring in honest remedy, instead of abusing an existing remedy. If you do not give them that chance they are going to go on abusing the present remedies, and the position of the children will arise in any event, it seems to us, so that that perhaps is a part answer to your question. But then you say, will it not also affect the well-being of the children—was that the point?

6743. Yes.—Every divorce, whatever the grounds, affects the welfare of the children, or may affect it.

6744. But this form of divorce will presumably produce more divorces, will it not, therefore it will affect more children?—I think that it is impossible to answer that dogmatically, because we hope that, if such a remedy were available, a very considerable number of people who now bring arranged divorces would bring honest reasons of dissolution. Therefore I am by no means clear that the sum total at the end of each year would necessarily be greatly increased.

6745. You do not think that this solution would be taken advantage of by selfish parents who would otherwise have decided to make a go of their marriage?—That is a possibility, but I myself would feel that in the great majority of cases they would not seek such a divorce just on selfish grounds without any care whatsoever for the well-being of the child.

6746. Do you think that there are many people in Scotland who would support this kind of divorce?—I can only speak, of course, from my personal experience, but I think that lawyers, contrary perhaps to public opinion, are on the whole a pretty honest body of men, and I think most lawyers find it distasteful to witness what undoubtedly goes on—though perhaps one could not prove it in a court of law—namely, the granting of what I might call "bogus" divorces.

6747. And that is why you propose this solution?—That is one reason. The other reason is simply this, that, as is suggested in paragraph 21, we feel that the whole basis of a marriage has disappeared where mutual consent has vanished. And, if I may put it in this way, the only people in this country who share with the Pope and Mr. Stalin complete infallibility are the judges of the House of Lords, while the rest of us are all extremely fallible human beings. But in effect the law says: "In regard to one matter and one matter only we all must be infallible; when it comes to choosing a mate we must choose right, and if we choose wrong we have no remedy unless there is a matrimonial offence". That implicit attitude of the law seems to me to be very far removed from the realities of everyday life, and I cannot see why this is the one field in which all of us must always be right in making our choice, and if we are wrong in making our choice and find we cannot live together because of complete incompatibility in every field, that we should be left in that position.

6748. There is a further point, that, having married, very many people have children and they therefore have a responsibility to them. I was wondering whether you felt that this particular solution might not rather weaken their sense of responsibility towards their children?—I would, with respect, think not. It is quite possible for two married people to find married life together impossible and intolerable and hateful, and at the same time to have a very deep sense of responsibility towards their children, and to feel their duties fully towards those children. I do not think that the two sentiments are incompatible in any way.

6749. You think that the parents can fulfil their duties towards their children if they are apart?—Not perhaps in the highest degree possible, given a normally happy marriage, but here of course we are positing that the marriage is not happy and that the children will sense the disharmony of the home and they will suffer in that respect. Are they going to suffer very much more, or suffer more at all, if there are separate establishments?

6750. You had not thought of bringing the question of the children before the court in a case like that?—Again, I do not want to speak at all dogmatically, but I think that in Denmark, where something approaching this proposal has been in force since 1920 or 1922, that is one of the factors which a judge does consider. I do not say that

it is a determining factor at all, but arrangements have to be made in regard to the children, and they have to be of a nature which the judge is satisfied is satisfactory.

6751. (Dr. Bain): We heard from the Church of Scotland, from Dr. Hutchison Cockburn, that he agreed that there is a great deal of perjury and many arranged divorces, and all the dishonesty of which you speak, but nevertheless he said, in answer to a question from me, that he considered the threat to the stability of marriage which might develop if divorce were extended to be a greater evil than the amount of dishonesty which goes on at present. Your view is that you think the perjury, and all that is associated with it, is the greater evil?—I am not sure that I have made up my mind on that question, but I would challenge the view expressed by Dr. Hutchison Cockburn in this way: has he any figures to support his view that this remedy is a threat to the stability of marriage? From what I know about Denmark I would flatly contradict any such assertion.

6752. It is a very generally held objection, it is the prime objection that has been put to us against the extension of the grounds of divorce.—Yes. As I have already said, I decline to be impressed by theoretical objections unless you produce very strong supporting evidence from countries where there has been practical experience as apart from theorising.

6753. One question about your suggestion for producing a medical certificate before marriage. You would agree that it would be better to have a general medical certificate rather than to single out two specific diseases, only one of which is transmissible to the offspring?—We really cannot speak with any strong view on that. It seems to me that it is primarily a matter for people with medical knowledge, but I think we do feel very strongly that it may radically affect the happiness of a marriage if one spouse discovers after the marriage ceremony is over that the other spouse is suffering from one of these diseases, particularly if the suffering spouse deliberately concealed this fact from the other.

6754. I agree with you, but I would like you to say whether you agree that you ought not to confine the certificate to these two matters?—I accept that at once.

6755. (Mr. Young): I would like to be a little clearer about the membership of your Society. Am I right in saying that in the main they are the younger lawyers who are members of your Society?—I am not quite sure what exactly "younger" means, but I think one can say that on the whole they tend to be lawyers under the age of forty, and I think most of them have had first-hand experience, day in, day out, in the divorce courts.

6756. That is what I wanted to bring out. I suppose it would be fair to say that the older you get as a lawyer the less prone you are to innovation?—I am not going to commit myself to a rash assertion to that. I think that there is at least one exception to that rule, if it be a rule—I do not think my illustrious namesake got any more conservative as he got older.

6757. Leaving lawyers out of account, the tendency as people grow older is not to want change?—(Mr. Stott): None of us wants unnecessary change, I think. We only want a change by which we think there is some object to be served.

6758. Some of us, Mr. Shaw, know that you have an intimate connection with France. Do you happen to have any knowledge of the French consultation procedure?—(Mr. Shaw): No, I am sorry, I have not.

6759. Will you turn to paragraph 24 of your memorandum, where you deal with divorce after seven years' separation? Lord Keith put it to you that if we were to adopt the New Zealand proviso, that would still enable those cases to be dealt with where there had been no matrimonial offence but the parties had simply drifted apart. Would not two other classes of case which are not unknown to solicitors also be included, first, the class of cases where a spouse has a right to bring a divorce but just will not be bothered to bring it? Does not that within your knowledge account for quite a number of cases?—I would respectfully agree. Undoubtedly we all know of cases, particularly of women, who have good grounds for divorce and fail to exercise them, usually perhaps on religious grounds, though the husband may

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not share the wife's religious views, but occasionally—and I think it is right to say occasionally—on vindictive grounds.

6760. I want to put it to you that in the case I quoted, and also in the case where a spouse is spiteful, if an action of divorce were actually brought against such spouses, they would not bother to defend?—Would there be a defence?

6761. I am assuming that there is a proper defence under the New Zealand rule. But in these cases, that is, in the case of the spouse who cannot be bothered to take action, and in the case of the spiteful spouse who is not too vindictive, they in fact would not take advantage of that defence and the so-called guilty person would get his remedy?—Yes, I think that might very well be so.

6762. (Chairman): Have you ever known a case where a wife failed to take divorce proceedings, having cause, simply because she could not be bothered?—I think one might go this length, that one has known cases where she has not taken her remedy immediately, but when she has met a possible future mate, she then acts.

6763. (Mr. Young): Following that up—I think this is a more appropriate question to the solicitor member of your Society, because he is more often in contact with wives who do not take actions of divorce—have you in your experience, Mr. Farquharson, met cases where a wife just will not be bothered to take a remedy?—(Mr. Farquharson): Yes, and I would concur in what Mr. Shaw has just said. They do not trouble to take action until they meet somebody else whom they wish to marry, and when they are in great haste to have their divorce go through as quickly as possible. (Mr. Stott): I have known divorces for desertion where the desertion took place twenty-five years before. (Mr. Farquharson): Can I just mention one other thing apropos the same point. I raised an action yesterday for petition of dissolution of the marriage, where the man disappeared in 1917 and the wife had not troubled until this year to take any action at all, and I may say, so far as the children are concerned, they are grown up and married and out of the house, and she is living all alone.

6764. Can I put something to you which you have not dealt with at all? It has been suggested in the course of the evidence that we have heard that we might introduce into Scotland a scheme on the lines of the English scheme of summarily getting a variation of aliment, by using our small debt procedure—I should say that it sounds very attractive. The Society, of course, has not taken a decision on this and any views I express are purely my own. My difficulty is to relate the summary procedure to the Divorce Act of 1938, whereby the court may—it is only permissive—may accept a decree of adultery and aliment or separation and aliment as all the evidence required, apart from the evidence of the pursuer, to grant a decree of divorce. By too readily adopting this summary procedure there is a danger that that point may be lost sight of.

6765. At the present moment, because of the fact that a full proof is necessary in the Sheriff Court, judges in the Supreme Court give a fair amount of weight to such a decree?—I would not agree with that. My experience in the Supreme Court is that there is only one judge who really recognises that decree and will grant the decree of divorce on the basis of that decree and the pursuer's evidence, and that the others insist on a full proof, the extract being used only as an admixture of evidence.

6766. If that is so just now, when we have a full proof in the Sheriff Court, it would be even more so if we had this summary procedure, would it not, and a judge in the Supreme Court would require to be satisfied that there was proof of desertion or adultery, as the case may be?—Yes, I agree with that.

6767. (Sheriff Walker): Where a decree of separation is granted, do the parties simply live apart for the rest of their lives, or do they sooner or later come together again? Or is there no information about that matter?—(Mr. Shaw): I am quite sure that there is no official information of the nature that you get in the official judicial statistics for Scotland. Therefore any view one

expresses must be based, I think, entirely on something within one's own personal experience or what one has heard from social workers.

6768. Basing it on your experience, can you give me any idea of what happens in the general run of cases?—I can only speak from my own very narrow experience, but I have been told—and I have in one case at least met a couple who are living together as man and wife and are so regarded by their neighbours and are treated with respect and friendship, and the basis of their unhappiness, their secret unhappiness, is that the law does not allow them to regularise their position.

6769. Are we not at cross-purposes, Mr. Shaw? I understand that some 280 decrees of separation are pronounced in a year. What I was wondering was, do those people really remain apart, separated, or do they come together again sooner or later?—I do not know.

6770. You see, it might be that if they came together again sooner or later, separation might be a good halfway house, as not dissolving the marriage, but allowing people subsequently to resume cohabitation. But there is no information about what happens?—(Mr. Stott): It is a very rarely that one hears of couples under separation coming together again.

6771. In the small proportion of cases where a decree of divorce is refused, sometimes one has heard a hope expressed that the parties may come together again, notwithstanding what has happened. Is there any information as to what happens to people who have been refused a divorce? Do they live together again, or do they simply form other associations?—(Mr. Shaw): I have had cases where decree has been granted and the parties have subsequently re-married. I have had even more cases where decree has been refused, and I can only say that I have never heard of a case where the parties subsequently resumed cohabitation.

6772. Thank you. Now I would like to ask you a question or two about your ninth proposition, that of divorce by mutual consent. I want you to assume a case where husband and wife are each minded to bring the marriage to an end as soon as possible, both divorce-minded, quite deliberately, if they can manage it. Am I right in thinking that in all cases the law as it at present stands enables them to get a divorce, by one party going and committing adultery and furnishing the evidence to the other party?—As far as I know, yes.

6773. I am assuming that there is nothing like collusion or concert between them, if they know enough about the law one goes away and commits adultery, tells the other one and there is a perfectly honest divorce. Would you agree with that?—Yes.

6774. If that is the position, why do you want divorce by consent? Have you not got it in substance already?—I think that that argument is always taken on the basis that one party has committed a matrimonial offence, namely, adultery. But then, by advancing this remedy, we want to cater not for the unscrupulous party who already has his remedy, as you have indicated, by following that course of conduct, but we want to cater for what we believe is the very large number of decent and honourable people who are not prepared to stoop to that kind of conduct, but who find it quite impossible to live together.

6775. Have you any information as to whether there exists any considerable class of people where, both sides being desirous of a divorce, neither of them will stoop to committing the act of adultery necessary to getting a divorce—or is that simply an imaginary body of people?—The number is not statistically ascertainable, that is certainly so, but I would strongly oppose any suggestion that there is not a great number of people in this position.

6776. (Chairman): Could I put one variant on that question, if Mr. Walker will forgive me? Do you personally know—because after all I think that was what Mr. Walker was getting at—do you personally know of any couples, who both want a divorce but neither of whom would stoop to the act of adultery in order to obtain it?—No, Mr. Chairman, I cannot say that I do.

6777. (Sheriff Walker): But I would be right, would I not, in thinking that if there are no such people, people who would stoop to committing adultery, there would be no need for your proposed new ground of divorce by consent?—I understand you to say that if we can take it

for granted that everyone is prepared to stoop to this deceit then this ground is unnecessary?

6778. Quite unnecessary.—That may be so, but my information is that in Denmark at least something like 1,000 people each year avail themselves of the very similar remedy which they enjoy there. I am not quite sure of those figures, but I think they are something like that.

6779. (Chairman): Are these taken from Denmark's judicial statistics?—No, my Lord, they are the result of research made by this Society by applying to Danish lawyers.

6780. I am sure the Commission would be very glad to have the figures on which your evidence is based.—You will appreciate, my Lord, that we made enquiry of people known to us in Denmark, to satisfy ourselves; I would not like to give their names publicly but I am very happy to give them to the Secretary, if that meets with your wishes.

6781. If you could give us in that confidential way the information you have from Denmark, we could then collate it with the other information which we propose to obtain.—Exactly.

6782. (Sherriff Walker): In the cases where adultery forms the legal ground of divorce, which I am sure are fairly numerous, has one sometimes the feeling that the adultery is not the real ground on which the divorce is raised, but some prior incompatibility or breakdown of the marriage? Would you agree with that?—I entirely agree.

6783. And in such cases, has the existence of children of the marriage much influence on the question of whether one party will raise the action, or has it little or no influence?—I do not think I can answer that, except that I might perhaps point out, in case it has any relevance, that the figures given in the official statistics seem to show that almost as many people without children go to the Divorce Court as people with children; it was eight-twentieths and twelve-twentieths, respectively, in 1948.

6784. I want now to come to your detailed proposal for divorce by consent. Do you recognise that a married woman may often act in her husband's interests, out of affection or fear, and not because of any real interest of her own?—I am not so sure about the fear, but perhaps in her husband's interests.

6785. Do you know of an old presumption which was sometimes applied by our courts in the case of a married woman, that where a married woman gave up some of her property in favour of her husband during her marriage, it was presumed that she did it through affection or fear, and not of her own free will, and the act was regarded as invalid? You recollect that?—Yes.

6786. That psychology might still prevail today, might it not, in spite of the equality of the sexes—or would you not agree?—Are there not two answers to that point? Under our proposal the parties have of course been living apart for nine months before they can make their first appearance in chambers, and then another nine months must elapse, so that the chance of coercion, at least, perhaps largely disappears.

6787. You are either going a step ahead of me. What I was wondering was whether your Society would recognise the psychological truth that a married woman may often act against her own interests because of affection for her husband?—That may be so, yes.

6788. Let me put a case to make it clear: suppose a couple have married early in life, and the husband reaches a position very different from his original position. The wife, in order not to interfere with her husband's career, might agree to a divorce, might she not?—I think so.

6789. In your scheme for carrying through divorce by consent, is the lapse of the eighteen months the only protection that you provide against a wife damaging her own interest through affection for her husband?—As I said earlier, I think that the basis of this idea is that the court must be satisfied that there really is mutual consent freely arrived at, and what you are postulating, I think, is not mutual consent freely arrived at but sacrificial consent.

6790. I am assuming that the wife did in fact consent to the divorce.—Yes, but that consent would spring from a sense of sacrifice, not from what we assert here, a realisation by both sides that it is impossible for them to go on living together happily.

6791. I am assuming that she actually consents, not because of her own interests but because of her affection for her husband. In the application there are two appearances before the court, once in chambers and once in the courtroom; would the two people, husband and wife, be represented by the same solicitor and the same counsel?—I should think that that would be highly probable.

6792. And apart from the court hearing the evidence of what these people say, and perhaps of two other witnesses, what means would the court have of finding out whether the wife was acting in her own interests and not out of affection for her husband?—It might be able to gather that from the independent witness, with the evidence that we postulate, but I can see of course that the court might not. But I would suggest that there is a simple answer to the case that you figured. If a wife is prepared to go in for all this sacrifice her husband might, to shorten the whole process, simply commit an act of adultery today and lodge his action of divorce on that ground next week, and the wife would say: "I know you are doing it, it is a postulated act but I know you are doing it to rid yourself of me".

6793. But the husband could not raise an action of divorce for his own adultery.—But he could ask his wife, this self-sacrificing wife, to raise it for him.

6794. But generally in these circumstances the wife would be advised by independent solicitors, would she not?—If she is a very self-sacrificing wife, which is what you are postulating, I think it is inevitable that she would fail to tell her legal advisers that her husband went out with her full knowledge and consent, spent a night with another woman and thereby provided the ground of divorce.

6795. Suppose you introduced in your procedure a provision that the court should appoint somebody to look after the wife's interest, it might be a welfare officer or someone like that, would you not think that that might help to protect the wife against herself?—I am very reluctant to give much support to the idea of an extra-legal officer, so to speak.

6796. Finally, Mr. Shaw, may I take it that you would not approve of divorce by consent if it were plain in the particular case that the wife was really sacrificing herself for her husband?—I agree at once, because that seems to me to offend against the whole basic conception of the proposition in this memorandum.

6797. (Mr. Mordoch): May I refer to your first and (only) propositions, under which you propose that an innocent wife can be divorced, subject to certain safeguards, by a guilty husband? You provide certain safeguards, one of which is that the innocent wife shall be entitled to alimony. I gather that you would think it wrong that an innocent wife should be divorced by a guilty husband unless her financial position were secured?—That is certainly so.

6798. Your avowed object in putting forward these propositions is so that the guilty husband may marry another woman and have legitimate children?—That is so in regard to the first proposition, certainly.

6799. Has it occurred to you that if that happens the innocent wife's order for alimony would not be worth the paper it was written on, and that she would get no financial provision at all?—I cannot speak, Sir, with any knowledge of that position, because I am not an English lawyer. Speaking purely as a layman, one would imagine that the position you have postulated would depend very largely on the earning capacity of the husband.

6800. If I am right about that, would you persist in these propositions?—I can only reply in this way.—Mr. Farquharson will correct me if I am wrong—we have experience in this country of the order of a court at the present moment, under a decree of judicial separation, not being worth the paper it is written on because you cannot, for various reasons, enforce it. In practice, therefore, I do not know that it makes very much difference.

6801. In England—I do not know whether it is the same in Scotland—if a woman obtains a maintenance order against her husband, in a magistrate's court, and then divorces him, the order in the magistrate's court remains in full force and effect—she does not get alimony in the High Court, she relies on her magistrate's court

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order. If that man re-marries—and you may take it that this frequently happens—you cannot enforce the wife's order against the husband, for the reason that his money will not feed two families and he will of course feed the family with whom he is living.—I appreciate the force of that, Sir, and I think that if you will look at our memorandum you will see that we have raised that express difficulty. . . .

6802. Mr. Shaw, if you concede that I am right about that, then your safeguard for the innocent wife seems worthless?—Then it is also true to say, Sir, that the safeguard for the innocent wife under the present arrangement is also worthless, that she is left in this position, that she is still a married woman and her husband is driven into an illicit union, from which illegitimate children result. We think that that is socially undesirable and that that position should be remedied.

6803. I know nothing about the Scottish courts, but you may take it that in the English magistrates' courts, certainly in the metropolitan area, if a man contracts an illicit union while his original wife has a maintenance order against him, the magistrate will take very little notice of the illicit union, and will make him pay as much as he possibly can to his legal wife.—I do not doubt that for a moment, but that position depends on the magistrate being able to find the erring husband, and in our experience that is often very difficult.

6804. To find the husband?—A magistrate in, let us say, London orders a husband to pay; the man removes without telling anyone except his illicit partner, to, let us say, Newcastle. Is it easy in every case to find out where he has gone?

6805. It is not easy, but you may take it that he would be found, because if a summons could not be served on him a warrant would be granted. Once the warrant has got into the hands of the police it will go all over the country until the man is found.—There may still be a very long time lag.

6806. Yes, but that is irrelevant. Do you agree that your safeguard for the innocent wife, if a man contracts a second marriage and has children, is worthless in the lower income groups?—(Mr. Stott): I cannot see myself why the claims of the first wife should not be preferred to those of the second wife and family. I cannot see why there should not be a legal obligation on the man who has married again to maintain his first wife as a preferential obligation.

6807. The reason is because he has not got enough money to provide for the two families.—Precisely, so what I was suggesting was that it might be possible for the courts to prefer the right of the first wife to the right of the second illicit family, just as at present the right of the first wife is preferred to the claims of the illicit family.

6808. Let me reduce that to what would happen. A man comes up on a summons. He is a man earning about £10s. a week and he has got a second wife and two children, and he says: "I cannot pay, I have to keep my new wife and two children". The magistrate says: "You have got to pay", and adjourns the case for a fortnight; the man comes back at the end of a fortnight and he has not paid. The magistrate then says: "You must prefer your first wife". He says: "I am not going to". The magistrate says: "Very well, then, two months imprisonment". The man goes to prison for two months. Whom does that benefit? Not his first wife.—That, of course, is a difficulty which one is up against in every case of a man failing to consider his wife and family, it often just makes it worse and it is very difficult to know what to do in such cases. And, of course, where there are two wives, the situation is complicated even further. One will always get that, where a man cannot or will not for one reason or another maintain his wife, and of course to put him in jail does not remedy the matter, but it seems that the difficulty is not any different from what is met at the present moment: because a man is maintaining two families—one is not a legal family, certainly, but you just get the same point—you cannot get him to maintain his legal one, in fact a man might work all the harder. I quite see the difficulty, I know that it is a genuine one and I do not say that it is easy to avoid, but I would not agree that

the proposal here worsens the difficulty in any way. The difficulty is bound to arise in a case where a man has either one large family or two families of different sizes. (Mr. Shaw): Might I add this? We propose in paragraph 4 that the amount shall be within the discretion of the court, and I understand that in England a judge has a complete discretion, once a decree of divorce has been pronounced, to decide on the amount of alimony, and it may be that the judge will say that the wife, the plaintiff in this case, is a young woman perfectly able to earn her own living, she has had a good job before she has married, there is no reason why she should not go back to that job, and I suppose the court may on occasion say: "We will award no alimony at all".

6809. (Chairman): As I understood Mr. Maddocks' point, it is this: if you have an innocent wife who is protected against the possibility of her husband re-marrying so long as she has committed no matrimonial offence, she is in a better position from the point of view of enforcing her order for alimony, than she would be if the husband was allowed to divorce his wife against her will and marry his mistress. In the first case, there is some prospect of the wife getting her alimony in spite of the irregular union, for the reason Mr. Maddocks has given, but in the second case the prospect of getting alimony is extremely poor. His suggestion was, that being so, you cannot put the innocent wife in as good a position financially as she was before this compulsory divorce.—I think that theoretically Mr. Maddocks may very well be right but I am not convinced from the little we know of this subject in Scotland that, while that may be the theoretical position, it is what is in fact frequently happens, because a man may very well rather go to jail than be deprived by the order of the court of the chance of supporting an illicit wife or a second wife.—Can obey the order of the court and pay money to a woman who is no longer his wife.

6810. There was one phrase which leads me to ask a supplementary question. I think you used the phrase, "A man is driven into an illicit union". Is a man ever driven into an illicit union? Is he not free to choose whether he goes into it?—He is free to choose the union, my Lord, but the law requires him to make it an illicit union, I will put it that way.

6811. (Mr. Mece): Would you turn to paragraph 33, which contains the suggestion that the wife should be entitled to a proportion of the husband's earnings? Do I understand that the basis of your argument is that in modern opinion there should be equality of treatment between the sexes?—I think broadly that is so.

6812. Are there any lady members of your Society?—I am told there is one.

6813. Have we got the full picture before us of this proposition, because my experience is in the industrial centres of Lancashire, and there for national needs the wife is asked by the Government to do her share of the work. Is the husband to have the right to a proportion of his wife's earnings?—I can see no reason why theoretically he should not, but do not forget that this proposition is directed exclusively to the case where one partner, presumably always the husband, is out working and the other partner is doing what we feel is an equally important job, running the home, but it is an unpaid job. That is what this proposition is directed to.

6814. (Chairman): You use the phrase, "the wife is entirely occupied in running the home", which would exclude such a case as Mr. Mece puts?—That is so.

6815. (Mr. Mece): May I put it to you that when a wife does go out to work she often, by force of circumstances, neglects the home?—I quite agree that the home is not in the condition that it would probably have been in if she had been able to be there throughout the day.

6816. Therefore the husband might say, "If you are going out to earn money for yourself, then that is your money which you can spend as you like, but I want my proportion of it".—That may be so, Sir, but I still, with great respect, do not see the exact relevance of that point of view to our thirteenth proposition, in paragraph 32.

6817. Only that you based it upon equality of the sexes?—(Mr. Stott): There cannot be many cases, can there, where the husband is entirely occupied in running the home?

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6818. I am not suggesting that, Mr. Stott. I am suggesting that if the wife does go out to work, the husband loses a great deal of comfort in a home which the wife's normal duty would lead her to provide?—(Mr. Shaw). I would controvert even that, if I may, because certainly in what you might call the middle income groups you may find that the wife provides a great deal in the way of additional help to run the home both by labour-saving devices and getting in an additional charwoman, and I am by no means satisfied that the net result is a lower standard of comfort in every case.

6819. Then you do not support my plea for the husband?—I hate to divide against my own sex, but I do not necessarily support that.

6820. One further question on paragraph 39, in which you recommend medical examinations of parties before marriage. Is that to be compulsory?—I would say yes.

6821. Is it to be compulsory within a certain time before the marriage or within a certain time of the engagement for marriage?—I am not sure that it would be practicable to say a certain time after the engagement.

6822. Either before the marriage, say, within a month of the marriage, or within a month after the engagement?—As long as it is within a reasonable time before the marriage.

6823. Before the marriage?—Yes.

6824. May I put this situation to you, which I think is quite a common one? Two young people meet and become engaged, and their financial position is such that they cannot marry for some eight or ten years. The girl gives the best of her life to that engagement. Then they have your suggested medical examination and at that stage it is found that there is a discretionary bar to marriage.—On the contrary, Sir, I think we have made abundantly plain in paragraph 39 that the whole point of this procedure is that each party shall enter the marriage in the full knowledge of the physical condition of the other

party. There is no suggestion in this paragraph that if the medical certificate proves that, let us say, the husband is suffering from venereal disease, then that shall necessarily be a bar to the marriage. If the girl is prepared to accept that fact, and go on with the marriage, that is her concern. But what we feel is that each party should be forewarned.

6825. Then would you make it a ground of breach of promise of marriage if she finds that she does not want to marry him?—Breach of promise cases, I think, are perhaps happily almost unknown in Scotland, so that it is not anything more from our local point of view than an academic question. But, as a matter of principle, one would imagine that in the case of venereal disease, if it is possible to show that it is the result of a positive act on the part of the man, then one might say that if a breach of promise action were brought by the man it should be a good defence to say, "Well, he has brought it on himself by this act, and therefore he is not entitled to insist on the promise". (Mr. Young): May I suggest, my Lord Chairman, that that is already Scots law?

6826. (Mr. Mace): Then may I ask a general question? Would you give me your Society's definition of the marriage vow between the two parties, whether it be a ceremony in church or before a registrar?—Our Society's definition?

6827. May I put it this way—your Society's view of the contract of marriage?—Certainly, Sir, I could not give such a definition. I do not think that we are called upon to do so for this reason—that that vow is taken in the case of every marriage whether in church or outside of church, and that vow under the present law is permitted to be broken on certain grounds.

6828. I did not want to discuss that aspect of it. Might I have the view of your Society as to what that vow is?—I can only answer that we did not discuss that point.

(Chairman): Thank you very much for your memorandum and for your help in coming here today.

(The witnesses withdrew.)

PAPER No. 78

COMMENTS OF THE SCOTTISH ASSOCIATION FOR MENTAL HEALTH ON THE MEMORANDUM SUBMITTED BY THE NATIONAL ASSOCIATION FOR MENTAL HEALTH

(NOTE:—Evidence was given by the representatives of the National Association for Mental Health on Thursday, 29th May, 1952, and the memorandum submitted by the National Association (Paper No. 20) together with the oral evidence (Questions 1398 to 1556) are reproduced in the Minutes of Evidence for that day (Seventh Day). For convenience, the memorandum of the National Association has been reprinted below, with the comments of the Scottish Association set out at the end of each section.)

Introduction

1. The National Association for Mental Health is a voluntary body registered as a charity which exists to promote all those measures by which the mental health of the community might be improved, and to mitigate the effects of mental disturbance and disability. Its membership comprises persons with professional qualifications such as psychiatrists, psychologists, psychiatric social workers, and magistrates, but it is predominantly an association of lay persons having the interest of the mentally sick and the mental hygiene of the community at heart. The 1950-51 Annual Report of the Association sets out the aims and objects of the Association, and the constitution of its main committees.

2. In response to the Royal Commission's invitation to submit evidence the Association convened a committee composed of representatives reflecting the professional and lay interests of the Association. The memorandum which follows is the work of this committee; it has the approval of the Executive Committee of the Association.

3. Essentially the memorandum is based upon the observations of professional workers in the field of psychiatry, of child guidance, of social case-work and of marital consultation work as practised by magistrates and social agencies. It thus tends to embody the point of view of those dealing with the effects of human behaviour at close quarters, and to reflect the concepts with which the National Association for Mental Health approaches its preventive and remedial work. It is divided into two parts; one in which the husband and wife, who are parties in a marital cause, are mainly considered, and one in which the interests of the children, which naturally loom large in the work of the Association, are chiefly dealt with.

Comments of Scottish Association

Nothing to add.

Basic assumptions

4. The National Association for Mental Health, as a non-denominational body, bases its work on the findings of modern psychology and social science, and has a humanitarian and ethical goal. In the view of the Association, mental health, sound morality and personal and

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social maturity form different aspects of the same goal towards which the work of the Association is striving. The breakdown of marriage would appear to the Association to be a crucial example of failure to maintain a healthy, responsible and mature human relationship. Such failure is a problem of great concern to mental hygiene, not only through the unhappiness which it brings to the main parties, but also in its wider repercussions affecting chiefly the security and happiness of the children of the marriage as well as the wider social milieu in which such disturbed persons move.

5. The memorandum assumes that an important value in marriage is the achievement of the biological goal of healthy sexual relationships issuing in the procreation of wasted children. At the same time it cannot be denied that with the complexities of highly civilized communities there may be instances in which this biological goal is not the primary object of the parties in marriage, and that the human relationship of the parties forms the focus of attention. Such would be the case, for example, in marriages where the wife is above the child-bearing age.

6. The Association holds strongly that childhood should be passed in an atmosphere of stability, consistent affection and security where the extremes of neglect and indulgence are excluded. Emotional harmony, warmth and devotion in the home are the greatest factors contributing to good mental health in the adult. For any child to be deprived of such a background can often be shown to have serious effects on his subsequent personal development and mental health out of all proportion to the apparent disturbance. It is, therefore, clear to the Association that any home where the emotional conditions are even modestly realized is preferable to no home, institutional care. No child should be lightly removed from the care of his parent or parents, and this is more especially true of the young child in respect of his mother.

7. The Association, basing its present remarks on the evidence of child guidance workers and child psychiatrists, is unable to state authoritatively which of two alternatives is more damaging to the mental health (present or future) of children: (a) a home atmosphere in which the parents behave incompatibly towards each other and the children, or (b) a "broken" home, i.e. where there has been divorce or separation and the children are in the care of one or other spouse or some third party. All that can be said is that more children of the former or (a) sort come to clinics on account of nervous or emotional distress than of the latter or (b) sort. In the absence of statistics to show what the true ratio should be the significance of this fact is hard to assess. It may be that while the disturbed but intact home is an immediate source for the bad nerves of children, the permanent "loss" of one or other parent is responsible for subtler and later after-effects, though the child may actually experience apparent relief and peace on the separation of bitterly opposed parents. On these grounds the Association feels that no rigid views or rule-of-thumb disposals of children involved in the marital disputes should ever be made, but that legal provisions should allow for painstaking investigation of each family prior to decision, which should always take full account of such investigation.

Comments of Scottish Association

Paragraph 4: after "modern psychology" insert "psychiatry". Otherwise we agree with paragraphs 4, 5, 6 and 7.

Principal aims of the memorandum

8. The Association would like to feel that its chief contribution to the deliberations of the Royal Commission is a certain point of view with its implied assumptions, from which changes in the law should flow.

9. In principle, the criterion of the need for divorce would seem to us to lie in the irretrievable and complete, or nearly complete, destruction of the marriage relationship. Under the present divorce law, with the single exception of the insanity issue, a decree is granted where the guilt of one party can be shown to have been the outcome of a conscious act against the other party in violation of the marriage contract. We do not believe that this ought to be the overriding criterion. We would like to see the area to which divorce is applicable extended to include cases where behaviour or attributes of one partner can be shown to have led to the deprivation or

detriment of the health and happiness of the other partner or the children. It is our opinion that only an assessment of the total relationship between the partners can distinguish between the casual acts which may disturb a mainly stable relationship; acts which are the breaking points in a relationship which is no longer stable, and the persistent attitudes, behaviour and mutual feelings of the partners which constitute the real basis of marital tension.

10. The touchstone of divorce should not be the isolated act as such, whether done impulsively or as the result of an intolerable marital tension. At present, these two are not distinguished in law, although in their motivation and as indices of marital disharmony they may be vastly different. Rather should there be an attempt to assess and legislate for the total situation irrespective of the technical "guilt" of one or other party in law. The Association holds that in many cases the spouse who is by present law represented as the "guilty" party is victim of such acts, may in fact be driven to some formal breach of the marriage by behaviour or attitudes of the "innocent" or petitioning party that are mainly responsible for the situation.

11. The Association makes no apology if these principles cut across some of the existing provisions. The Association is not concerned to frame clauses of a Bill, but to impress a certain point of view upon those concerned with new proposals which shall minimise damage to human beings, and shall increase the prospects for a constructive and hopeful handling of marital problems. What follows should be read in the light of this preamble.

Comments of Scottish Association

Paragraph 8. No change.

Paragraph 9. Delete sentence beginning: "We would like to see" and ending "or the children".

Paragraph 10. In the first sentence "normally" should be introduced between "be" and "the" to read— "The touchstone of divorce should not be normally the isolated act as such".

Paragraph 11. No change.

Husband and wife

12. As regards the husband and wife, the Association would like to comment on those sections of the law which at present deal with desertion, adultery, cruelty, unsoundness of mind, and mental defect. These are matters of which it has a specialist knowledge and wide case-work experience.

Desertion

13. We suggest that the law as it stands at present militates against the possibility of reconciliation. Attempts to bring husband and wife together are frustrated by the partner's knowledge that if the attempts fail a further three years' separation will be required before a divorce can be granted. The Association would suggest that an aggregate of three years' separation should be the criterion, and that the law should be framed in relation to the principle stated in paragraph 10 above.

Adultery

14. It is our experience that the single act of adultery is often provoked on by the "injured" party as the ground upon which to ask for the dissolution of a marriage. We deplore the degrading use which is commonly made of a single act of adultery in order to obtain a divorce, where the underlying cause of breakdown in relationship is often quite other. If the underlying cause is tackled there may be hope of reconciliation. In our view, in the case of adultery, divorce should usually be confined to proved repeated acts of adultery, and that before a decree is given the best possible advice should be available as to the motivations of both parties. Such advice might be given by ministers of the Church, by competent social workers, or by doctors. In every case we suggest that delay should be imposed.

15. We advance this plea because in practice single, isolated, impulsive acts of extra-marital sexual intercourse may be compatible with a deeper loyalty to the spouse and adequate marital life and happiness as well as with good parenthood.

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16. We recognise that this suggestion may be subject to grave criticism by some religious bodies, but we believe that it would finally contribute more to the sanctity of the marriage tie than present practice in the application of the law as it now stands.

17. The Association holds not that single acts of adultery should be condoned, but that the guilty party should not be severely penalised by the destruction of marital happiness as a result of a rash and perhaps ill-considered act and the sometimes equally impulsive reaction of pique and vengeance on the part of the offended spouse, who in most cases also suffers unnecessarily by the sequelae of a disrupted marriage. Within the Association's experience of such matters, the guilty party, in such cases, is often severely afflicted with remorse which can be constructively used in work of healing and reconciliation, granted that delay and agencies for conciliation exist and are used. The Association would like to see ministers of religion, doctors and social workers also engaged in this work.

18. Our submissions under this head are made on the assumption that our suggestions on extended criteria for divorce for cruelty, long prison sentences and unsoundness of mind are also adopted.

Comments of Scottish Association

Paragraph 12. No change.

Paragraph 13. *Desertion*. Paragraph 13 as it stands, with the addition of: "During the triennial periodic efforts should be made through some conciliatory advisory body to effect reconciliation".

Paragraph 14. *Adultery*. Agree up to end of third sentence ending "hope of reconciliation". We would *negate* there—"In our view only where reconciliation fails should the single act be accepted" and *delete* the remainder of the paragraph to "doctors". *Leave in last sentence*—"In every case we suggest that delay should be imposed".

We would also delete paragraphs 15, 16, 17 and 18.

Cruelty

19. The Association would strongly recommend that a divorce on grounds of cruelty should be given for reasons additional to those at present admitted. As the law now stands, cruelty leading to a "breakdown in health" must be proved. We would not suggest that the present law should be revoked, but rather that it should be extended to include a further category of case under some such heading as "persistent abnormal behaviour, which would be considered by a jury of reasonable citizens to be intolerable, and to lead to a situation in which mutual respect, affection and trust between the partners is impossible".

20. Under this head there should be included two classes of behaviour from which a spouse may suffer lasting detriment and unhappiness. In the first class there would be those acts and persistent attitudes aimed directly at the spouse and/or the children; continual hostility, nagging and disparagement; obnoxious sexual practices in the home; persistent morose refusal to communicate or converse, to aid and co-operate, to comfort and give affection, to grant reasonable conjugal rights.

21. In the second class there would be included acts committed outside the narrower marital relationship which by their severity of degree or continuance seriously damage the spouse, children and the marriage. Such would be: a sexual perversion carried on outside the home; alcoholism; persistent adultery; irresponsible and concealed extravagance (often with consequent failure to maintain the home); defamation of the spouse's reputation to outsiders, and the like.

22. It will be seen that the Association wants to stress the kind of behaviour which signifies a serious, continued lack of consideration for the positive elements of the marriage contract. Among these what might be called "malicious" adultery (as seen from the point of view of the marriage) takes its place as behaviour which destroys the marital relationship.

23. The Association recognises that such types of behaviour would require careful evidence, as perhaps furnished by independent witnesses and by expert medical reports, to show their persistence, lack of response to

various forms of exhortation and treatment, and degree of harm caused to the marriage.

24. In criminal procedure the concepts of "intolerable behaviour" and "uncontrollable impulse" have no legal standing. In the marital area the Association knows such behaviour to be the most potent source of marital breakdown.

25. In cases under this head the Association would advocate rapid settlement. If there is no hope of reconciliation delay merely adds further strain.

26. As a corollary to this recommendation we would ask that financial injustices inherent in the present position should be removed. Where, for example, it is clear that a wife leaves her husband as a result of his intolerable behaviour she should be granted retrospective financial support to the date of her leaving the home. At present she runs the risk of being "guilty" of desertion and not entitled to support.

Comments of Scottish Association

Paragraphs 19, 20, 21, 22, 23, 24, 25 and 26.

Comment: While the definition of cruelty in Scotland is different we approve of the general lines of the recommendations and that they should be made applicable in so far as they apply.

Prison sentences

27. So far, the memorandum has dealt with types of behaviour which may or may not have entailed proceedings against the offending spouse under civil or criminal law. At this point the Association wishes to add also the recommendation that a long prison sentence of the order of ten years should afford the opportunity of divorce where the nature of the offence for which the prisoner is committed is such as to affect the nature of the marriage relationship. The onus would naturally be on the petitioner to show detriment to the marriage relationship.

28. In such a case the petition might be brought early, so as to afford the innocent party a chance of freedom and happiness. The Association approved the decision of the court in granting a divorce to Mrs. Hume in the Setty case, as an extreme example of the kind of situation it has in mind.

Comments of Scottish Association

Paragraphs 27 and 28. We agree.

Unsoundness of mind

29. We appreciate the reasons for which the present clauses in the law governing divorce of persons of unsound mind were included in 1937, and recognise that many socially desirable results have been brought about. With the advances leading to the present state of medical knowledge, however, it is becoming increasingly difficult for doctors to certify that any patient is incurably of unsound mind, and except in the most stubborn cases it is in recent years becoming increasingly rare for a person suffering from mental illness to be admitted to a mental hospital and detained there under treatment for an uninterrupted period of as long as five years. The advances in medical treatment, however, though they do materially improve the possibility of fair recovery from mental diseases formerly thought incurable, may still result in leaving patients with defects of behaviour which render them inadequate or intolerable spouses. It is also stressed that there are disabilities other than certifiable unsoundness of mind which can so change an individual as to make participation in a satisfactory marriage impossible. Personality changes towards violence or impulsiveness, for example, may follow certain organic illnesses such as epidemic brain inflammation, or result from head injuries or certain operations to the brain. Here we would like to advance the suggestion that the social behaviour of the partner, rather than the disability from which he suffers, should be the criterion for the granting of divorce.

Comments of Scottish Association

Paragraph 29. We agree.

Mental defect

30. The Association does not consider that any change in the law should be made to allow the divorces of one partner on the grounds of mental defect unless, as is at present provided under the nullity clause, defect was

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not revealed at the date of the marriage. We would stress that the marriage of a defective is not proved always to lead to the procreation of defective children, although it frequently produces children of inadequate intelligence. The Association has known of cases where a defective has been an adequate parent, and indeed has exhibited great warmth and tenderness to young children. Here again, therefore, we would only envisage defect being adduced as a cause of divorce where it led to behaviour of a nature so disastrous as to make the preservation of the marriage impossible.

Comments of Scottish Association

Paragraph 30. We agree but would substitute the word "may" for "frequently" in the phrase "although it frequently produces children of inadequate intelligence".

Willful refusal of divorce

31. The Association has received evidence that great hardship may be caused in the case of a partner who is technically in the right in refusing divorce to the technically guilty partner even when the marriage has been broken for many years. There are cases where children have been born to the "guilty" partner by a second liaison and at present these children can never be legitimated.

32. We are aware that this question raises many difficulties and would ourselves offer no solution other than to ask that the question should be considered. We would, however, draw the Commission's attention to a precedent contained in the law as it affects adoption where it is laid down that "the court may dispense with any consent required . . . if it is satisfied . . . in any case that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld". (S. 3 of the Adoption Act, 1950.)

Comments of Scottish Association

Paragraphs 31 and 32.

Comments: In the event of the adoption of the principle of divorce of a partner who willfully refuses, provision should be made for the alienation by the pursuer of the innocent spouse.

In so far as legislation *per subsequent marriage* is concerned, no change seems to be called for in the law of Scotland.

Nullity

33. The Association's committee which prepared this memorandum debated for some time the questions relating to suits of nullity. It became clear that the technical-medical definition of non-consummation of marriage is one of great complexity. Whilst the Association cannot, therefore, in the time at its disposal, make any recommendations, it is clear to it that there is urgent need for expert examination of this problem, and it accordingly suggests that the Royal Commission should set up such an expert body.

Comments of Scottish Association

Paragraph 33. No comment.

The children

34. The Association includes under this head all young persons up to the age of seventeen years. The Association would like to comment on those aspects of treatment under the present law which affect the emotional security and stability of the children in divorce cases.

Comments of Scottish Association

Paragraph 34. Accept.

Custody of children

35. The Denning Report recommended the appointment of court welfare officers to give guidance to parties who resort to the Divorce Court or are contemplating so doing. We would urge the implementation throughout the country of this recommendation which, so far as we have been able to discover, has not been implemented, except in London. The Denning Committee proposed that besides their tasks of attempting to reconcile the parents, court welfare officers would have special duties to perform in

cases where there were dependent children. We would endorse this view and would add that such officers should be competent to give objective advice concerning custody to the court after appraisal of the personalities of each person concerned, irrespective of the technical guilt of the parties. We would suggest that such welfare officers should have expert training in the principles of child development, and be appointed on grounds of educational and personal suitability for this work. In the first instance they should be recruited from officers of the existing services. Attention should, however, be paid to an extension of training to cover the new functions proposed.

36. We believe that in this matter the matrimonial courts are at present in advance of the Divorce Court in taking advice from experts. In view of the fact that many divorce suits at present reach the Divorce Court without first going through the matrimonial courts, we would underline the necessity of expert advice in the highest courts: if anything, the advice tendered in the Divorce Court should be even more skilled than that in the lower courts.

37. When an application for the custody of the child is made it should be obligatory for both parents and the court welfare officer to appear before the authority responsible for arriving at a decision. The present practice of making such decisions on the evidence produced by affidavit without cross-examination of the parties should be discontinued, as it is liable to gross mistakes in the disposal of children and thus likely to produce grave injuries to their mental health and development.

Comments of Scottish Association

Paragraph 35. We would endorse this view but recommend that welfare officers should be appointed independently of the existing services.

Paragraph 36. No comment.

Paragraph 37. The procedures recommended presently apply in Scottish courts.

Representation of the child's interests

38. At present the interests of the child are not guarded in court by an independent representative. Advocates speak in the interest of both father and mother, but nobody speaks for the child. Worse than this, the child is often treated as a pawn in the game, and father or mother strives to prove technical innocence in order to gain the custody of the child, since under present practice the child is most often confided to the technically innocent party. We recommend that the court welfare officer should normally be called upon to give oral evidence on the child's behalf. If oral evidence is likely to be detrimental to the child's interests or mental health then evidence should be presented in writing. The Association wishes to draw special attention to Section II of the Denning Report, in which most of these points are made with great force.

39. We recommend further that the court welfare officer should, on analogy with present practice in adoption cases, assume the rôle of guardian *ad litem* to the child during the progress of a case. It should be his duty to recommend whether, for the period of the case, the child's interests are best served by leaving him with one or other of the parents, with suitable relatives, or by placement in a children's home. In this duty he would call upon the experience of the probation service and children's officers, as well as on such disinterested evidence from the child's environment as may best serve his purpose. By this means it is hoped that the stress caused to a child by continuous claims made upon him by one parent to the detriment of the other can be avoided.

Comments of Scottish Association

Paragraph 38. Agree.

Paragraph 39. Agree.

Position of the children after divorce

40. We have received evidence to the effect that considerable mental strain is caused to children by their being continually shuffled from one parent to the other after a divorce has been granted. We suggest that access by the parent to whom the child is not confided should not be unreasonably withheld, but that where the parent to whom custody is granted finds his or her authority with the child

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undetermined by actions of the other party, it should be open to the custodian to make application to the court. Such application should also be allowed in cases where access by the parent who is not the custodian causes the child undue mental stress. In both cases the court welfare officer should advise upon the application. The court welfare officer should have the duty to review the custodial arrangements in the light of changing circumstances.

Family courts

41. We believe that where the powers of matrimonial courts are well exercised, much can be done by way of reconciliation. It seems possible that if all cases had by law to go through these courts before coming to the Divorce Court much could be done to mend marriages on the verge of disruption. Although it is outside our own experience it seems reasonable to suggest the establishment of family courts which could consider all legal matters affecting the family, including petitions for divorce. In such a court the interests of the children might more readily find a hearing.

42. With reference to paragraph 14 above, relating to "delay" in the bringing of divorce petitions, such a family court might be an intermediate legal institution upon which would devolve the task of sifting and verifying the grounds on which the marital "deadlock" rested, and of deciding which cases required to go forward to a higher court as being beyond its own powers to remedy.

Comments of Scottish Association

Paragraphs 40 and 41. We agree but recommend that the appropriate court should be the family court or, if such courts are not set up, the Sheriff Court.

Legitimacy

43. We recommend that the area of illegitimacy should be still further reduced. For example, marriage between the parents of a child born prior to wedlock should always legitimise the child. We make these points in the interest of the children; there is no evidence known to us showing that legislation in this sense would increase the risk of an extension of permissive relationships.

Comments of Scottish Association

Paragraph 43. Agree.

Publicity

44. We are aware that certain restrictions are placed on the Press in regard to publicity over divorce proceedings. We recommend that these restrictions should be extended to exclude publicity in cases of cruelty such as we have outlined. We need not, we believe, elaborate the mental stress which such unwholesome publicity adds to an already intolerable situation.

Comments of Scottish Association

Paragraph 44. Agree.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

General propositions

1. The criterion of the need for divorce lies in the irretrievable destruction of the marriage relationship.

2. The disturbance of the total relationship between the partners to a marriage should be assessed in arriving at a decision, and the isolated act should not be given overriding significance.

3. Where the possibility of reconciliation exists and is desirable, delay in divorce procedure should be accompanied by suitable measures to bring about a rapprochement. Where reconciliation is neither possible nor desirable rapid settlement of the case should be effected.

4. The interests of children during and after divorce proceedings should be more appropriately safeguarded, bearing in mind the emotional and material needs of the child.

Specific recommendations

5. In a case of desertion, an aggregate period of three years' separation should be the criterion for divorce (para. 13).

6. In a petition for divorce on the grounds of adultery, granted that our other recommendations are accepted, an isolated act should not normally be sufficient ground for a decree (para. 14).

7. A divorce on the plea of cruelty should be obtainable under widened criteria which should include certain varieties of persistent abnormal behaviour (para. 19), and a long prison sentence where the offence for which the prisoner is committed is such as to impair the marriage relationship (para. 27).

8. In cases of unsoundness of mind the behaviour of the affected partner should be the criterion for divorce and not the length of his detention in hospital, or the nature of his disease. This recommendation is made in the full appreciation of the benefits conferred by the Herbert Act, but bearing in mind the improvements in treatment since the date of that Act (para. 29).

9. There should be no change in the law as regards the marriage of mental defectives (para. 30).

10. Special consideration should be given to the possibility of legislating for cases of unreasonable refusal of divorce after long separation (para. 32).

11. Nullity should be examined by a specialist committee (para. 33).

12. Court welfare officers, with specialist training as proposed by the Denning Committee, should be appointed with special responsibilities for reconciliation of partners and guarding of children's interests (paras. 35-39). They should represent the children's interests in court (para. 38) and not in the rôle of guardian of *litore* as necessary (paras. 39 and 40).

13. Custody of the children should not be assigned as a result of evidence by affidavit (para. 37) nor according to the technical innocence or guilt of the partner selected, but on the basis of the best place for the child's emotional and material happiness.

14. The possibility of establishing family courts for all questions relating to the family should be considered (para. 41).

15. The stigma of illegitimacy should be still further reduced (para. 43).

16. Publicity given to divorce should be restricted (para. 44).

Comments of Scottish Association

Two minor amendments here.

In paragraph 8, first sentence, the words "and not" to be replaced by "rather than merely".

In paragraph 12, after the words "Denning Committee" insert "but appointment to be independent of existing services".

NOTE.—The Association wishes to make clear the position of those of its members who adhere to the Roman Catholic faith; the Roman Catholics are unable to accept any recommendations relating to the subject of divorce, as being contrary to their tenets. On the other hand, the Roman Catholics wish to associate themselves with those portions of the memorandum which relate to the work of conciliation and the care and welfare of children.

(Comments of Scottish Association received

26th March, 1952.)

5 November, 1952]

Dr. MARY KNIGHT, Miss C. G. HALDANE, J.P., Mr. J. ADAIR, O.B.E.,
Mr. J. ANDERSON, M.A. and Mr. J. ROBB, M.B.E.

EXAMINATION OF WITNESSES

(Dr. MARY KNIGHT, Miss C. G. HALDANE, J.P., Mr. J. ADAIR, O.B.E., Mr. J. ANDERSON, M.A.
and Mr. J. ROBB, M.B.E., representing the Scottish Association for Mental Health;
called and examined.)

6829. (Chairman): We have here representing the Scottish Association for Mental Health Dr. Mary Knight of Paisley, who was formerly superintendent of a mental hospital; Miss C. G. Haldane, Justice of the Peace, Edinburgh, who is a Church of Scotland social worker; Mr. J. Adair, formerly Procurator Fiscal, Glasgow; Mr. J. Anderson, Master of Arts, Airdrie, who is a retired schoolmaster; and Mr. J. Robb, who is Secretary of the Association. I will address my questions to you, Mr. Adair.—(Mr. Adair): Yes.

6830. Before I ask any questions, is there anything which the Association wishes to add to the memorandum which is before us?—I think that it might shorten matters if I add just one or two things, my Lord. First of all, we have endeavoured to limit our submission by adopting almost completely the memorandum of the English Association. We did that deliberately because we were in general agreement with them, although there are certain cases where, had we framed a memorandum for ourselves, we would probably have placed the emphasis rather differently. I take as an instance paragraph 5 of the English Association's memorandum, where we would not have placed probably the same importance on the biological side of the marriage contract, but rather on the relationship of the parties. We would have treated it rather as being a unique relationship, the setting up of an entirely new unit in the community, with the opportunity for the integrating of the two personalities. We should have brought in the physical element in marriage only as a secondary element.

In paragraph 9, I would like to suggest that we should want to guard against cases where any normal conduct on the part of one of the spouses had unusual repercussions on some super-sensitive or over-suspicious spouse, thereby causing unhappiness, although such conduct might not have any effect on the children. We have no desire really to widen the range of divorce grounds to include things that might be treated as somewhat trivial in their nature.

As to paragraphs 13 and 14, we would like to urge the importance of machinery of some kind being set up to encourage reconciliation.

As to paragraph 14, we appreciate that in many instances proof of even a single act of adultery is often very difficult, and that to insist in all cases on proof of more than one act would in many instances put an undue burden on the innocent individual.

As to paragraph 23, we feel that outside evidence is often difficult to get. There may be a rather cunning spouse, who will not act in any way in the presence of others that would lead to independent evidence.

6831. That is of cruelty?—Yes, in these cases one must be guided very largely by the credibility of the innocent spouse, coupled with reliable evidence of medical or some other nature, that leads to a conclusion that the spouse's word may be accepted. As to paragraph 29, we have seen from newspaper reports that there has been a suggestion from certain quarters that, instead of issuing upon certification for a period of five years, periods of treatment in mental homes as a voluntary patient might be treated as the equivalent. We are very much afraid of the introduction of that, as we feel that it might quite readily be taken advantage of, by husbands particularly. An unscrupulous husband might use undue influence to get an innocent wife into a home, keep her there and, by means which one can realise, get unscrupulous medical evidence that would lead to decrees that we feel ought not to be allowed to go through. We would also like to put forward that whatever might be the view with regard to continuous residence in institutions, there should be a period of five years' certification even although the party in the interval may have been on parole and have been out for short periods. Our view is that, if a period of less than five years was taken, then there are cases, in which there might have been a vast

improvement, where the shock brought about by the divorce proceedings might just be sufficient to undo all the good that had been done by the treatment up till then.

6832. I think that you have reduced the number of questions which we might have asked you very considerably—first of all, by your general acceptance of the views put forward by the Association in the South, and, secondly, by the clear explanation which you have given of some of the points on which you differ from them. Speaking for myself, there is very little left which I wish to ask you, but as regards the matter which you have just mentioned, of course the court must be satisfied under the existing law that the respondent is a person of divorce for insanity is incurable of unsound mind; the other requisites are merely in fortification of that and not in substitution for it. Still, you feel that a period of voluntary treatment should not count at all towards the five years?—Yes. It is becoming much more difficult for any doctor now to say that any case is incurable.

6833. May I ask—have you read the evidence given by the National Association for Mental Health in London?—No, I am sorry, we did not have an opportunity of seeing it.

6834. I understood that you had. It was sent to Dr. Fraser.—Dr. Fraser unfortunately could not be here herself, but she certainly did not communicate it to any of us here. All we had was what appeared in the newspapers.

6835. I am very sorry; I hoped that you had seen that evidence because I thought it would be a pity if we detained you by asking a series of questions already put to a body with which you are in general agreement.—I wonder if it would suit if we read this evidence and communicated to you any comments which we might have to offer upon it. (Chairman): That would be very helpful. If you will be so good as to send any comments you may wish to make in writing to the Secretary, then the Commission can consider what further steps, if any, should be taken. (See Paper No. 79.)

6836. Would you now turn to paragraph 9 of the English Association's memorandum? That paragraph contains the sentence:—

"We would like to see the area to which divorce is applicable extended to include cases where behaviour or attributes of one partner can be shown to have acted to the deprivation or detriment of the health and happiness of the other partner or the children."

Of course, that differs from the existing law. A wife can get a divorce if the behaviour of the husband has been such as to affect her health or cause reasonable apprehension of injury to her health, but she cannot get a divorce because of the effects on the children. You struck out that paragraph and I wondered what your reasons were for doing so.—We felt that it was widening the matter too much, and that one could conceive of very many instances where behaviour of one of the parties might be such as to cause unhappiness that might be of a very temporary nature, whereas the matter could very readily be adjusted between the parties themselves without interference.

6837. I see. You thought it unnecessary to make that a ground for divorce?—Yes, we felt that it was opening up a field that we did not want to widen too much.

6838. Then you suggest an addition to paragraph 13, on desertion. The addition you want to make is that, during the triennial, periodic efforts should be made through some conciliatory advisory body to effect reconciliation. What sort of steps would be taken to provide those efforts to effect reconciliation? Would the parties be advised or instructed to consult somebody?—We thought that they should be advised to consult somebody.

6839. You were not suggesting compulsory recourse to reconciliation machinery?—Although we are very much against compulsion along these lines, we feel that there

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[Continued]

ought to be a very definite direction at some stage or other, so that an opportunity would be given to all parties really to have the possibility of reconciliation brought definitely before them by someone who was able to do it.

6840. (*Lord Keith*): Mr. Adair, it is during the triennium that these efforts are to be made?—At that stage, yes.

6841. How is anybody going to get to know about the parties?—Not during that period, I quite agree with you.

6842. There is no possibility of making contact, so far as I can see, with two people who, quite unknown to anybody, have separated, and one of whom is in desertion.—There is no opportunity for anyone to get in touch with them, but I think there ought to be more publicity and more help for such an organisation as the Marriage Guidance Council to induce people to go and consult them during that period.

6843. I quite understand that.—And when there was a proposal to take steps for divorce on the ground of desertion, we see the possibility of something along these lines. Before the actual service of any action, a notice should be given of an intention, and at that stage the person ought to be directed to the conciliation body.

6844. To whom is the notice to be given?—To the parties.

6845. Of the intention to raise an action?—That would be given to the clerk of court who, in turn, would then tell those people, "Before the raising of the action you go to that reconciling body".

6846. (*Chairman*): Would you turn to paragraph 35, which deals with custody of children? You see that the English Association pointed out that the Denning Report recommended the appointment of court welfare officers to give guidance to parties who resort to the Divorce Court or are contemplating so doing. The English Association say:—

"In the first instance they should be recruited from officers of the existing services. Attention should, however, be paid to an extension of training to cover the new functions proposed."

You say below:—

"We would endorse this view but recommend that welfare officers should be appointed independently of the existing services."

I would like to know your reason for that.—Our feeling is that, at the present time, welfare officers and probation officers are invariably associated with the criminal courts. They are known in the district as officers connected with the criminal courts and we do know that that causes a good deal of comment wherever they go, and we feel that their work would be very much hampered if they were to be so spoken of when they went to visit people in connection with custody questions.

6847. The English Association did not suggest that these services should be rendered by officers of the existing services as such. They suggested that the welfare officer should be recruited from officers of the existing services. Would your objection still apply to that?—If they were to be independent of the criminal courts we would not have that objection.

6848. That is the matter of the recruiting ground and, as I understood it, no more than that.—Although we do feel that there are many sources as recruiting grounds that are equally good.

6849. Paragraph 37 of the English Association's memorandum says:—

"When an application for the custody of the child is made it should be obligatory for both parents and the court welfare officer to appear before the authority responsible for arriving at a decision."

Your comment is:—

"The procedure recommended presently applies in Scottish courts."

—I think what was intended here was a reference to the fact that affidavits were not accepted in the Scottish courts; all witnesses appeared personally and were seen by the judge.

6850. I read it rather too widely. I am afraid it was the natural construction.—It is my mistake.

6851. Thank you. That has cleared up that point. Then, in paragraph 41, there is a proposal for the institution of special matrimonial courts and your comment on that is:—

"We agree but recommend that the appropriate court should be the family court or, if such courts are not set up, the Sheriff Court."

Were you there suggesting that the Sheriff Court should have power to make decrees of divorce, or simply to deal with separation and aliment?—Dealing, just as they are now, with separation and aliment.

6852. (*Lord Keith*): My Lord Chairman has covered most of the points that I had in mind to ask you about. Might I ask you something about paragraph 29, which deals with divorce on the ground of insanity? Dr. Knight may be able to help in this matter. As I understand it, with improved knowledge of mental disease there are now methods of treatment in the early stages which will, in some cases, result in cure. Am I right?—(*Dr. Knight*): Yes, in some cases.

6853. On the other hand, there are other types of mental disease in which, I think, it is recognised that no form of treatment will effect a cure?—Yes, for example, epilepsy.

6854. Am I right in thinking that schizophrenia is incurable by treatment?—Not entirely, but the results are not so sure.

6855. On the other hand, am I right in thinking that melancholia can definitely be cured under modern treatment?—In almost all cases.

6856. Broadly speaking—I am not a doctor as you know, and I have no doubt Dr. Baird may have something further to say about this—may I take it that medical science has advanced very considerably even since the introduction of the Divorce Acts of 1937 and 1938?—Yes.

6857. And that a great deal more is known about insanity and the treatment of insanity?—Yes, that is right.

6858. And is it not therefore much easier now to know what cases are incurable?—A better way would be to say we know what cases are curable.

6859. That is perhaps better. You know what cases are curable. If that is so, then I suppose that the curable cases would not be cases in which divorce was appropriate?—No.

6860. On the other hand, the other cases might still be cases in which the remedy of divorce could be retained?—If you accept the principle that insanity is a cause for divorce at all.

6861. Yes, I quite see that, but I do not think that paragraph 29 is against divorce for insanity in principle, is it?—No, it is not.

6862. May I take it that you do not see any objection in principle to the retention of the remedy of divorce for cases which are not known to be curable?—That is the attitude of the Association; it is not my personal attitude.

6863. But it is the attitude of the Scottish Association?—Yes.

6864. There is one other point which possibly is more appropriate to Mr. Adair. You say in your comment on paragraph 32:—

"In so far as legitimation *per subsequens matrimonium* is concerned, no change seems to be called for in the law of Scotland."

I am not quite clear, Mr. Adair, how that squares with paragraph 43, where it is recommended that the area of illegitimacy should be still further reduced:—

"For example, marriage between the parents of a child born prior to wedlock should always legitimise the child."

And the comment of the Scottish Association is, "We agree". At the present time, of course, there are in Scotland many cases where subsequent marriage would not legitimate children?—(*Mr. Adair*): Where there had been a bar to marriage?

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[Continued]

6865. Yes—I am afraid that the two paragraphs were meant to be read together. We are not inclined to open up the possibility of legitimisation where there actually was a bar to the marriage at the time.

6866. You are against extending the law of legitimisation so as to legitimate children that were born when there was a bar to the marriage?—Yes.

6867. That is the view of the Scottish Association?—Yes. I have one comment to make in reply to Lord Keith with regard to the question of cure of insanity. One has to appreciate that that person is not back into the position of mind in which he or she was before entering a mental institution.

6868. I appreciate that. On the other hand, the person could not be said to be insane?—(Dr. Knight): No.

6869. No. The mentality may have changed, I appreciate, but the insanity would have gone?—The insanity would have gone—as long as one is looking at it from the point of view of insanity alone and not as being back to one-hundred per cent. fitness.

6870. (Chairman): There is one question arising out of Lord Keith's question. As the matter of legitimisation by subsequent marriage has been raised, I should be interested to know the reasons why your Association do not think it right to legitimate a child by subsequent marriage if there was a bar at the date of the child's conception?—(Mr. Adair): One can probably take an instance—the case of a man who is married and there may not be a child of the marriage born, say, in the first two years. There has been an illicit association outside the marriage and there is a child unknown to the wife, and later there are children born of the marriage. Then, subsequently, there is the marriage of the parents of the original child. We do not feel that the legitimisation of that child ought to be allowed to deprive the legitimate children of rights that they undoubtedly had, particularly patrimonial rights. (Chairman): I see. I do not want to pursue the matter because we have grave doubts whether it is within our terms of reference, but I thought that as you had given the view of your body I would like to know the reasons for your recommendation.

6871. (Dr. Baird): Mr. Adair, you wish certified insanity to be retained as the sole ground for divorce on the ground of insanity?—Still retained, five years. We do not feel that at this stage, when the matter has only been tested since 1937 or 1938, we should be justified in saying that we want to upset the whole of that completely. There is a divergence of view in the Association as to whether insanity ought at all to be a ground of divorce, but we take the attitude that the criterion certainly ought to be certified insanity, for a period of not less than five years, with proper certificates that it is an incurable case.

6872. Despite the fact that more and more cases, many of which could still be certified as incurable, are no longer certified, but enter as voluntary patients and remain so?—Quite.

6873. You are still of that opinion?—We are still of the view that possibilities of undue influence on a weak mentality could be used, so that we would not wish to open up that field.

6874. Then with regard to personality changes which may follow treatment of one kind or another—which may cure the insanity but which leaves these traits—you think that they should be dealt with under the cruelty ground or under some other general clause?—Only if the behaviour comes into the definition of whatever is accepted as cruelty.

6875. You think that cruelty could be stretched to include social behaviour of a kind intolerable in marriage?—Only if the social behaviour is such that there is really a breaking up of the real marriage ties.

6876. (Mr. Justice Pearce): In answer to Dr. Baird, in justifying your view that voluntary treatment should be excluded, you mentioned the possibility of undue influence. I wondered if that was due to a misapprehension, because, in England, in dealing with insanity cases, the Official Solicitor represents the respondent, the insane person, and he has an independent medical expert to examine the respondent. Any pressure put on the respondent would not be of the slightest use to anyone because no other

person has any say in the matter at all. There are two doctors, one being the expert employed by the Official Solicitor on his behalf, and the other the expert—really the medical superintendent in almost every case.—In Scotland we have a curator appointed, who does get independent evidence.

6877. I wondered if it was the fear of the possibility of undue influence that was worrying you. It is difficult to see how undue influence could have the slightest effect on such a case.—What we had in mind was the possibility of keeping the person in the institution for that time—the influence of getting the person into the institution and keeping him there.

6878. (Lord Keith): What you mean, I gather, Mr. Adair, is that the same husband might prevail on his insane wife to go into a home for voluntary treatment, is that right?—Yes.

6879. But what would it matter if the wife was really insane?—Experience has shown that those who are in voluntary homes as patients are not always insane. If this is to be extended there may be instances where what is just a desire to get clear of a wife by putting her into a home may end in the wife's being certified.

6880. (Mr. Justice Pearce): Would the doctor in charge of her had an independent reputable specialist on these matters both be deceived in that case? In what way would they both be wrong?—We are not satisfied with certain medical certificates that are granted by psychiatrists today.

6881. You mean when people are certified?—Yes.

6882. Yes, but when cases are tried with two independent experts before the court, would you not think that that would be fair?—(Dr. Knight): There are many facile border-line cases who could be so impressed before the matter came up legally that they would have adopted the husband's point of view.

6883. (Chairman): You think that at the date of initial entry into voluntary treatment there may be undue influence by the husband who wants to get rid of his wife. She is persuaded to go into a voluntary home and she stays there for a considerable time not being, as you suggest, necessarily insane, and I suppose that might have an effect upon her?—(Mr. Adair): It is not only the question of the effect upon her, but the fact that she is being treated during all that time by a man who is being paid for this treatment and who may be prepared to certify.

6884. (Sheriff Walker): In divorce on the ground of incurable insanity there are two different considerations to be borne in mind—one is the permanency of the state of incurability, and the other is the degree of the insanity. Am I right in thinking that these are two different things—the permanency and the degree of insanity?—(Dr. Knight): Yes, they are two quite different things.

6885. Suppose that a person has an innocent and harmless, but insane delusion. I will give you an instance. Suppose a man has a firm belief that under direct revelation from God he is bound to do something, say, to pay money to a charity. That is quite harmless to any of his associates and that state is permanent. Is he in your view incurably insane?—In respect of that delusion he is, but it does not mean, of course, that he cannot be lived with in an ordinary home.

6886. Under the present Act applying to Scotland, I understand that there is a definition or test of the degree of insanity, namely, that there must be a warrant for the person's detention under the Lunacy Act. Mr. Adair might tell me, does that mean that a warrant for detention under the Lunacy Act would be issued only if the patient was harmful to himself or another?—(Mr. Adair): No, certifiably insane and detained for attention in a certified institution as distinct from a voluntary hospital.

6887. There must be some test of what is certifiably insane. Does that mean that he is harmful to himself or others?—You have certification of two types of person. One type is the dangerous lunatic. A dangerous lunatic must have been committed, or there must be reasonable ground for thinking that he is going to commit, some offence or is dangerous. The other type is insane, and

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Dr. MARY KNIGHT, Miss C. G. HALDANE, J.P., Mr. J. ADAIR, O.B.E.,
Mr. J. ANDERSON, M.A., and Mr. J. ROHR, M.B.E.

[Continued]

PAPER No. 79. OBSERVATIONS BY THE SCOTTISH ASSOCIATION FOR MENTAL HEALTH
ON THE EVIDENCE GIVEN TO THE COMMISSION BY THE REPRESENTATIVES OF THE
NATIONAL ASSOCIATION FOR MENTAL HEALTH

may be a person, for instance, who is unable to look after his own affairs. That may be all that the insanity amounts to—a person who has got certain grandiose delusions.

6888. I want to take the concrete illustration of a man of some means whose only symptom of insanity is that he is giving from time to time a donation to a charity, in the firm and fixed belief that he is doing it under direct revelation from God. There is a case where I think a man's will was reduced because he was held to be insane on some ground of that kind. In the case of such a man is he certifiably insane?—No, the Sheriff would not grant a certificate in that instance unless the man had been actually disposing of his assets to the prejudice of his relatives, or there was good ground of thinking that he was immediately going to do that. The mere fact that he had a delusion or that he was giving away certain small sums would not be sufficient grounds.

6889. Even although he was doing that under an insane impulse or direction?—An application for his certification must be made by the relatives or by the local authority.

6890. If one takes away the test under a Sheriff's warrant under the Lunacy Act, there would be no standard, would there, of the degree of insanity which would be

necessary to found a divorce?—No, we had that in view also.

6891. (Chairman): May I ask a question following on that? In England we have a system whereby, if a man or woman is incapable of managing his or her affairs, a receiver is appointed who takes over the whole of the property and administers it on behalf of "the patient", as he is called. But, as I understand the matter, it by no means follows that if certification were applied for it would be granted—it is the same thing with us. A curator would be appointed by the court who would have the control thereof of the man's affairs. That would be as a result of the petition that would be put in by the relatives in such a case.

6892. But in such a case, if the person was not certifiable, but merely incapable of looking after his affairs properly, that would not be regarded, would it, as insanity which would found a divorce petition?—The question of whether or not there was sufficient insanity would depend on the original certification. He has got to be certified as insane and be in an institution.

(Chairman): Thank you very much for your assistance and for coming here today. We shall hear from you later what your views are on the evidence given by the English Association in London.

(The witnesses withdrew.)

PAPER No. 79

OBSERVATIONS BY THE SCOTTISH ASSOCIATION FOR MENTAL HEALTH ON
THE EVIDENCE GIVEN TO THE COMMISSION BY THE REPRESENTATIVES OF
THE NATIONAL ASSOCIATION FOR MENTAL HEALTH

(NOTE.—The Questions and Answers referred to below will be found in the Minutes of Evidence for Thursday, 20th May, 1952 (Seventh Day).)

Questions Nos. 1398-1400. No comments.

Question No. 1401. We agree with the National Association for Mental Health that it is indeterminate, on present evidence, whether the "broken home" or the home of frequent antagonism is worse for the children. In our experience, great damage is undoubtedly done in both instances. The atmosphere in many homes is such that there would be little prospect of any union providing anything better and the extension of grounds of divorce would probably mean more re-marriages and more unsatisfactory homes.

Question No. 1402. Where the isolated or casual act is something other than adultery, we would agree. Where, however, it is an act of adultery, we would not advise the taking away of the innocent spouse's right to bring the union to an end, if the exercise of that right was the final decision arrived at by him or her. It would be a very dangerous principle to lay down that married couples were entitled to have casual intercourse outwith the marriage vow without the risk of divorce. Isolated acts are difficult of proof and are very apt to lead to repetition. (Agreeing with comment of Mr. Justice Pearce in Question No. 1460.)

Question No. 1403. Agree.

Questions Nos. 1407-9. We would distinguish clearly between the casual act of adultery and the "hotel bill cases" referred to here. There can be no question that many hotel bill cases are, if not legally cohesive in their character, at any rate morally so. If any method can be devised to prevent the continuance of this deceit on the courts, we would welcome it, but it does not appear to us to be a matter coming strictly within our province. Only where conciliation fails should the single act of adultery be accepted as ground for divorce.

Question No. 1415. We feel that the statement of the Chairman as applied to Scots law is perhaps somewhat wide. Statements here are too wide, e.g., "persistent morose refusal to converse" might arise in melancholia, and in stages of cancer, heart disease, tuberculosis, etc.

As we understood the National Association's memorandum, they contemplated the case of a wife leaving her husband because of conduct on his part that made it impossible for her to continue to live in family with him although that conduct was not such as would ground an action for judicial separation—i.e., an overbearing, jealous or drunken husband whose attitude, comments or actions carry no physical violence but on a sensitive, anxious, well-doing wife render conditions at home intolerable. A guard is required against the supersensitive or the suspicious spouse, or the spouse unable to bear criticism. In such cases it is felt that a wife satisfying the court of such circumstances should be entitled to alimony.

Questions Nos. 1422-7. No comments.

Questions Nos. 1428-35. While it is a matter on which other bodies are better able to speak, we think that much good would come from an increase in the number of and publicity for such bodies as marriage guidance councils with their specially trained counsellors as reconciling agents. We suggest that, in addition to this increase of opportunity for voluntary approach, all parties contemplating divorce should, say, two to three months before actually raising an action, intimate that intention to a court official, i.e., the Sheriff Clerk, who would then issue a direction to both parties to make appointments with the appropriate marriage guidance council or other qualified person or body and intimate same to the secretary of that body and request a report within the two to three months. Such a report, in the event of the case proceeding, might be an admissible evidence for certain purposes, i.e., custody of and access to children. It appears to us that practical advice is desirable to influence the spirit of goodwill so essential to reconciliation. It would probably be necessary to safeguard against any such reconciliation being a bar to evidence of the breach on the plea of condonation in the event of a later breach. It is desirable that, if necessary, attendance be compulsory, on at least one occasion, at some form of marriage guidance council, in order that both parties may be presented with a clear picture of the reasons for the failure

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of the marriage and the possible consequences of divorce, particularly to the children.

Questions Nos. 1436-47. There does not appear to be under the law of Scotland today any legal justification for a wife leaving her husband and treating him as being technically in desertion, short of what would entitle her to a decree of judicial separation, i.e., adultery or cruelty. In our experience, the fear of losing financial support, and subsequently being divorced for desertion, does deter the wife from leaving the husband in cases where life for her is really intolerable, but either the circumstances do not justify separation or evidence of cruelty is lacking.

Questions Nos. 1448-66. No further comments.

Questions Nos. 1467-71. In approaching these Questions, we take as a basic principle the desirability of avoiding anything of the nature of making divorce easy. From the days of ancient Rome to those of modern America, history seems to make clear that easy divorce has a ruinous effect on a nation. It involves a lowering of the general moral standard which is more injurious than unhappiness. It increases the number of children deprived of family life with consequential mental and other deleterious effects. It increases the numbers on whom fall the mental strains of the breach of the relationship. The good of the community as a whole is more important than the happiness of a small minority of individuals. There are many methods open to an individual who wishes to bring about the breaking down of the marriage. Cases, for instance, are known to certain of us where husbands and wives living in comfortable homes lead separate lives associating neither at bed nor board and not even speaking to one another—in some cases without exception and in others conversing when friends or others call. While, therefore, we would agree that there is ground for changing the emphasis from what is described by Lord Keith as the penal view to that of granting relief, we would press that the need for such relief should only be found in evidence of conduct such to present grounds justifying divorce and not in evidence of incompatibility and kindred grounds with their mutual contributions. The question whether, in certain cases, because of the influence or effect on the lives of the children of the parental conduct, they should be removed, is a different question.

Questions Nos. 1472-5. We had not contemplated that the National Association favoured divorce because of a sentence of imprisonment *per se*. We had intended to cut out the words "of the order of ten years" and let the Answer apply to all that class of cases which, because of the definite sexual background or otherwise, affected the nature of the marriage relationship. We felt that many cases of this class come into the realm of imprisonment sentences of the order of eighteen months, i.e., contraventions of Criminal Law Amendment Acts, 1885 and 1924. On the other hand, long sentences for such crimes as fraud and embezzlement may have resulted from acts in which both parties were knowingly benefitting. It would be unreasonable to give one party in such cases a right to dissolve the union. Also it is conceivable that a long sentence might be given, e.g., for some political offence. Therefore we consider that divorce should not be granted unless the offence affects the nature of the marriage relationship. Much more common is the case of repeated short sentences aggregating to years. These deprive the spouse and family of considerable support.

Questions Nos. 1476-81. We do not think that considering the short period during which insanity has been a ground of divorce that the time has arrived for any change in the law on this matter. We would certainly strongly resist any shortening of the period. It is to be kept in view that insanity is only one form of illness that may involve a prolonged period of absence in hospital and that may affect the ability of the patient to carry out marital duties or responsibilities as formerly. In regard to the changes in medical treatment of recent times and the increasing numbers of earlier releases from hospital for longer or shorter periods, there can be no doubt that knowledge that divorce proceedings were being instituted after a shorter period would have the consequence of retarding recovery or nullifying the effect of the treatment in many cases. As to conduct of the patient on his or her return, we consider that this should be judged by standards

accepted as applicable to the populace at large and not otherwise. Any other course would, in our view, lead to endless difficulties of a practical nature, e.g., in recurring cases where long or short periods of conduct considered intolerable may alternate with years of ideal comradeship. Such a patient was Mary Lamb who collaborated with her brother, Charles, so greatly to his and our advantage.

Questions Nos. 1482-7. No comments.

Questions Nos. 1488-9. In our opinion, any act of adultery is such a breach of the matrimonial vow and contract as to cut at the roots of society life and that if not readily and voluntarily forgiven and condoned it ought to ground an action of divorce, keeping in view always our comment re Answers to Questions Nos. 1407-9.

Question No. 1491. This Question would appear to involve a differentiation between cases of certified insanity and others. Where there is concealment of certified insanity, we consider that it should be placed in the same position as concealment of certified mental deficiency as a reason for annulment of marriage. *Prima facie*, the certified person is *incompetent*. In our view, however, the provision should not go beyond this. The concealment of, say, voluntary residence in a mental hospital or home should not be included. To go beyond our suggestion would, in our view, raise such difficulties as to be impracticable.

Questions Nos. 1492-1500. We would strongly urge that the period of certification of the patient in hospital or under supervision and care for not less than five years remain an essential (1) under Questions Nos. 1476-81 and (2) if patient after treatment in hospital ceases to be certifiable, no divorce proceedings to be competent in less than five years under Questions Nos. 1476-81. Where there has been refusal of treatment by a spouse, that individual should not have the right to institute divorce proceedings.

Questions Nos. 1501-3. As we stated orally, we are opposed to the treatment of a patient as a voluntary inmate of a home as grounding a divorce. The experience of evidence of certain psychiatrists in the criminal courts may have coloured the views of certain of our members in considering how unimportant facts may be treated as evidence to justify declaring a person to be insane. As these are men of recognised position in the profession and as cases are known of voluntary patients preferring or being induced to remain in such homes rather than return to their old surroundings, there is a fear that a very wide door may be opened to divorce under this head to cases where the grounds are really trivial.

Questions Nos. 1504-7. The propositions made in the Questions are not acceptable to us. If such propositions were accepted, in contested cases who would decide when the break is irretrievable?

Questions Nos. 1509-12. In our view any legal ground of divorce should be available equally as a ground for separation if that course is chosen by the parties.

Questions Nos. 1513-14. We agree that we regard the family as a whole. We have not found that the mother, whose children are ill-treated by the father, continues to love the father. In actual cases of this kind, divorce or separation would be welcome to the wife. In our opinion, divorce on the ground of cruelty to the children ought to be possible. The children of an alcoholic parent are notable sufferers of this type.

Questions Nos. 1515-25. These Questions and Answers reinforce our views expressed orally that the officers to be appointed should be independent of existing services. While in a limited number of cases, the officer would be calling at homes where others of the officers named would be calling, in probably the majority of cases that would not be so. It is therefore important that this should not be a person linked in the minds of the community with the administration of the criminal courts or delinquency. Otherwise such supervision might stigmatise the children. While agreeing that the courts ought to satisfy themselves that the disposal of the children as contemplated is in the best interest of the children themselves and not merely an arrangement agreed to for sale or other objectionable

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PAPER No. 80. MEMORANDUM SUBMITTED BY THE SCOTTISH COUNCIL OF
WOMEN CITIZENS' ASSOCIATIONS

5 November, 1952]

Mrs. J. B. THOMSON, Miss I. H. McLELLAND and Miss A. HARRISON

reasons, there does not appear to be justification for supervision beyond a date when the "child" may legally marry and set up a home. We therefore suggest as the appropriate age—18 years.

Questions Nos. 1526-28. No comments.

Questions Nos. 1529-35. No comments.

Questions Nos. 1536-8. While recognising the desirability of voluntary approach to suitable bodies, we recognise also that very many have never heard of and know nothing of these bodies and have not given any real thought to reconciliation. The extent of the compulsion suggested would be limited to that referred to in our observations on Questions and Answers Nos. 1423-35.

Question No. 1539-48. We consider it very essential that the law be specific in laying down what are the grounds on which divorce may be granted.

Questions Nos. 1549-54. We view with much concern the proposals for divorce by consent. We conceive this as a ground for a great increase in divorces to the detriment of family life. We look on divorce by consent as likely to prove itself a cause of such uncertainty in the minds of many parents as to affect markedly their mental outlook. In many cases it would not really be instances of real consent by mutual desire but of pressure on the part of one to secure consent of the other. People are so interdependent that the withdrawal of co-operation on even a limited scale may readily cause the giving of an unwilling consent. We deprecate the idea that the goal of marriage is primarily biological, thereby reducing man to animal level. The most important feature, in the long run, is the spiritual and psychological relationship of the contracting parties. Relatively few divorces are sought on biological grounds.

Questions Nos. 1555-6. No comment.

(Dated 5th January, 1953.)

PAPER No. 80

MEMORANDUM SUBMITTED BY THE SCOTTISH COUNCIL OF WOMEN CITIZENS' ASSOCIATIONS

We beg to submit the following recommendations:—

1. That, as far as possible, the laws of Scotland and of England dealing with matrimonial causes should be brought into line, the best provisions of each country being extended to the other.

Domicile

2. That the provisions of the Acts of 1943-49 which allow a wife, who has the necessary domiciliary qualification and whose husband is a foreigner, to bring an action for divorce in her own country, be extended to allow proceedings to be taken in Scotland when the husband is domiciled in England. (There was some support for a proposal that the period required to establish domicile be reduced from three to two years.)

Maintenance

3. That the recommendations of the Mackintosh Committee be enacted to give the court powers to adjust the nature and extent of the provision to be made for the innocent spouse either by payment of a capital sum or by weekly or other regular allowances. All such allowances to cease when the innocent spouse re-marries.

Aliment

4. That aliment for children be paid through an official of the court—as the court officer in England. That this officer should also deal with wife's maintenance payments where these are less than £5 weekly. The Council are of opinion that a guilty wife who is in the financial position to do so, should be equally liable to contribute to the maintenance of any children of the marriage.

Custody of the children

5. That the children's officer should have the supervision of all children of divorced or separated parents and that his advice be taken before the custody of the children is granted.

Desertion

6. That the necessity to prove "willingness to adhere" be abolished in Scotland. (There was some support for the granting of divorce to either party after desertion or separation of seven years' duration.)

Cruelty

7. That more consideration be given to the mental aspect of cruelty.

Division of property

8. That, as is done in some Scandinavian countries, the household chattels and furniture be considered the joint property of husband and wife, and, on dissolution of the marriage or on separation, the wife should be entitled to a half-share of such goods. Savings standing in a bank account in the wife's name should be her own property.

Income tax

9. That the incomes of husband and wife be assessed and taxed separately.

(Dated 18th December, 1951.)

EXAMINATION OF WITNESSES

(MRS. J. B. THOMSON, MISS I. H. McLELLAND and MISS A. HARRISON, representing
the Scottish Council of Women Citizens' Associations; called and examined.)

6893. (Chairman): We have before us representatives of the Scottish Council of Women Citizens' Associations. I gather that your spokesman is Miss I. H. McLelland of Glasgow?—(Miss McLelland): Yes.

6894. What position do you hold in the Council, Miss McLelland?—(Vice-President of the Glasgow Association. I am a member of the Committee which deals with questions of legislation in the Scottish Council—although we are not legal experts.

6895. Then we have Mrs. J. B. Thomson, who is President of the Scottish Council?—(Mrs. Thomson): Yes.

6896. And Miss Agnes Harrison?—(Miss Harrison): Yes. I am President of the Edinburgh Association.

6897. I am very sorry indeed that you have come on so late, but your memorandum is so very short and admirably clear that it may be that we shall have little to ask you upon it. Do you wish to add anything to this memorandum orally?—(Miss McLelland): I would just like to say that we made this a very brief memorandum, and you will notice that in our first paragraph we ask for the best terms we can get from both countries, England and Scotland; and we have just added a few of the things which are of immediate interest to us. Although we are a women's organisation, I would like you to notice that we are quite emphatic that we do not demand any preferential treatment for women, although we do realise that circumstances, leading up to divorce, and usually following

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[Continued]

divorce, are a little bit harder on women than men, but that we leave to the settlement of the matter in the courts. I would like to draw your attention to the second point in paragraph 8—savings standing in a bank account in a wife's name. We think that that needs qualifications. We realise that all the household savings should not necessarily be the wife's property, but that there are cases where by her own efforts she has greatly increased the savings, and we think that when that case can be made then the savings in her name should be hers.

6898. Thank you. Arising out of what you have just said under paragraph 8, as I understand it, you are simply dealing with what should be done on dissolution of the marriage. Would your Council be satisfied if the judge who granted the decree dissolving the marriage had a discretion to allot, for example, such furniture as might be needed to the party having the custody of the children, and to divide savings in a manner which he considered equitable between the parties? Would that meet your view?—As I understand the law at present, the necessary provision for a wife when she is with her husband is not very good; it does not satisfy us and I think that that might carry over into a divorce settlement. In that case we would not be satisfied with the mere hope that it would be just. We would like to have it confirmed that the property must be justly divided.

6899. I was thinking to some extent of the wife's interests. You suggest that the household chattels and furniture be considered joint property of husband and wife, and on dissolution of the marriage or on separation the wife should be entitled to a half-share of such goods. It struck me that if, as very often, the wife had the custody of the children it might be right that she would have more than half the furniture because she would need more. That was why I suggested that some sort of discretion might be vested in the judge.—We would accept the judge's discretion, of course, subject to its being quite clearly understood that the wife is entitled to her half-share.

6900. I see. Not less than half?—Not less than half.

6901. But more if the judge thought fit?—Yes.

6902. Would you tell me how this memorandum was prepared? How many branches or committees has the Scottish Council got?—(Mrs. Thomson): There are nineteen Associations; all of them had information about this and were asked to send in suggestions.

6903. You remember perhaps that the Commission sent out five questions to which it invited answers. Did you send round these five questions to your Associations or not?—No, we did not.

6904. What sort of questions did you send to the Associations?—We just asked them to consider the question generally, and send in their suggestions to us.

6905. What questions, the question of divorce?—Of marriage and divorce, in general terms, as we understood you were considering it.

6906. To give you their views on any changes there should be in the law as regards marriage and divorce—is that right?—Yes.

6907. The first of your proposals is a general proposition, and if you get the best provisions from each country, I suppose, so much the better. As to domicile, I do not think that I will trouble you with any questions on that, nor on the next, maintenance, nor aliment, but that we come to custody of the children. You say:—

"That the children's officer should have the supervision of all children of divorced or separated parents and that his advice be taken before the custody of the children is granted."

May I take that in two stages—perhaps the second part of it first? Your suggestion, as I understand it, is that in every case where a divorce or separation order is made the advice of the children's officer should be taken before the custody of the children is granted?—(Miss McLelland): Yes, we think that would be a safeguard.

6908. The court should be advised by him?—Yes.

6909. The first part is what really puzzles me at the moment.—"That the children's officer should have the supervision of all children of divorced or separated parents". I want you to imagine this situation: the judge

has granted a divorce, the advice of the children's officer has been taken and the judge has given the custody to one parent, possibly access to the other. Do you contemplate that, that having been done, the children's officer should have some supervision and, if so, what exactly do you suggest that he should do?—I would suggest that from time to time they should have a report from the schools about the younger children, and especially they should have some means of contacting adolescents, because if they are with one parent, and sometimes the mother is forced to go out to work, the parental interest in the children is reduced and we think that that sometimes leads to delinquency and irregularities, and that if some contact could be made between the children's officer and these children it would be all to the good.

6910 (Lord Keith): You mean, Miss McLelland, that the children's officer should keep an eye on the children and what is happening after the order for custody is made?—That is just exactly what we mean.

6911. (Chairman): I can quite appreciate that getting reports from the schools might be a very useful check, but I wondered if you contemplated that the children's officer should visit in all cases visit the home and see the children. That might be considerably resented by some parents who are doing their best to take care of the children?—If the officers were properly chosen to do this work it would be appreciated. That has been my experience so far.

6912. I see. I wanted to see whether you had any doubts about that. To come to desertion: you say that the necessity to prove willingness to adhere be abolished. There is a great deal of support for that in the evidence before us. Then you say that there was some support for the granting of divorce to either party after desertion or separation of seven years' duration. Of course, in the case of desertion there is already a remedy for the deserted party, before seven years, but you say "to either party". How many of your Associations made that suggestion?—A minority of our Associations.

6913. Could you tell me how many?—Only three or four.

(Chairman): As to cruelty, I have no questions, and I have already asked you about paragraph 8, division of property. As to paragraph 9, income tax, you recommended:—

"That the incomes of husband and wife be assessed and taxed separately."

I am sure every husband would willingly support that, but whether you can persuade the income tax authorities to accept it is perhaps rather doubtful.

6914. (Lord Keith): I have very little to ask. I suppose that in paragraph 2 you have in view that at the present time a wife who has resided in Scotland for three years can take proceedings against a husband who is somewhere abroad, even if he is domiciled abroad, and you want to introduce that in the case of a husband who is residing or domiciled in England. I suppose that the converse would be true—that if a wife is residing in England then she could take proceedings in England against a husband who is in Scotland?—Yes.

6915. What is the idea behind this—is it that it is going to save expense or trouble to the wife?—It is not so much the expense as the fact that she has probably to leave her family for a period and that she is going to what to her is tantamount to a foreign country with no friends near her, and she finds her difficulties very much increased in that way.

6916. A wife who is living in Scotland and has to take proceedings at the present time in England would no doubt have to make a journey to London or elsewhere in England for the matter of a day or a couple of days. That is not a great hardship or a great separation, surely, from the family?—Would it entail, may I ask, previous correspondence with the courts in England?

6917. Whoever is looking after her affairs, her solicitor, would attend to all that.—Yes, naturally, but we still have sympathy for the woman who is far from her own people at a time like that, and we think there is no logical reason why this Act should not apply to the relations between Scotland and England as it does between Scotland and America, perhaps.

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[Continued]

6918. I see the logic of it. What seems to influence you most is that it is a hardship for a wife to take the two or three-day trip to London?—It is not a matter of time so much as mental distress.

6919. (Mrs. Jones-Roberts): I am just a little puzzled, Miss McLelland, as to the effect of your proposal in paragraph 5, and I wonder if you can help me here? The children's officers at the present time are full-time officers of the local authority. As I understand it, you recommend that they should be also entrusted with the supervision of all the children of divorced or separated parents. Do you envisage, therefore, that they should also become officers of the courts? Who would tell them about these cases? Would the information come from the court?—It could be passed over to the department of the children's officer.

6920. And is it your idea that the children's officers would report to the children's committee and that the court would therefore have no further cognisance of the matter? I am a little puzzled as to the division of responsibility as between the children's committee, on the one hand, and the court which made the order, on the other hand.—As I understand it, at present, cases of neglect and cruelty to children can be brought by the children's officer.

6921. That is perfectly true, cases of neglect may come to the notice of the children's officer, but here you are making recommendations to cover all cases where an order has been made. You would not suggest, would you, that there would be danger of neglect in all cases where a divorce or separation has taken place?—I think, nevertheless, that the neglect could not be presumed to be taken out in every case or even in half of them. There are so many possible cases that it would be a wise precaution, especially just now, as we are so much concerned with the young people, the adolescents.

6922. The main duty of a children's officer at the present time is to act on behalf of the local authority in receiving children into care, children who have been deprived of normal home life, and to find suitable homes for them

or, where that is not possible, to put them into institutional homes. You seem to be extending that to something quite outside the range of their present duties, to include children who may be in quite normal homes and are possibly being very well cared for.—It might appear that we are giving the children's officer too much to do, and that we are expecting too many disasters from these broken marriages. But when one hears that, in some countries where divorce is easier than it is in Scotland, eighty per cent. of the cases of delinquency are traceable to broken marriages, we feel that it might be a wise proceeding here to keep an eye on the children for a considerable time.

6923. Yes. Your suggestion differs from most of the suggestions we have heard, in so far as a great many bodies have suggested that a special type of officer, called a court welfare officer, might advise in cases of this kind, and whose help might also be called in on matters of reconciliation. Have you considered that somebody quite distinct and separate from the children's officer might do this, somebody who is in fact an officer of the court?—We have considered the possibility of a connection with the probation service, and we feel that anything that savours of the probation officer would not be a good thing. The probation officer, according to one memorandum, was to be called the welfare officer. People get very alert to that sort of thing, and we do not think that it would be wise to have a probation officer.

6924. One further point—you suggest supervision—for what period? How long is the supervision to continue?—Certainly during school life—and what is probably even more necessary—until about the age of eighteen.

6925. You appreciate that you are placing a very great additional burden on either a children's officer or a court welfare officer, if this is to continue for a number of years in what might be regarded as quite normal cases?—Yes. (Lord Kew): The courts in Scotland only give custody of children up to the age of sixteen, therefore there would be no point in having the supervision beyond that age.

(Chairman): Thank you very much for your memorandum and for coming to help us today.

(The witnesses withdrew.)

(Adjourned to Thursday, 6th November, 1952, at 10.30 a.m.)

TWENTY-EIGHTH DAY

Thursday, 6th November, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (Chairman)

Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
Mr. R. BELCH, M.A.
Mr. G. C. P. BROWN, M.A.
The Honourable LORD KERR
Mr. F. G. LAWRENCE, Q.C.
Mr. D. MACE
Mr. H. H. MADDOCKS, M.C.

The Honourable Mr. JUSTICE PEARCE
Dr. VIOLET ROBERTSON, C.B.E., LL.D.
SHERIFF J. WALKER, Q.C., M.A.
Mr. THOMAS YOUNG, O.B.E.
Miss M. W. DENNERY, C.B.E. (Secretary)
Mr. A. T. F. GOSLYN (Assistant Secretary)
Mr. D. R. L. HOLLOMAN (Assistant Secretary)

PAPER No. 81

MEMORANDUM SUBMITTED BY THE NATIONAL MARRIED MEN'S ASSOCIATION

Divorce maintenance—secured and/or unsecured

1. By virtue of the Matrimonial Causes Act, 1950, Section 19, sub-sections (2) and (3) (see *Questions 6935* and *6936*), upon a decree for dissolution of a marriage the wife, whether she be the successful petitioner or guilty respondent or the legally equally guilty party in cases where decrees are granted to both parties, may apply to the court for permanent secured maintenance and/or unsecured maintenance, and it is in the discretion of the court to grant either or both as it thinks fit during the joint lives of the parties. Where a wife prior to divorce has obtained a maintenance order from a court of summary jurisdiction under the Summary Jurisdiction Acts, 1895 to 1949, this order remains in force after divorce if the wife so desires but she cannot apply for divorce maintenance whilst it remains in force. She can apply to the magistrates to quash the order and then apply to the Divorce Court for maintenance at her option. She cannot have an order from both, but she can elect as to which she prefers.

2. This Association recommends:—

(a) That only wives who have obtained decrees upon their own successful petitions or cross-petitions, and whose husbands have not also obtained decrees adjudging them equally guilty, should be allowed to apply for maintenance after divorce. Only an absolutely innocent wife who has succeeded against an absolutely guilty husband should be permitted to apply for divorce maintenance for herself.

Wives against whom a decree has been given or wives who have obtained decrees at the same time as decrees have been granted to their husbands, i.e., decrees to both parties, should be debarred from making applications for maintenance.

(b) That orders made by courts of summary jurisdiction under the Acts of 1895 to 1949 should (two facts) be determined by a decree of divorce. If the wife is entitled under recommendation (a) then she can apply for divorce maintenance. To allow her to rely upon her magistrates' order and not apply for divorce maintenance would enable her to defeat the purpose of recommendation (a) if she were a guilty wife.

(c) Where a wife obtains divorce maintenance it should not in any case continue beyond the date of her remarriage.

(d) That Section 19, sub-sections (2) and (3) of the Matrimonial Causes Act, 1950 (see *Questions 6935* and *6936*), should be amended to give effect to the above recommendations.

3. *Restraint.* It is intolerable that innocent ex-husbands should now be paying maintenance to their guilty ex-wives during their joint lives even though it is described as a compensatory allowance. It is an encouragement to potentially guilty wives to take a chance when they know that even if they are discovered they will still obtain

maintenance. It is also an encouragement to wives to launch unfounded petitions as they know that in the event of failure maintenance will still be theirs.

It is only slightly less intolerable for an ex-husband to pay life maintenance to an ex-wife where both have obtained decrees and therefore both have been adjudged equally guilty. In these cases at least the maintenance to the ex-wife should cease when the youngest child reaches the age of sixteen years.

It is manifestly wrong that a guilty ex-husband should continue to pay maintenance to an innocent ex-wife after she has re-married. She should not be allowed to capitalise the past errors of her ex-husband.

The position of the legal wives of all ex-husbands should be considered, as in the vast majority of cases they have succeeded where the former wives have failed; even the former wives of guilty ex-husbands.

It is not the principle of British justice to punish offenders against our legal code permanently. Even reprieved murderers are released before serving a life sentence. Therefore why continue to penalise a man who in many cases has been compelled to offend the moral code and in many cases has offended no code at all but who has been unfortunate enough to marry a woman whose conduct has warranted the granting of his release and yet not release from financial obligation?

It is surely wrong that whilst a widow who has unfortunately been deprived of a husband whose loss has not only been financial should receive 26s. per week, whilst an ex-wife who has conducted herself in such a manner as has contributed to a divorce should receive maintenance which in many cases is three times that amount and furthermore the loss of her ex-husband is as great a gain to her otherwise as the loss of the widow's husband is to her.

4. *Children.* Nothing in the foregoing recommendations is intended to be construed as applying to children's maintenance. This should continue as at present even where it is paid to a guilty wife who has the custody of the children.

The Association recommends only the cessation of maintenance payments in respect of ex-wives; except in the exceptional case mentioned in (a).

Judicial separation as an alternative relief to divorce

5. Where grounds exist for divorce the petitioner at present has the right to ask for a judicial separation as an alternative relief to divorce. A petitioner who prefers judicial separation when divorce is equally available is either actuated by malice or expects to acquire more financially upon the death of the other spouse than would be the case if divorce preceded death. There can be no good reason for maintaining a separate state when divorce

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is procurable. Separation can only injure one or both of the spouses both physically and mentally or produce conduct which is injurious to public morality.

6. *This Association recommends therefore:—*

That a petitioner may not pray for a decree of judicial separation where the same grounds would entitle relief to be granted by dissolution of the marriage nor allow judicial separation or a dissolution of the marriage to be sought at the option of the court.

Right to petition for divorce after seven years' separation

7. *This Association recommends* that the Matrimonial Causes Act, 1950, should be amended to make seven years' continuous separation a ground for either party to petition for a dissolution of the marriage, the court to be empowered to grant a decree of divorce if it is satisfied that there is no hope of a satisfactory reconciliation.

8. *Reasons.* The experience of officials of mental homes can pay ample testimony to the fact that sexual abstinence over a long period can produce grave mental illness.

Sexual offences that have appeared so numerous at assizes all over the country are not all the expression of lust but in many cases due to a system which denies human rights with consequent detriment to the community at large.

Even criminals guilty of grave offences are not permanently deprived of their human rights as are separated persons.

Commonsense demands that separation permanently should be abolished.

9. *Children.* The children of parents divorced as a result of seven years' continued separation are in no worse position than those whose parents have been divorced on grounds already available.

Their position might well be better than having to live with an overwrought parent as a result of continued separation.

Security for wife's divorce costs

10. At present a wife petitioner or respondent can compel her husband to provide security for her costs and this must be paid before a certificate for trial can be obtained. If she is successful the amount of the security is taken as part payment of her costs and the husband is compelled to pay a further sum to meet her full costs. If she is unsuccessful and is refused her costs she nevertheless is allowed to retain the amount of the security as part payment of her costs.

11. *This Association recommends* that a guilty wife should not have the benefit of the security but that it should be returned to the husband. It is manifestly unjust to fix a sum before the hearing which she will retain for her costs whether she wins or loses. The deposit should be security in fact as well as in name, i.e., it should be deposited only for the purpose of meeting the contingency of the husband having costs awarded against him.

Desertion

12. At present if a wife deserts her husband without just cause she is not entitled to maintenance whilst her desertion continues but as soon as she decides to terminate her desertion her husband must take her back or commence to pay maintenance. If a husband deserts his wife she can obtain a maintenance order and she is not bound to take him back.

13. *This Association declares* this to be a manifest injustice and inequality of treatment for the same offence. Furthermore, a husband whose wife has deserted him without just cause may stop her maintenance and then find himself condemned if subsequently the magistrates decide the wife had just cause. If he continues to maintain her then he provides an opening for the wife to say that he told her to go or otherwise he would not have continued paying. In that case he risks being condemned for desertion.

14. *This Association recommends:—*

(a) That where either spouse deserts the other, the deserted spouse should be able to summons the other before a court of summary jurisdiction for the purpose:—

(i) in the case of the wife, to obtain a maintenance order as at present;

(ii) in the case of the husband, to get a declaration that his wife has deserted him without just cause thus relieving him of her maintenance legally without him having to take the law into his own hands in the first instance.

(b) That in the case of either spouse at the hearing before the court the magistrates should decide the terms and conditions upon which the deserted spouse should be compelled to resume cohabitation with the deserter. Only if a husband is unwilling to take his deserting wife back on the terms considered reasonable by the magistrates should a maintenance order be made against him. Similarly, if a wife refuses to live again with her husband who has deserted her then she should forfeit her right to maintenance.

(c) Where a husband deserts a second time after a reconciliation as envisaged in (b), and his second desertion is proved to the magistrates, then his wife should have a maintenance order and she should no longer be compelled to resume cohabitation with him. Where a wife is proved to have deserted a second time without just cause after such a judicial reconciliation, then her husband should be no longer bound to maintain her and no longer bound to resume cohabitation with her.

15. *Reasons.* The adoption of these recommendations would avoid repeated applications to the magistrates. It would enable a husband to get judicial authority for his action instead of having to judge the matter himself as the first instance. It would check the practice of erring wives deserting their husbands for just under three years, returning for a few months and then deserting again but being careful not to stay away three years on any one occasion so as to defeat any attempt by him to obtain a divorce under the Matrimonial Causes Act, 1950, for desertion of at least three years.

Enforcement of payment of divorce maintenance

16. At present in default of payment a writ of *fiat facias*, sequestration or *elegit* is issued as of course out of the registry upon an affidavit of service of the order and non-payment. Thus, where a husband is seeking by legal process a variation of the order, his ex-wife may meantime obtain a writ and levy execution without him being present to oppose it. Again, the alleged arrears may not be admitted and may be the result of some dispute as to computation but he is not given an opportunity to oppose the issue of a writ, which is issued as of course upon the ex-wife's affidavit only. (Matrimonial Causes Rules, 1950, Rule 62 (1).)

17. *This Association recommends* that this Rule should be so amended that when arrears are alleged to exist the ex-wife should take out a summons for her ex-husband to show cause why a writ should not be issued, and not leave him suddenly to meet execution upon his property without prior notice.

Judgment of a county court, when not complied with, cannot be enforced until the judgment creditor has taken out a judgment summons against the debtor for default. Similarly, when civil judgments are obtained in the High Court they cannot proceed to the execution phase before the debtor has been given the opportunity to prove that default has not been made.

Why therefore should an ex-wife have greater rights in regard to arrears of maintenance than are possessed by judgment creditors for value given or services rendered?

Access to children

18. At present, courts of summary jurisdiction can grant orders for access to children where the parents are separated. The magistrates, however, have no power to specify how this access is to be afforded. They can only specify the frequency, which is usually once a week. For a man to go to the wife's home for the purpose of seeing his children exposes him to the possibility of spurious charges at the instance of the wife. Again if

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he meets the children in a public place the wife usually insists on being present to make him as uncomfortable as possible or else to confine her bickering relating to the separation circumstances. The magistrates cannot interfere as she is affording "access" to the children and that is all they have power to compel. Many wives deliberately remove their home at least one hundred miles and then tell their husbands that they can come to visit the children. This is usually impracticable financially and also usually precluded by the time available at weekends for travelling.

When access is granted by the Divorce Court, however, the manner in which the order is to be complied with is set out and usually the ex-husband is entitled to have the child or children in his absolute custody for certain

stated periods of the year. Access at other times is provided in a manner where the ex-wife is not allowed to be present.

19. This Association recommends that power should be given to the magistrates equal to that of the Divorce Court in this matter. Furthermore, we recommend that the term "access" should be discontinued and one party given the "general custody" of a child and the other the "special custody". The term "special custody" is intended to be substituted for "access" and the magistrates to be empowered to regulate the terms and conditions of such "special custody" in the same way as the Divorce Court does in its orders for access.

(Received 11th December, 1951.)

EXAMINATION OF WITNESS

(MR. WILLIAM B. COLVIN, representing the National Married Men's Association; called and examined.)

6926. (Chairman): Mr. Colvin, you live at Hylton, Sunderland, and you are a member of the Committee of the National Married Men's Association?—(Mr. Colvin): That is right.

6927. I am going to state quite shortly the history of your memorandum and what you have told us about the Association. You will recall that about a year ago the Commission issued a statement setting out five questions on which they invited memoranda in answer. It was in response to that that you submitted on behalf of the Association the memorandum which is now before us?—I did, my Lord.

6928. As the Commission had no knowledge of the Association it was thought desirable to get information at first hand, and so a letter was sent to you, and in reply you supplied a note on the constitution and history of the Association. The Association is not a Scottish body and your memorandum does not deal with Scots law?—That is quite right.

6929. And you, I believe, for personal reasons preferred to be heard in Edinburgh?—As a matter of fact, Edinburgh is much nearer my home town than London.

6930. Yes. Then you have told us certain facts about the Association, and I will invite you to add to them if you wish when I have finished. The Association was started at the initiative of Mr. F. Wornell in February, 1949, his sole object being to bring about a more equitable situation for husbands than at present they endure under "current domestic law". That refers to the law of England?—That is right.

6931. His appeal in the Press brought a nucleus of members, from amongst whom were chosen the members of the present Committee, all of whom live in England. There are five men and one woman on the Committee. So the lady member is on this occasion taking the side of the married men?—That is so. I shall have something to say about that later.

6932. The paying membership is 165 at present. What is your subscription?—Five shillings per annum.

6933. And you say that the Association has many moral supporters and gets a ready acceptance from all sections of the Press. I wondered what that meant. Does it mean that if you write a letter to the Press they generally publish it?—We mean that the founder and chairman, Mr. Wornell, has written many articles which have been published in the Press. Indeed, it is as a result of those articles that the Association has been brought to the notice of those who were wishful to join.

6934. You yourself became a member in February, 1951, and when the Commission issued its invitation for memoranda to be submitted, you were invited to join the Committee and you drew up this memorandum which was subsequently adopted by the Committee?—That is so, my Lord.

6935. Before I ask you any questions, is there anything you wish to add, either arising from what I have said or to the memorandum itself?—Just in two rather important respects, my Lord. One is perhaps more academic than

practical. The references in our memorandum to the Judicature Act of 1925 are not altogether appropriate. Both Sections of the 1925 Act were repealed and are re-enacted in the Matrimonial Causes Act, 1950, and therefore we should have been more correct to have made references to those Sections of the latter Act. That does not affect, however, the statements that we have made in our memorandum.

6936. I think that it would be convenient if you would revise your memorandum by inserting the correct references to the Act of 1950. Will you do that?—We agree to that. My second point is that I wish to make it clear—although it is partly our own fault, I know, because our title is misleading—that the Association is not limited to males. Membership is open to women on the same terms as men. Our motto is sex equality, not sex privilege.

6937. How many of your 165 members are women?—I could not say offhand; I forgot to get that information from Mr. Wornell, but we have amongst our correspondents letters from women who are not members of the Association, but who nevertheless show sympathy with our cause. As a matter of fact, we believe, my Lord, that the memorandum we have submitted is in keeping with our motto of sex equality. It may be, of course, that on reading it one might think that it seeks for more in the way of relief for husbands than it does for wives, but nevertheless the fact remains that it is for the benefit of wives as well as for husbands. It has not been our intention to seek more relief for men than for women. Under the existing laws, however, the position of the husband is rather worse than that of the wife, and therefore we have had to attempt to redress the balance. The present laws have been so concerned, and rightly so at the time that they were enacted, with the protection of injured wives, that under today's conditions they leave loopholes for the unscrupulous ones to take advantage of them. And therefore, if we appear to be biased, it is not by intention, my Lord. We definitely, as I shall show later, have well in mind the position of the injured wife, whose rights we are definitely out to protect. The present laws do not take into account the very altered relationship that has taken place since they were enacted in the relation of the sexes to each other, and, for that reason, in order to secure equity it is merely a coincidence that we have had to ask for greater reliefs for the husband than for the wife.

We recognise divorce as a regrettable necessity; we deplore the fact that it is necessary, my Lord, but we only deplore it in the same sense as we all deplore the amputation of limbs for the purpose of saving life and to maintain the remainder of the body, and as the surgeon is equipped for the carrying out of those very necessary operations, so are we of the Married Men's Association deeply concerned that Her Majesty's judges and divorce commissioners should also be adequately equipped by statute to perform those operations which fall within their province to secure human happiness, to terminate misery, to terminate it completely, and in some cases to save

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[Continued]

sanity, and collectively therefore to maintain the moral fibre of the community.

We have no place in our organisation for the man who wilfully and for his own selfish ends completely ignores his marriage vows and destroys the solemn contract which he has entered into. Nor, conversely, have we any sympathy for the woman who does likewise, who thinks that by doing so she may make a further marriage which will perhaps be more materially beneficial. And although we desire a broadening and a greater justice in our divorce laws, we are at the same time concerned to see that we do not extend them so far that the two types of unscrupulous people, which I have cited, should be able to take advantage of them. We think that in regard to our proposals for maintenance we shall also secure another of our objects because, although we desire to widen the grounds for divorce by the addition of a new ground, and the amendment and tidying up of some of the consequences of divorce, so far as is consistent with those objects, we desire to limit the number of divorces.

We believe that our recommendation regarding maintenance will have that effect—for a husband who feels that he would like to kick over the traces, to use a term perhaps not quite appropriate here, will be deterred to a certain extent by the fact that he must face the consequences of having to pay life maintenance to his injured wife, and we say rightly so. Our proposals for maintenance provide that the injured wife's right to maintenance shall remain as at present. We agree that unfortunately in the case of the husband who is in a dire plight in that he has to face either the graveyard, a mental home or the Divorce Court, there is no doubt that, being a sensible man, he will choose the last, irrespective of what future maintenance payments he may have to make. In his case finance is no object, but fortunately not all unhappy husbands are in that very tight corner. There are cases where their marriages could be saved but they refuse to save them simply because they have an ulterior motive, and we think that by maintaining maintenance for the injured wife under the existing laws, strengthening them if need be, husbands will be deterred from embarking upon divorces that need not be commenced.

On the other hand, if a wife, whether she is guilty or innocent or shares the guilt equally with the husband, knows that in any of those circumstances she can apply for maintenance, then that very fact has the very opposite effect in her case. Instead of its being a deterrent, it is an incentive to some wives, who would perhaps otherwise make the necessary effort to maintain their marriage vows, or causes them to be regardless or reckless as to what effect they may have upon their husbands, which may cause them to provide grounds for divorce. And it is for that reason, my Lord, that we have suggested that a guilty wife or wife who shares the guilt equally with the husband should not be allowed to apply for maintenance. Now, I know, my Lord, that although she is allowed to apply under the present matrimonial regulations, that does not necessarily mean that she will be granted maintenance. We know that the circumstances are to be taken into account and that in these days in the case of a wife, guilty of adultery, it is perhaps but rarely that she is granted maintenance, although there are some cases where she is. But in these days, since the operation of the 1937 Matrimonial Causes Act, the Herbert Act, I should imagine that more marriages are dissolved upon the grounds provided by that Act than on the grounds provided by the earlier Act of 1857. And I submit that as almost all those cases, dependent upon the financial position of the parties, maintenance is granted to guilty wives. Being guilty on the grounds of desertion or cruelty seems to have less effect, as far as maintenance is concerned, than when one is guilty of adultery. But apart from our proposals seeming to have a deterrent effect upon the presentation of divorce petitions, we support these proposals because they are in the interests of justice and equity. It is not right that a guilty wife should be granted maintenance, and we feel that it should not be left to the discretion of the judiciary as to whether a guilty wife—or an equally guilty wife, in the case where desertion is granted to both—should have maintenance. We feel that it should be laid down by statute that maintenance should only be paid to the innocent wife, and not to a guilty or equally guilty wife. And then again with regard to maintenance generally, even to an innocent wife we say that this maintenance should not continue beyond

the date of her re-marriage. We say that it is intolerable that a woman, who has perhaps secured a divorce or has been divorced, should be allowed to re-marry, claim maintenance from her legal husband with whom she resides, and yet be able to receive maintenance from a former husband who himself may also be married.

Now we know that where a wife does re-marry and is in receipt of maintenance from her ex-husband, that does in fact give her ex-husband the right to apply for that order to be quashed or to be reduced, and that therefore he does secure some advantage. But the ex-wife may marry, for instance, an old age pensioner. She may appear before the registrar, or the magistrates if she has still continued to rely upon a magistrates' order, and can rightly maintain that she is no better off by her second marriage, and that on those grounds the order should continue, and that her ex-husband should be compelled to maintain his payments. And as the law stands at present she would very likely succeed.

On the other hand, she may not succeed but the order may be reduced to a nominal sum; but upon the demise of her second husband, if he has not been able to leave her well provided for, she can again approach the court and have the order increased from that nominal sum, very probably to its former amount. Now we say, my Lord, that that is very wrong. That is a social injustice not only to ex-husbands, it has a galling effect upon those very righteous married women who have done their duty, who have looked after families, who have perhaps had difficulties during their married life, but who have had the grit and determination not to give way but to hold on fast. They see others who have chosen to become ex-wives, who, rather than struggle to maintain the marriage have sought divorce, and as a result, receive, shall we say, a premium for their neglect in the form of a perpetual annuity, because that is what it amounts to under the present law. It is quite possible for a woman to be married, rely upon her husband for maintenance, and yet still be receiving maintenance from perhaps two or three former husbands, depending upon the financial circumstances in each case.

We say also that, from other points of view, it is very wrong that maintenance should continue after re-marriage. If a woman is so unfortunate as to lose her husband as a result of a colliery disaster or in the shipyards or in any way in connection with or arising from his work, she now receives a pension under the Industrial Injuries Act, the former lump sum payments having been abolished. The only way in which she could get a lump sum payment would be at common law, and in that case there would be special circumstances—she would need to prove negligence against the employer. So, more generally now, workmen's compensation is replaced by a payment under the Industrial Injuries Act. But if she re-marries that pension ceases in the same way as a pension under the National Insurance Act ceases. But not so the maintenance payment which an ex-wife receives from her ex-husband. She can re-marry and thus give him the right to apply to have the maintenance order reduced or quashed, but it may not be automatically reduced or quashed. It may be maintained at the former figure and subsequently increased. Again, even at this moment, it is quite possible that Servicemen in Korea are losing their lives and in consequence rights to pension will be created, and rightly so, in favour of their widows. But should those widows re-marry those pensions will cease. Why, therefore, should the State consider that these widows, who are guilty of no offence, should have their pensions terminated on re-marriage, and yet not provide that maintenance to a former wife should cease upon her re-marriage?

We have thought very deeply as to how it could be that the law on maintenance should have got into this state, and we can only satisfy our curiosity by a theory that we have conceived—whether it be right or not is a matter of opinion—but we have come to the conclusion that just prior to 1858, when, as you know, the first Divorce Act came into force, there must have been two bodies of opinion in this country, one arguing for divorce, on the ground of adultery alone of course, and the other not wishing to grant divorce under any circumstances. The anti-divorce people must have felt that somehow or other they would have to admit divorce on at least one ground, and therefore they fought a retiring action. They agreed

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[Continued]

to support the measure provided that clauses were included relating to maintenance. These clauses were justified, and we still think that they are justifiable in the case of an innocent wife, but it was hoped, by including these clauses, that although they could not stop an Act which would allow divorce, they would nevertheless nullify to a certain extent the effect of that Act.

So far as children are concerned, we say that their rights must be protected in any event, that a guilty wife should have maintenance and, where she is an equally guilty wife, maintenance for herself as well, until the youngest child shall have reached the age of sixteen years. And we are not introducing anything new there, my Lord, for under the present National Insurance Act if a woman is left a widow and has, say, one child, she receives a pension for herself and payment for the child, but when that child reaches the age of fifteen years, not only does the payment for the child cease but also for the wife if at that time she is still under the age of forty. There are some cases where, if she has passed the age of forty at that time, her pension for herself does continue, of course. Therefore, we think that it is not very wrong to ask that maintenance to a former wife, a guilty wife, where she is receiving maintenance on account of the children, should cease when the youngest child reaches the age of sixteen years.

Turning now to our second recommendation, regarding the choice of judicial separation as an alternative relief to divorce, we make that suggestion because we think that to tolerate separation as a permanent feature of our system is wrong. We ask ourselves what is the motive by which an injured party has the right to ask either for a judicial separation or a dissolution of the marriage, and prefers the former—what is the motive? We instance in our memorandum possible motives—material motives, should the death of the other spouse occur before a dissolution of the marriage, but we must confess that it is quite possible that on religious grounds an injured party may desire to apply for judicial separation rather than divorce, because on religious grounds they may be opposed to divorce entirely. We do support religious toleration and, wherever possible, believe that the religious views of all men and women should be respected equally; but when it comes to this matter, we say that to allow that alternative remedy of judicial separation to remain for the benefit of protecting the religious liberties of the people whom I have cited is, in our opinion, not religious liberty or toleration, but it is to grant, shall we say, a licence to people with certain religious views to determine what particular condition shall be applied to the other party, when that other party has committed a matrimonial offence. And in no branch of our law do we allow an injured party to determine what the redress shall be. That is left to third parties and, therefore, much as we wish to respect the religious views of those who are opposed to divorce, we still say that they should not be allowed to exercise that liberty to the detriment of the other parties to the marriage.

6938. Mr. Colvin, I am very reluctant to interrupt you, but I am bound to say this. The views of your Association are set out very fully in the memorandum. The invitation which I gave you was by way of enquiring whether you wished to add any further suggestion to those set out in the memorandum. If you were to go through all the suggestions in the same way as you have gone through the first one—and you are, I suppose, now half-way through your second—then I think that we should occupy the whole morning and we should never get to the stage of questions. Would it not be better to allow the Commission to put whatever questions they wish on your memorandum? In reply to these questions it may be that you will clear up all the points which you are now developing, and then if you feel that we have not given you every opportunity of ventilating your views perhaps at the end you may add something. To travel again over everything in greater detail is hardly what I expected in an opening supplementary statement.—Thank you, I did not intend to go, my Lord, point by point through our memorandum. I was only setting out to give the reasons why we were formulating those proposals. But I agree, my Lord, perhaps there may be many points brought out by questions from the members of the Commission; and I readily accept your suggestion.

6939. My two questions both arise out of your very interesting opening statement. First, your knowledge of statute law leads me to ask what your occupation is?—

I am an accountant, my Lord, not in practice. I am an accountant employed by a North-East manufacturing company.

6940. Then you said in your opening statement—and you emphasised it more than once—that your Association was not concerned to assist men or women who had disregarded their matrimonial obligations and had put an end to the marriage, whether by adultery or other acts. That leads me to ask you one question on paragraph 7 of your memorandum, which recommends that the law should be amended to make seven years' continuous separation a ground for either party to petition for a dissolution of the marriage:—

"... the court to be empowered to grant a decree of divorce if it is satisfied that there is no hope of a satisfactory reconciliation."

Now, in view of your opening statement I should have thought that you would want to impose this limitation—that an innocent wife or husband, who did not want to be divorced, should not be divorced at the instance of a husband or wife who is guilty of adultery, or whose conduct has broken up the marriage. I should point out that in one country where a ground like this has been tried, the court must refuse a decree if it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner—that is in New Zealand; and in Western Australia, the court must refuse a decree if the plaintiff has, in the five years before commencing the action, been guilty of adultery. I want to ask you this: would you be satisfied if the seven years' separation ground were allowed, subject to these limitations?—We would not be satisfied, my Lord. When I said that we did not wish to assist certain people to obtain a divorce, I put in the proviso, "consistent with the attainment of our main objects". And one of our main objects is stated in this particular paragraph—to obtain this new ground for divorce, a right to petition by either party. If, as my Lord states, the idea adopted in Western Australia were to be accepted, and the party petitioning shall be debarred by reason that he has himself committed an offence—really that would bring us back to our present position. In this country at present, three years' continuous desertion is a ground for divorce only at the instance of the injured party. If we adopt the scheme which is already in operation in Australia and other countries, we are really only maintaining the same ground as we have today, except that we are extending it really from three to seven years.

6941. May I come to the New Zealand scheme? I will quote it:—

"... if upon the hearing of a petition ... the respondent opposes the making of a decree, ..."

that is, the innocent party opposes—

"... and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition."

What would you say to that limitation? Would you accept that as a reasonable limitation on your suggestion?—We could not accept that as a reasonable limitation, my Lord, because the real purpose of putting forward this as a new ground is to cover, if I may say so, those cases that are not already covered by cruelty, divorce after three years' continuous desertion, or adultery, in other words, those cases where the parties are separated, and yet neither party wishes to commit an offence. In our opinion we want to break down the idea of permanent separation. We are mindful of cases of people who have been separated for forty and fifty years and we say that that situation is wrong; it is not in the public interest, and is not benefiting anyone. We are first on this point, my Lord, and I think that we should perhaps have underlined one part of our recommendation, namely, that the court is to be satisfied that there is no hope of a satisfactory reconciliation.

6942. Yes, we note that point.—We would like to stress that, my Lord, because if the other party should come along even after the seven years have expired and say that the marriage would have been successful but for a certain circumstance which has existed for some time, and which is likely to be removed two years hence, then if the court is satisfied that that is so, it should be a ground for dismissing the application.

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[Continued]

6943. (*Mr. Justice Pearce*): First, let us deal with maintenance. Your objection is to any wife who has ever committed a matrimonial offence getting maintenance, is it not?—That is so.

6944. The cases where they do are a very tiny proportion, are they not?—A tiny proportion of what?

6945. Perhaps I am not making it clear. In the great majority of cases guilty wives get nothing whatever?—I would not agree there, Sir.

6946. What experience have you had of the way in which court orders for maintenance operate?—In nearly all cases except where the wife is guilty of adultery, maintenance is almost automatic when she makes application under the . . .

6947. I do not think that you and I are following one another. We are not discussing maintenance where a wife has not been guilty of any matrimonial offence—you are not making complaints on that particular point. You are complaining that a wife who has been guilty of adultery gets maintenance, or may get maintenance.—It is possible.

6948. Yes. I am only pointing out to you that the vast majority of cases are undefended, are they not?—Yes, I agree.

6949. And would you agree that hardly ever in an undefended case do you find that there is what we call a compassionate allowance to a guilty wife?—I would not like to agree there, because an application can be made subsequent to the decree.

6950. I know that applications can be made, but can you give me any idea of what you consider to be the proportion of cases in which guilty wives get maintenance?—Very few in the case of those guilty of adultery—but in the case of those guilty on other grounds, more often than not.

6951. Guilty on what other grounds?—On the ground of cruelty particularly.

6952. Guilty of cruelty. Do you mean where the case has been fought out?—Where the case has been fought out and particularly where decrees are granted to both parties.

6953. (*Chairman*): I think that Mr. Justice Pearce asked you what is your experience which qualifies you to express a view as to what the court usually does in these matters?—I have had personal experience.

6954. Do you mean that you have been a party in divorce proceedings?—I have been a party to divorce proceedings.

6955. A respondent?—No, petitioner.

6956. (*Mr. Justice Pearce*): With an order made against you for maintenance?—An order, yes, still in force. It was a decree to both parties.

6957. On what ground?—On the ground of cruelty. I was the petitioner and it was answered and cross-petitioned and fought out, with the result of a decree to both, but nevertheless there is still maintenance to pay.

6958. There are some very rare cases where that is done, and the reason for which it is done is that the husband is in a better financial position than the wife. The wife has been married for some time and is in a worse condition for starting to try to earn her own living than when she entered marriage, and if you are treating them both equally the fair thing is to get the husband to make some contribution to his wife, albeit quite a small one. That is the principle, is it not?—I agree, Sir.

6959. You say that that is wrong?—We say that, even in these circumstances, maintenance should certainly not continue for life. There is no justification for it, particularly after the wife's re-marriage.

6960. In some cases—I am not saying it is so in yours, you appreciate that—a woman may be left in a position where she is really incapable of earning, and a man may be in a decent financial position, and assuming that they have both been responsible for the shipwreck of the marriage, there is no particular reason why the husband should be well-off as a result and the wife starving. You do see that point of view?—I do see that point of view. If a wife is able to turn something, that is taken into account and the husband pays a little less in consequence. But, on the other hand, if the ex-wife is a person who

will not work and is quite willing to continue drawing this perpetual annuity, there is no one to compel her to go to work. Yet if she is receiving more than £2 a week and she does not enter employment, she is compelled at the present moment to put a stamp on a national insurance card of 4s. 5d., as a non-employed person in receipt of £2 or more, and therefore cannot be exempt from stamping.

6961. I follow. Then you say that a maintenance order in the magistrate's court, where a wife has been guilty of adultery, should immediately cease instead of the husband having to make application for discharge of the order, is not that so?—That is so, we suggest that.

6962. The present situation is, if the husband goes to the magistrate's court, if the wife has committed adultery he can at once get the order discharged?—That is so.

6963. But you say that he should not have to have the trouble of going to the court?—I think that we are at cross-purposes there, Sir. We are thinking more of the case where a wife has an order from the magistrates on some other ground. If our proposal that a guilty wife should not obtain maintenance in the Divorce Court were accepted, naturally she would continue to rely on her magistrate's order and not apply.

6964. Yes, until the husband took the trouble to go to the magistrate's court and take out a summons to have it stopped?—He could not do so unless she had been guilty of adultery.

6965. I see, you are thinking of the wife who has been guilty of cruelty but gets a decree, and it does not determine the magistrate's court order?—That is so.

6966. In the case of adultery the matter is perfectly satisfactory as it is?—As it is, he could have that order discharged by going to the magistrates' court.

6967. And in the case of cruelty, if the magistrate considers that the circumstances warrant it, he can, of course, vary the order if that seems just?—That is so, but we have a case on our files of a wife who had attempted to get an order from the magistrates, and the magistrate had said that she was not justified. Subsequently, she had grounds for divorce against her husband, and she is now going to get maintenance from the Divorce Court, yet in fact she had not been able to get it in the magistrate's court because she had been living in desertion from her husband. We have had another case where a wife has had an order from the magistrates which has been discharged on the ground of adultery, but is likely to be revived by maintenance from the Divorce Court, subsequently.

6968. Perhaps you could send us a note of those cases, with the facts set out?—I will do so.

6969. On the question of security for a wife's costs, the situation, as it is today, is that in the case of a rich man, where a wife has nothing, in order that a solicitor may be able to present her case so that it may be seen whether there is justice in it, there is a sum put forward for security to enable the proceedings to be brought?—Yes, if the registrar orders security and the husband is the petitioner, then unless he provides the security he cannot proceed.

6970. Quite. In such a case, if the wife's grievance is found to be unjustifiable, the court will always order the security to be paid over to the wife's solicitors, so that they can be paid for the case which they brought in all good faith, that is so?—That is so, Sir.

6971. So far as the rich man is concerned that does not create any real hardship, in that it is merely £100 or £200 extra to the trouble which he has had over his unfortunate marriage?—I do not think, Sir, that it is confined to the rich man.

6972. I was only dealing with the rich man. In the case of the poor man, shall we say the man earning under £500 a year, legal aid comes into it now, does it not, and because of that I suggest that your complaint may be a little out of date. Is a man entitled to legal aid if he has got under £500 a year, or do you not know?—It depends upon his other circumstances, as to whether legal aid would apply.

6973. Say under £420, let us deal with that class?—I should think that in almost all cases it would apply; he may get legal aid for himself, but would be protected from an application by the wife's solicitor for security of costs?

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[Continued]

6974. Suppose that the costs of citing the case are estimated at £100 for the husband, and he is ordered to pay a proportion of them, £50, that being all that it is thought he can pay. Then the wife, on the other hand, having no resources, is ordered to contribute nothing. Is not the situation that no registrar would ever make an order for security in that type of case, because the State having decided that the man can only pay half of his own costs anyhow, it is ridiculous to get him to make a contribution of security in respect of his wife's costs which the State is carrying? Is not that the present situation with regard to the man who is unable to pay the whole of his legal aid costs?—I agree that in regard to the man who gets legal aid this is perhaps a little out of date, but in any other case, Sir, why should a man be responsible? If he fails, yes, but if he succeeds, why should the wife get security for her costs in any event, win or lose?

6975. Is not the situation this, that in the case where a wife has not got money she cannot get a solicitor to take up the case unless he can see that he is going to get paid? Somebody has to produce the money so that the solicitor can go on with that assurance, and when the case is fought out and the wife is found to have no case, are you suggesting that the solicitor should not get any money if he is setting for a wife who fails? You follow the problem, do you not, that it is a difficulty?—I see that it is a difficult thing, but in that case if the husband has the money, I see no reason why the wife should not get legal aid, if she has no money herself.

6976. Which she will.—But in my own case, if I may be permitted to say so, the judge in giving his decision said that he did not propose to grant any costs to the wife whatever, and her barrister said, "She has no money", and the judge said, "That is still no reason for granting her any costs, and the circumstances are such that I am not prepared to grant her any costs". But I had already paid £75 as security, and on that matter the judge said: "In my opinion that was far too high, and I am certainly not going to allow any costs", and the costs were much in excess of £75, so the solicitor or barrister presumably would have to stand the costs unless they got the money from her in some other way.

6977. I understand. Then, in paragraph 5 your Association suggests that a husband should be able to get a declaration from the magistrate where his wife leaves him without reasonable cause for doing so. You have given sound reasons for that. Whether they are conclusive is a different matter—but it would be unreasonable, would it not, to say that a husband must not take his wife back more than once? Is not that what you are suggesting?—I would not say that, but I would say that he should not be legally compelled to take her back more than once. He can take her back a thousand times so far as he is personally concerned, but he should not be legally compelled to do so—put after a hearing of which the magistrates decide on what conditions she should be taken back.

6978. You would make that apply also in respect of a deserting husband, would you?—Definitely—we favour sex equality.

6979. Because one sees cases where husbands go off once or twice, then settle down?—The case of the deserting husband is not quite the same, Sir.

6980. Why not?—Because if a husband should desert and his wife gets an order, she can prevent him from coming back.

6981. No, she cannot. You are in error, are you not? If she has got a maintenance order, no magistrates' court ever puts in a non-cohabitation clause, does it? Do you know of one?—They could put in that clause, but it is not usual in these days.

6982. Then what is to prevent him from coming back?—If she refuses to live with him, he could not get the order discharged on that ground.

6983. I see the point, at any rate.—We have had many instances mentioned to us in letters, where a husband has been unsuccessful in this. It may be, of course, that the magistrate in those circumstances thought that his offer was not genuine.

6984. Then, in paragraph 6, with regard to enforcement of writs of sequestration, *fiat facias*, or *alegit*, it would meet your point if the summons were taken out returnable to the other party, so that before the writ was issued the other party had an opportunity of being heard,

or it would equally cover it, would it not, if the order were made *ex parte* by the registrar, who should have the whole file of the proceedings, so that he would see if any summons were pending for variation and obviously then would not issue the writ without hearing what the other side said?—We would agree to that, Sir. As a matter of fact I have had no personal experience of that, but it has always struck me that if for some reason or other a divorced man were unable to keep up his maintenance he would be in rather a worse position than any other debtor.

6985. (Chairman): You say that you agree with the proposition put by Mr. Justice Pearce?—I would agree to that. I think that meets exactly what we asked for.

6986. (Mr. Justice Pearce): Then with regard to children, you want the magistrates to have a right to specify how the access is to be given and to make any necessary orders to see that it works?—That the magistrates should have the same power as the Divorce Court now has. In that connection, we do know that the magistrates already have the power today, but only under the Guardianship of Infants Act, so that where a wife has the custody of children under the Summary Jurisdiction (Separation and Maintenance) Acts, they have only the powers we state.

6987. (Mr. Mordaunt): The position is that a magistrate has difficulty in enforcing any conditions which he wishes to impose on the right to access, because a magistrates' court has no jurisdiction in contempt, that is, contempt of court; whereas the High Court can impose conditions, and if those conditions are broken, the High Court can enforce the conditions because it is regarded as contempt of court, if they are not complied with. With a magistrates' court that cannot be done, that is the root of the trouble, is it not?—That is the root of the trouble. But in addition there is the fact that the magistrates are not able to specify in their order how the access is to be afforded, whereas the High Court is. The magistrates are able to do so in the case only of the Guardianship of Infants Act, but not under the Summary Jurisdiction (Separation and Maintenance) Acts. (Mr. Mordaunt): Are you quite sure that you are right about the Guardianship of Infants Act? I am not saying that you are wrong, but I am not sure that even under the Guardianship of Infants Act the magistrates can say that access is to be given, say, from two o'clock on Saturday afternoon until six o'clock on Saturday afternoon. (Chairman): Might I suggest that perhaps in due course we shall look at the Guardianship of Infants Act, then we can see exactly what the position is?

6988. (Lord Keith): Mr. Colvin, I have listened with great interest to the statement which you have made to the Commission about the maintenance of guilty wives. So far as Scotland is concerned, that is a problem which does not affect us, therefore you will understand that if I do not ask you any questions on that point it is because we are in a situation which meets your views.—I am glad to hear it, my Lord. It is news to me. I have no knowledge whatever of the law of Scotland. I am very pleased, and I am also pleased to know that some of our proposals have been accepted in Germany, where they are now formulating new domestic laws.

6989. (Sir John Walker): Mr. Colvin, you do not know about Scots law, but I would like you to assume that in the case of the large majority of people who are dependent on their own earnings for a living, when a divorce is pronounced it completely dissolves the marriage, so that there is no alimony due by one side to the other. Will you assume that that is the position?—Yes.

6990. I understand you to justify the English practice of awarding alimony payable by the husband to the divorcing wife on the ground, at least partly, that the fear of having to pay his ex-wife alimony might deter a husband from committing a matrimonial offence? Was I right in that?—We say that it would have a deterrent effect, varying in its success with the type of case.

6991. Is that not a very highly speculative conclusion?—I would say that it is.

6992. Because if that were so, you would expect, would you not, that husbands in England were more deterred than husbands in Scotland from committing matrimonial offences?—I think that you are perhaps attaching too much importance to the deterrent effect which the maintenance provisions may have. Even imprisonment does not stop

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Mr. WILLIAM B. COLVIN

[Continued]

PAPER No. 82. SUPPLEMENTAL NOTE SUBMITTED BY THE NATIONAL MARIED MEN'S ASSOCIATION

theft, even in this country. I do not know, but I believe that in Scotland the husband pays maintenance to an innocent wife?

6993. No, I think you may take it that apart from the limited class of people who have got capital saved, either land or some other form of capital, there is no payment due by either party on divorce, and that the wife, when she divorces her husband, gets no alimony.—That has not led to a great deal of divorces in Scotland, has it?

6994. But what I want to do is to get your help on this: would you not expect, in view of the differing state of the law in the two systems, that the husband in England would be much more deterred from committing a matrimonial offence because of the liability to alimony his wife, than the husband in Scotland?—Yes, in the case of those men who considered finance alone.

6995. I put it the other way, Mr. Colvin: take it from the innocent wife's point of view. If she knows that she would be likely to get alimony from her offending husband, do you not think she would be more prone to raise an action of divorce than if she knew she would get nothing?—There is a possibility of that in certain cases, I agree, but I do not think that it is so widespread as to be material.

6996. Do you not think that if an innocent wife were refused any alimony at all on divorcing her husband, that might make for the stability of the marriage, as she would be persuaded perhaps not to raise any action of divorce?—I think that it would be more equitable to adopt the Scottish system, but we also think that there is a just case for the injured wife receiving maintenance.

6997. You mentioned the position on the death of a husband through industrial injury. That has raised something in my mind to which I would like an answer. Take the case of an industrial worker who has been divorced and has re-married. He would be paying alimony to his ex-wife and supporting his present wife, would he?—If his financial circumstances justified it.

6998. Assume that he is earning a good wage, say £10 a week. Is it common in England that an industrial worker in that position might be paying alimony to his ex-wife and supporting his present wife?—Yes, that is quite possible.

6999. Now, supposing he is killed by somebody's negligence, as often happens, his present wife would have a claim for loss of earnings?—That is so.

7000. What about his ex-wife? She has lost her maintenance, does she have a claim?—She would have no claim whatever at present, her maintenance would cease upon the death of her ex-husband.

7001. But the same act which deprives the wife of her maintenance has deprived the ex-wife of maintenance,

has it not?—That is so, but we say that the ex-wife should not have had that maintenance in any event.

7002. (Chairman): We have no more questions to ask you, Mr. Colvin. I think that it would be more convenient, instead of inviting you to make a further statement now, if I suggested that if on reflection you wish to add anything, you might put it in the form of a second memorandum and send it to us.—I will do that, Sir. (See Paper No. 82.) May I say one thing? I know that it must be in the minds of the members of the Commission as to how much a man should have before he pays maintenance to his former wife. I am giving you an actual case which could be verified to the hilt: a man with £684 per annum is paying £3 10s. per week to a former wife, plus 15s. for a child—which is only right—but that will cease when the child is sixteen. The same man has re-married, his second wife has no earnings. In order to obtain the divorce—and here he had to provide £75 security—he had to re-mortgage the house which he originally bought at the commencement of his marriage and had just managed to get paid off. He now re-starts life, through no fault of his own, with that load of maintenance plus the mortgage to pay off once more, and having a second wife to maintain. I mention these facts so that members of the Commission can assess the extent to which English registers and judges go in this matter. On the other hand, of course, you might find a similar case in another part of the country, still in England, where the maintenance in those circumstances would have been much less; in other words, there is no uniformity. By leaving matters to the discretion of registrars and judges you get no uniformity, and there must be discrimination in some cases. We ask that provision should be laid down by statute. Indeed, on that question of maintenance, my Lord, if the Commission should eventually agree with our proposals—and we will not anticipate—if you should agree, we ask you to consider whether it is not within your terms of reference to report this matter to the appropriate committee which has been set up by the Lord Chancellor, which inquires into what laws need urgent amendment. In other words, if you agree with our proposals as regards maintenance, could you do something which would accelerate the effect, rather than that it should be left to the devices course which your final Report will no doubt take?

7003. I just want to ask one question arising out of what you have said. You have given us a concrete case as to an order for maintenance. To complete the facts in that case, were there cross-petitions for cruelty? Were the husband and the wife both granted a divorce on the ground of cruelty?—That is so, my Lord.

(Chairman): Thank you for your memorandum, and for your evidence here today.

(The witness withdrew.)

PAPER No. 82

SUPPLEMENTAL NOTE SUBMITTED BY THE NATIONAL MARIED MEN'S ASSOCIATION

Divorce maintenance (see Paper No. 81, paras. 1-4)

No maintenance after divorce may incite despised husbands towards divorce and conversely deter wives.

Maintenance for all ex-wives irrespective of guilt or innocence (as at present is legally operative in England) may deter husbands and incite wives towards divorce. Maintenance for innocent ex-wives but none for the guilty or equally guilty (recommended by this Association) will deter both guilty husbands and guilty wives and award justice and equity to both innocent ex-husbands and ex-wives.

Right to petition for divorce after seven years' separation (see Paper No. 81, para. 7-9)

Marriage has been referred to legally as a contract and sometimes as a status. In its highest and best character it is a status, removed for above contract, and if all marriages were of this calibre divorce would be unnecessary. The marriages which require the provisions of divorce law, however, can only be regarded as contracts. Impossibility of performance has always been

regarded as sufficient reason for the discharge of a contract. Can it be gained that, where two parties to a contract have failed, for whatever reason, to fulfil that contract for a continuous period of seven years, the contract is impossible for the parties to perform or operate? Destruction or non-existence of the subject matter would discharge a contract. Can the essential features of a valid marriage be deemed to exist when the parties have remained absolutely apart for seven years? The argument that this recommendation introduces a new feature of law, namely, divorce by mutual consent, is fallacious as it presupposes that two people will deliberately absent themselves from each other for seven years in order to obtain a divorce. If a married couple were to do this it would surely show that there was genuine need for the marriage to be dissolved, but that their moral principles were too sound to allow them to commit the other marital offences which would allow them to seek divorce.

(Received 29th November, 1952.)

PAPER No. 83

MEMORANDUM SUBMITTED BY THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN

PREAMBLE

1. The National Council of Women of Great Britain is established in the interests of no one particular social, political or religious organisation. Its objects include the promotion of the social, civil, moral and religious welfare of the community, the promotion of such conditions as will assure to every child an opportunity for full and free development, and the removal of all disabilities of women, whether legal, economic or social. There are eighty-nine branches and ninety-seven nationally affiliated societies.

2. The proposals put forward in the following memorandum to the Royal Commission on Marriage and Divorce represent the agreed policy of the Council, much of which has been advocated for many years. In regard to marriage, the policy of the National Council of Women has always been directed to the promotion of the welfare and stability of the family and the encouragement of the highest public and private morality for both sexes.

3. It will be realised, however, that the National Council of Women, being composed of such a large number of women and affiliated societies, cannot be united on the subject of divorce. There are those among its members whose religious principles do not permit of divorce under any circumstances whatever, who believe in and propagate the doctrine of the indissolubility of marriage, but who recognise that the law of this country provides for divorce, and relief for those suffering from matrimonial offences, whether by divorce or separation. There is common agreement that so far as divorce is concerned the parties should have made available to them every suitable means for prevention and reconciliation.

4. The National Council of Women believes that education for marriage and family life are of paramount importance. Stability of family life is the basis of civilised society, and instruction in the responsibilities of marriage and parenthood, and in the art of home-making, should be available for all young people, and given to boys as well as girls at a suitable stage of their education.

RECOMMENDATIONS AND ARGUMENTS

CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

5. The law should be amended so that if a return to cohabitation is tried for the purpose of reconciliation, it should not be regarded as condonation, and therefore a bar to proceedings. The reason is that the present law frustrates the attempt at reconciliation.

6. The law should be amended so that "the woman named" may be cited as co-respondent and liable for costs and damages in the same way as the male co-respondent. This is to secure equality between the sexes.

7. Where a separation order has been made on the ground of desertion and a non-access clause has been inserted as a protection for one of the parties, this clause should not preclude desertion running from the date when the desertion was found to commence.

CHANGES RECOMMENDED IN THE POWERS OF COURTS OF INFERIOR JURISDICTION IN MATTERS AFFECTING RELATIONS BETWEEN HUSBAND AND WIFE

8. Magistrates should have the power to make interim orders for maintenance up to the time of an order for alimony or maintenance made by the divorce judge in the High Court.

RECOMMENDATIONS RELATING TO PROPERTY RIGHTS OF HUSBAND AND WIFE

9. A wife should be entitled to a portion of the joint income of husband and wife for her own separate use. Self-respect and mutual respect are a necessary basis for successful marriage, and complete financial and economic dependence of either party militates against this respect.

In this connection members of the Commission are asked to consider the peculiar hardship to a wife, especially if there are children, that a husband guilty of adultery or desertion has the power to sell the house and furniture without regard to his wife or the welfare of the children. If, on the other hand, she is driven by his conduct to leave him, he may install another woman into the home which she has made.

RECOMMENDED CHANGES IN THE ADMINISTRATION OF THE LAW

10. The scheme of legal aid and advice as laid down in the Legal Aid and Advice Act, 1949, should be implemented in so far as it relates to matrimonial causes. At present legal aid only is available and only in the High Court, on account of national economy measures. This has the effect of eliminating legal advice which might lead to reconciliation, and/or the seeking of a separation order, and encourages the parties to take the more extreme measure of divorce. It is necessary that advice should be given first, before legal aid is sought.

11. Decisions as to maintenance should be dealt with by the judge during or immediately after the hearing of the suit.

12. Decisions as to the custody of the children should normally be made by the judge at the hearing of the suit or immediately after it, and a woman assessor who has heard the whole of the case should assist the judge when such decisions are being made.

13. There should be court welfare officers, of both sexes and of equal status, to assist the court as required in cases of custody.

14. In deciding custody, both parties should appear, and the welfare of the children should be the paramount consideration.

15. The broken home is one of the gravest social evils of our time, particularly in its effects upon the children. The importance of providing one stable home for the children should be the first consideration, and where possible, the children's wishes should be consulted. If a parent, not having the custody, remains within reach, this not only unsettles the child, but often induces corruption and deceit, and spoils the relationship with the parent who has the custody. Therefore, in adjudicating custody of the children both in separation and divorce, an order for non-access of the other parent in some cases might be desirable.

LAWS OF KINDRED AND AFFINITY

16. No suggestions offered.

MISCELLANEOUS RECOMMENDATIONS

17. Income tax. Married women should be taxed and assessed as separate persons, and the income of the parties should not be aggregated for the purpose of taxation. The position and status of the woman is involved. The higher amount paid in income tax when the incomes are aggregated can work out as a heavy penalty on marriage.

18. Domicile. A woman on marriage should not be compelled to take her husband's domicile. She should be entitled to retain or acquire a domicile of choice in the same way as a man or single woman. Again, the position and status of the woman is involved. A certain relief provided in the Matrimonial Causes Act, 1950, will become unnecessary if a woman is entitled to her own domicile independent of her husband.

19. Procedure and law of marriage. Marriage within a matter of hours after the issue of a licence should only be permissible in very exceptional circumstances, e.g., in connection with calling-up papers. The stability of marriage concerns not only individuals but the State. Marriage should not be contracted in a hasty manner.

PAPER No. 83. MEMORANDUM SUBMITTED BY THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN

PAPER No. 84. MEMORANDUM SUBMITTED BY THE SCOTTISH STANDING COMMITTEE OF THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN

without forethought, and every precaution should be taken to see that young people understand the nature of the contract they are making. For this reason certified mental defectives should be deemed incapable of contracting marriage. (See para. 24.)

20. *Reconciliation.* The intervention of the court welfare officer should not be compulsory in divorce cases, but only by the wish of either or both the parties or at the request of the court.

21. The work of the Churches and recognised voluntary bodies in giving help and guidance, both in preparation for marriage and in difficulties after marriage, should be encouraged by the State and receive adequate financial assistance, but the voluntary status of this work should be preserved. Conciliation services should be available should the parties contemplate separation or divorce.

22. *Education.* Education for marriage and family life in the widest sense is of the utmost importance. As an essential basis for this, the biology of sex must have an adequate place in the educational system, and be presented with the greatest discretion and delicacy. The co-operation of the Churches and of voluntary bodies in the educational field should be encouraged. (See para. 4.)

23. *Change of name.* Consideration should be given to the question of stopping the informal way in which names can be changed at a food office, thus facilitating irregular relationships.

24. *The marriage of mental defectives* who at the time are subject to the provisions of the Mental Deficiency Act, 1913 to 1938, should be illegal. (See para. 19.)

(Dated December, 1951.)

PAPER No. 84

MEMORANDUM SUBMITTED BY THE SCOTTISH STANDING COMMITTEE OF THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN

The Scottish Standing Committee adopt the proposals and recommendations in the memorandum submitted by the National Council of Women of Great Britain, in so far as these are applicable to Scotland. The following recommendations are made to apply to Scotland.

CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

(1) Alteration of existing grounds of divorce

(i) *Desertion*

The law should be amended so that it is not necessary for a deserted spouse to prove willingness to adhere to the deserting spouse throughout the entire three-year period of desertion.

The necessity of having to prove willingness to adhere throughout the whole three years' period of desertion tends to lead to dishonesty and deceit, and artificial and insincere attempts at reconciliation. To safeguard any possibility of divorce by mutual consent, proof of willingness to adhere at the commencement of desertion should be made.

The law should be altered so that divorce can be granted where, over a period of years, desertion has been intermittent and the deserted spouse can prove that he or she has been more deserted than adhered to during that time. It is suggested that the period of desertion in such cases be longer than three years—say, five years.

The present law should consider the deserting party's attitude of mind as well as the fact of desertion and it gives no remedy to a spouse who can prove intermittent desertion and neglect over a period of years. In addition, the present law tends to frustrate any attempts at reconciliation.

(ii) *Cruelty*

The present law should be altered so that proof of cruelty should give the wife an absolute right to divorce irrespective of whether there may be evidence that the husband intends to reform in the future.

A wife should not be compelled to forgive her husband of cruelty any more than she is compelled to forgive him for his desertion or adultery.

(2) Extension of grounds of divorce

Separation of parties for a period of seven years or any other period as a ground for divorce has been fully discussed by members and representatives of affiliated societies before the Scottish Standing Committee and the Parliamentary Committee of the Scottish Standing Committee. The consensus of opinion is that the mere separation of parties, without any so-called matrimonial offence, should not give either a right of divorce.

CHANGES RECOMMENDED IN THE POWERS OF COURTS OF INFERIOR JURISDICTION ON MATTERS AFFECTING RELATIONS BETWEEN HUSBAND AND WIFE

Maintenance

(1) It is recommended that the court have power to authorise an employer to deduct payments of alimony from an employee's wages where a decree of alimony has been granted against him.

The present law of arrestment of wages for payment of alimony is slow and expensive. A deduction by the employer of payments of alimony from wages, if collected by the wife, would not involve him in much additional work and would ensure regular maintenance for the dependants.

(2) It is also recommended that payments of alimony for £5 weekly or under be paid through the court.

In cases where it is not practicable to deduct payments of alimony from the defender's wages, alimony for £5 weekly or under should be paid into the court. It is felt that the obligation to pay alimony in this way has greater sanction and results in more punctual and regular payments.

RECOMMENDATIONS RELATING TO PROPERTY RIGHTS OF HUSBAND AND WIFE

It is recommended that the proposals made by the Mackintosh Committee on Inheritance relating to this subject be put into effect.

The reasons and arguments presented to the Mackintosh Committee and referred to in their Report are adopted.

RECOMMENDED CHANGES IN THE ADMINISTRATION OF THE LAW

Section 7 of the Legal Aid and Solicitors (Scotland) Act, 1949, should be made effective so far as it relates to matrimonial cases. The advising on matrimonial problems can often be as important, if not more important, than the initiation of court proceedings.

MISCELLANEOUS RECOMMENDATIONS

That the Act 1592, C. 11, and the Act 1600, C. 20, be repealed.

The old Scottish Act of 1592, C. 11, imposes certain disabilities on a divorced wife who marries the paramour. She is prevented from bequeathing her heritable property to her husband or to the children of her second marriage to the prejudice of her heirs by her first marriage.

The Act of 1600, C. 20, prohibits the marriage of a divorced person and the paramour where the paramour is named in the decree of divorce.

Although both these Acts would probably be regarded by the courts as obsolete, it is felt advisable that they should be repealed.

(Received 28th October, 1952.)

6 November, 1952] Miss A. F. MacFarlane, Mrs. C. R. MacNee, Lady Ramsay Steel-Maitland, Miss E. M. Houston, M.A., LL.B., and Miss B. Martin-Stewart

EXAMINATION OF WITNESSES

(Miss A. F. M. MacFarlane, Mrs. C. R. MacNee, Lady Ramsay Steel-Maitland, Miss E. M. Houston, M.A., LL.B., and Miss B. Martin-Stewart, representing the Scottish Standing Committee of the National Council of Women of Great Britain; called and examined.)

7004. (Chairman): We have before us representatives of the Scottish Standing Committee of the National Council of Women. Perhaps the simplest plan would be for one of you to give me your names?—(Miss MacFarlane): We have first Mrs. MacNee, the Vice-Chairman of the Scottish Standing Committee, and a lecturer at Edinburgh University; Lady Steel-Maitland, member of the Scottish Standing Committee, who lived for many years in Australia; Miss Houston, our honorary Legal Adviser; and Miss Martin-Stewart, the honorary Treasurer of the Scottish Standing Committee and the immediate past Chairman.

7005. Then shall I address my questions in the first instance to Miss Houston?—(Miss Houston): Yes, Sir.

7006. Before I ask you any questions I am going to give you an opportunity of adding orally, if you wish, to your memorandum, but first I want to make one or two opening observations. You say in your first paragraph that you adopt the proposals and recommendations in the memorandum submitted by the National Council of Women of Great Britain, in so far as these are applicable to Scotland. Then you set out some recommendations which are made to apply to Scotland.

In the preamble to their memorandum, which you adopt so far as it goes, the National Council say this:—

"The National Council of Women of Great Britain is established in the interests of no one particular social, political or religious organisation. Its objects include the promotion of the social, civil, moral and religious welfare of the community, the promotion of such conditions as will assure to every child an opportunity for full and free development, and the removal of all disabilities of women, whether legal, economic or social."

Then it states that there are eighty-nine branches and ninety-seven nationally affiliated societies. Could you tell me how many of the branches are in Scotland?—(Miss MacFarlane): There are seven branches in Scotland, my Lord, and about thirty or forty affiliated societies representing probably about 300,000 women.

7007. In paragraph 2 of the National Council's memorandum it is stated that the proposals put forward in the memorandum represent the agreed policy of the Council, much of which has been advocated for many years, but it is pointed out that it will be realised that the National Council of Women, being composed of such a large number of women and affiliated societies, cannot be united on the subject of divorce. As one could well understand, there must be some differences of opinion. The first paragraph of the introduction states that the Council believes that education for marriage and family life are of paramount importance, and that is further developed. Of course, questions on English law will be put to the Council in London, so we shall confine ourselves to the suggestions made as they apply to Scotland. Before I ask you any questions, do you wish to add anything to this memorandum, or are your views sufficiently fully set out?—(Miss MacFarlane): I think that our views are sufficiently fully set out. I might perhaps briefly mention on what subjects we are in agreement with the memorandum submitted by the National Council of Women in London, because, as you have pointed out, we do adopt the proposals in so far as they apply to Scotland. I do not know whether you want me to state those which we consider to apply to Scotland?

7008. Your memorandum deals only with recommendations which apply to Scotland, does it not?—Yes, but we do adopt the proposals made in the National Council's memorandum, in so far as they apply to Scotland, and I wondered if you would like me to state briefly which these are?

7009. Yes, I think that would be helpful.—We adopt the recommendation in paragraph 5. I do not think that paragraph 6 applies to Scotland. The present law, if I am rightly advised, is that a woman, if she is a co-defendant in an action, may be liable for costs, but I do not think she can be liable for damages. But, so far as it affects Scotland, we are in agreement with the principle in paragraph 6.

7010. What does that come to? Do you mean that in Scotland the woman ought to be named and cited as co-respondent and be liable for damages?—She is already named.

7011. (Lord Keith): She can be, in Scotland.—The suggestion was that she should be liable for damages.

7012. (Chairman): Do you approve of that?—Yes, we approve of that. Then, we are in agreement with the proposal in paragraph 9. Paragraph 10 is already covered by our memorandum. We are in agreement with all the miscellaneous recommendations, although I am doubtful whether that contained in paragraph 23 actually comes within the Commission's remit. Apart from that, I do not think that I have any preliminary remarks to make. The memorandum speaks for itself.

7013. Thank you very much. I want to ask one question arising on paragraph 9, with which you have just expressed your agreement. It reads: "A wife should be entitled to a portion of the joint income of husband and wife for her own separate use". We had some discussion of that with a witness yesterday. The idea is that the incomes of husband and wife should be aggregated, whether they come from reward for work or from investments, and the wife should be entitled to a portion, which may not correspond with the amount of her own earnings or income. Is that right?—That is correct.

7014. I am not quite sure that I follow the reason for that, because if a wife is earning, or if she has income from investments, she has got that for her own separate use, subject, of course, to the give-and-take between husband and wife in running the house. In that case there need not seem to be any need for the proposal?—I quite agree that where she has already got an income of her own this does not really apply, except that the word "joint" is used to cover a case where the wife's income might be very small, and the share which she ultimately got would exceed her own earnings, or what she received from her own sources. As you see, the memorandum argues in support of this recommendation: "Self-respect and mutual respect are a necessary basis for successful marriage, and complete financial and economic dependence of either party militates against this respect". I think that where the wife is already in receipt of an independent income perhaps that self-respect and mutual respect exist, but it is for cases where the wife's income is perhaps very small or does not exist at all that the recommendation is made.

7015. I see. If I may say so, would it not perhaps be a little clearer if it ran something like this: "A wife who has no means of her own, or very small means of her own, should be entitled to a portion of her husband's income for her own separate use"?—Yes, I agree.

7016. I was a little puzzled over this idea of joint incomes, and I see now exactly what you mean. Of course, you intend that there should be a legal right for a wife to be paid a sum without having to account for it in any way?—That is correct.

7017. Can you give us any indication of the sort of amount which you think she should have? Should it vary with the wealth of the husband, or should she merely be given some minimum sum, just, as you say, to keep her self-respect?—The actual proportion has been suggested as one-tenth, although it is not mentioned in the memorandum. It is really rather difficult to come to any definite proportion, because circumstances will vary so much, but it is not that she should have a certain salary for being a housekeeper so much as some little independent proportion of the income, which is more by way of pin-money. I should imagine, just to keep her independent for normal needs.

7018. Yes. I must say that I feel, and I am sure other members of the Commission feel, considerable sympathy with this suggestion. I just want to call your attention to certain practical difficulties. You see, we have to recommend legislation if we think it is a good idea, and if you

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[Continued]

fix a percentage of a husband's income, it may be very unjust in some cases, and on the other hand it may be perfectly fair in others; for instance, may I take the case of the man who has heavy commitments to discharge out of his gross income? If you take one-tenth of the gross income that might be far too much, in fact there might be nothing left at all. On the other hand, there might be other cases where it would be quite fair. Would it not be better, perhaps, to base it upon what is left to the husband after he discharges all his obligations, maybe of business and of keeping up a home, and rent, and things of that kind?—One-tenth of the net income? It would in many cases give the wife a certain proportion, it may not be very much but it is a little.

7019. We can consider that, certainly, but I thought that to stipulate one-tenth of the gross income was a little difficult?—I quite agree.

7020. May I now come to the Scottish Committee's memorandum? First of all you suggest, as to desertion, that:—

"The law should be amended so that it is not necessary for a deserted spouse to prove willingness to adhere to the deserting spouse throughout the entire three-year period of desertion."

I think that there has been fairly general support for that suggestion in Scotland. Then you go on:—

"The law should be altered so that divorce can be granted where, over a period of years, desertion has been intermittent and the deserted spouse can prove that he or she has been more deserted than adhered to during that time. It is suggested that the period of desertion in such cases be longer than three years—say, five years."

To give an illustration, if in five years the spouse has been deserted for two-and-three-quarter years and adhered to for two-and-a-quarter years, you say that she ought to be allowed to have a divorce?—Yes, I do. I think that there are many cases where the husband, or the wife for that matter, is a complete no'er-do-well. He perhaps spends a considerable time in prison serving sentences, he comes home for perhaps just one or two nights and then goes off for a longer period, and in many cases there is intermittent desertion over a very long period. The attitude of mind of the deserting party is quite clear, that he does not intend to build up the marriage and he does not intend to adhere to his wife. I think that there are definite cases of this kind, particularly in lower income groups, where perhaps the man has served many sentences of imprisonment for theft, and so on.

7021. Thank you, I think we quite understand the reason for that. Then I have nothing to ask about your recommendation on cruelty. On extension of grounds for divorce you say:—

"Separation of parties for a period of seven years or any other period as a ground for divorce has been fully discussed by members and representatives of affiliated societies before the Scottish Standing Committee and the Parliamentary Committee of the Scottish Standing Committee. The consensus of opinion is that the mere separation of parties, without any so-called matrimonial offence, should not give either a right of divorce."

So under that head you are making no recommendation at all?—None whatsoever.

7022. Then the next heading is, "Changes recommended in the powers of courts of inferior jurisdiction on matters affecting relations between husband and wife", and under "Maintenance" you say:—

"It is recommended that the court have power to authorise"—and I emphasise the word "authorise"—"an employer to deduct payments of aliment from an employee's wages where a decree of aliment has been granted against him."

If I may make a guess, what you have in mind is that the court should have power to direct the employer to do it, is it not?—That is correct.

7023. Because if the court merely authorised him to do it, I should think that most employers would say: "Thank you very much for authorising us, but we do not propose to take the trouble?"—Yes, I agree.

7024. I am not being critical of language, I only wanted to make sure that was what you intended?—Yes.

7025. (Lord Keith): Miss Houston, first of all, on the point in the National Council's memorandum, to which you refer, the right of a wife to part of the income of the husband, I think you modified that to mean a right to a portion of the net income?—Yes.

7026. When you spoke of "net income", did you mean income after he had discharged all the domestic and business obligations which fell upon him?—I think that some arrangement similar to that at the moment used by the legal aid societies, to assess the net income of a man in fixing his contribution for legal aid, might well be adopted. They do not take consideration of every debt, and obviously if the husband knew that he had to give his wife a proportion of his income, he might just create debts. But if similar means of assessing a man's disposable income as at the present moment are used by the legal aid societies were adopted, I think that would be the fairest way. They take into consideration several kinds of debts, I am not sure what they all are, but they have various means of assessing a man's net income, and the same considerations could apply.

7027. We have here a member of the Commission who is very familiar with legal aid, and I will leave any development of that proposal to him. You appreciate that there may be many cases of husbands with perhaps a rather narrow margin to live on, and in fact some with a substantial margin to live on, who, at the present time, with the cost of living and the rate of taxation, have probably got no balance at all left in any year after they have met all their commitments?—Even if it were only a few shillings a week for the wife, it is just to give her a sense of independence.

7028. It is going to be a difficult thing to work out, is it not? If you fix a definite amount then it may be impossible in some cases, it may cause hardship; if you leave the whole thing fluid then no husband or wife is really going to know where he or she is—I understand. Again I am not very accurately informed on this point, but I understand that this system does operate in Holland. (Lord Keith): I am not familiar with it, but it is interesting to know that. Perhaps we shall hear about that later. (Chairman): I think we might make enquiries from Holland as to whether such a system is working.

7029. (Lord Keith): I will turn now to the Scottish memorandum. You referred, on this question of intermittent desertion, to the man who is in and out of prison. Did you think that a man who was in and out of prison was in desertion of his wife while he was in prison?—As far as I understand the law, he is in desertion of his wife if he is serving a sentence of imprisonment during the period of desertion, but the case I had in mind was where a man perhaps is not imprisoned for very long, a few months, but he is a persistent offender, and there are many cases of this type.

7030. That seems to be rather more an argument for imprisonment as a ground of divorce, if the imprisonment amounts to a certain number of years. That I can understand. That would be a separate proposal from the proposal in respect of intermittent desertion?—Yes. If a long-term sentence were given and that in itself were grounds for a divorce, then it does not affect the case where a man perhaps is a persistent offender and goes in for six months at a time. His wife would have as remedy at all, if he came back periodically for the odd day or two, perhaps to get what he could from her.

7031. I am not entirely satisfied that you have got the law right, you know, Miss Houston, on this question of imprisonment and desertion. However, leaving imprisonment out of account, your proposal is that if there is intermittent desertion that should be a ground of divorce, as well as continuous desertion for a period of time?—Yes.

7032. Then as regards divorce on the ground of cruelty, you want an absolute right to divorce in respect of an act or acts of cruelty?—Yes, that is just to conform with what is already in existence in the law of England. As far as I know, a petitioner in England does not have

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[Continued]

to prove that the husband is not likely to assault her again; if she can prove past cruelty that gives her a vested right to an action, whereas, as you know, in Scotland the wife has to be able to assure the court that her husband is likely to continue to be cruel to her.

7033. I do not want to enter into discussion upon that aspect of the law either, because I think that there is a good deal of uncertainty about that also, but I see your point. I notice that you say, as one of your supporting reasons:—

"A wife should not be compelled to forgive her husband of cruelty any more than she is compelled to forgive him for his desertion or adultery."

(Chairman): I understood that to mean, if I may interrupt, that if there is adultery proved, or if there is desertion proved, the wife has a right to divorce however long ago it was, and you wish the same to apply to cruelty?—Exactly, yes.

7034. (Lord Keith): Now with regard to "Extension of grounds of divorce", you say:—

"The consensus of opinion is that the mere separation of parties, without any so-called matrimonial offence, should not give either a right of divorce."

Was there some difference of opinion in your Committee upon this matter?—Yes, the matter was referred to all the affiliated societies and all the branches, and there was a special meeting to discuss this and then there were written representations sent in, and the matter was very fully discussed. I think that it is only right to say that there were people who expressed the view that where parties had been separated for any long time that should give grounds for divorce.

7035. But the majority view was the other way?—The majority was the other way, yes.

7036. (Chairman): Might I ask, just to clear that up: was the minority in favour of divorce by either party in those circumstances, or divorce by consent of both parties, do you remember?—Divorce by either party.

7037. (Lord Keith): Was the majority view a large majority, or how would you describe it?—Yes, I would say that it was a large majority. I do not want to give you any figures, but there is no doubt that it was the majority.

7038. Thank you. With regard to maintenance, Miss Houston, I understand what you recommend under proposal (1), but I am not quite clear about your recommendation under (2), that payments should be paid through the court. What you have in view mainly, I suppose, is the Sheriff Court?—Yes.

7039. And the Sheriff Clerk would collect the payments?—That is correct, yes.

7040. Is it merely collection that he would undertake, in other words, would he just wait for the husband to come along and make his payments, or are you suggesting that there should be any power of enforcement?—If it were possible to give any power of enforcement, it certainly would be very much better, but, simply as it stands, I think that the feeling was that the mere fact that a man has to pay a sum of money into court is a greater sanction for its punctual payment.

7041. You think that a man would be more likely to pay if he were told that he had to pay the money into the court, and the wife would then simply come and collect the sum lying there for her?—Yes.

7042. In that event, of course, if she found the moneys were not being paid in, she would really be left to take her ordinary remedies to recover?—See would, yes.

7043. Then, as a change in the administration of the law, you recommend that the Legal Aid Act should be extended to legal advice?—Yes.

7044. I understand that; we have had that suggested by various bodies. Is there any reason, in your view, as to why this should be done?—I do think that a measure of reconciliation could be tried by the members of the legal profession, and if this Section were in force, and

not only the client but the solicitor knew that any efforts he was going to make on behalf of someone in matrimonial difficulties would be paid from the Legal Aid Fund, I think that more people would make use of legal advice.

7045. (Mr. Beloe): I think that you said that you represented about 300,000 women?—Yes.

7046. I wonder if it would be possible to let us have a list of the organisations which are affiliated to you?—Yes, that could be done.

7047. I ask it for a particular reason, because I know that in my own home town in England the Girl Guides are affiliated, for instance, and I wondered if you were including among those 300,000 a number of minors?—No.

7048. But it would be possible to let us have a list?—Yes.

7049. In the National Council's memorandum, I noted that there were certain things you did not support. You did not support the recommendations with regard to custody in paragraphs 12 to 14. Without asking you for any opinion at all on the wisdom of these particular recommendations, are you prepared to answer this question: are you happy that in many cases the question of what is to happen to the children in a divorce case does not come before the court at all?—You mean, where the parties agree that one will have the custody of the child?

7050. Yes.—In my own experience, I think that where that has been agreed it is in the best interests of the child. In nearly every case it is probably the mother who is going to retain the custody of the children, and the father has no objection.

7051. That would be the reason?—That is why I think that it is probably in the best interests of the children.

7052. It is always in the best interests of the children for the mother to have them, is it? (Chairman): I do not think that is quite what the witness said.—Perhaps I possibly am not really qualified to speak on this, because as a lawyer I only have to do with the actual proceedings, I never see the children after the decree has been granted. I never know whether the children are happy or not. But I do think that in Scotland, where there is any contested case about the custody of children, the law is adequate, because very often the whole case is remitted to a reporter and very often it is a woman lawyer, a member of the Bar, who makes an excellent investigation into the circumstances. It was for that reason that although the Scottish Standing Committee had this provision before them in the National Council's memorandum, they did not adopt it. We discussed it fully, but it was felt unnecessary so far as Scotland is concerned.

7053. (Mr. Beloe): Did you consider the question of uncontested custody at all?—No, we did not.

7054. So you really have no considered opinion on that?—No, I have not.

7055. (Chairman): Are you an advocate or a solicitor?—A solicitor.

7056. (Dr. Baird): Just one question about the proposal that the wife should be legally entitled to a percentage of the husband's income. Is the idea behind it that this may prevent unhappiness and disagreement over finance? Are you aware of much hardship being caused in lower income groups because the wife has no such entitlement?—I think Miss Martin-Stewart would be an expert on this, she is a social worker and has gone into many lower income group homes. (Miss Martin-Stewart): My Lord, I agree that it does help considerably if the wife, especially if prior to her marriage she has been in the habit of earning and having money of her own, does get something from her husband for which she has not to give account. While that is true of the lower income groups, it is perhaps more important in the higher income groups. I have found recently several women who have been having a very unhappy time, having no money of their own, and their husbands having possibly £3,000 or £4,000 a year.

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[Continued]

7057. (Lord Keith): Have you much experience, Miss Martin-Stewart, of the case where the wife receives practically the whole of the wage packet and runs the home out of it?—I have had a good deal of experience of that, because I happen to be warden of a community centre of about 900 people, and I would say that out of the 500 families with whom I deal at least fifty per cent. of the husbands give their pay packets to their wives and the wives give back so much to the husband.

7058. (Chairman): If that were universal this problem would not arise?—No, but I do not think, if I may say so, that it is a very satisfactory solution.

7059. (Dr. Ralston): I appreciate the point that in most cases the difference of opinion does not arise, because the people agree quite happily about finance. But you feel that, no matter how small the income is, the husband will never be without a little money in his pocket, whether he give his wife the whole income to manage or not, whereas the wife in fact has no right to have any money, no matter how little, for herself?—Of course, the husband, having earned the money and possessing the pay packet, has in a sense a right to demand something, whereas the wife has no right to demand a share of the wage.

7060. (Mr. Young): If your proposal were adopted, that one-tenth should be given as a matter of right to the wife, have you ever considered whether it might have another effect, of giving wives who perhaps get more than one-tenth, less? If you had a law which said that a wife must get a tenth, would there be a tendency, if that were enforced, to restrict the amount to one-tenth?—(Miss Houston): I would say personally that if a husband were in the habit of giving his wife more than that he would obviously have such a high regard for her, that, irrespective of whether there was a law making it obligatory, he would still carry on.

7061. Then let me put this to you: by and large, in married life either the man gives all his money to his wife and gets back a proportion, or they agree amongst themselves as to what the wife will do and what the man will do. That is the broad general picture, is it not?—Yes, I think that it is usual for a man to make a house-keeping allowance to his wife, or hand over the entire pay packet, otherwise the domestic arrangements just would not work.

7062. So what you are trying to legislate for is really the exceptional case, is it not?—I think that the main difficulty is that in the majority of cases what the husband gives for a house-keeping allowance is just sufficient and no more, or perhaps is not wholly adequate; for example, he may pay monthly bills himself, and simply give his wife enough to go on from day to day. The main grievance is that there is no surplus once the house-keeping allowance has been used up for necessities.

7063. Are you quite serious in saying that that is true in the majority of cases of married life?—All I can say is that it was recommended by the Scottish women who are represented on the National Council of Women, and certainly it has their support.

7064. But I want to know whether you think that this applies to the majority of cases, or to a small percentage of cases?—I personally just could not give an answer to that, I am afraid. I do not know whether Lady Steel-Maitland has anything she could say on that?—(Lady Steel-Maitland): My Lord, surely it is only in the cases of unhappy marriages that we have to worry about the money? If people are happily married they usually manage their money affairs satisfactorily, therefore we are referring only to the cases where divorce might apply, are we not?

7065. Are you suggesting that there should be merely a right to get this proportion, or that it should be compulsory in every case?—(Miss Houston): I am suggesting that the wife should have the right to it.

7066. It was your suggestion about the method of assessment under the Legal Aid Scheme which rather worried me. Fortunately, most people who apply for legal aid apply for it only once, you would agree with that?—Yes.

7067. And even in those cases where they apply for it once, they frequently apply for re-assessment of their income. If you are going to have a scheme like this, have you visualised the administration involved in that, where each married couple in Great Britain would require to have their income assessed annually by the National Assistance Board in order to arrive at what the net disposable income of the husband is?—I think that general principles could be laid down that from his gross salary certain deductions are made, income tax, national insurance, insurance commitments and so on, and there should be a definite scheme agreed on as to what payments are deductible from the gross income, then everybody could work out for themselves what the net income would be. It would not be an elaborate arrangement. Each family could work out just what is the net income.

7068. So your suggestion is really just that you would lay down a right, which the wife could insist upon or not, just as she chose?—Exactly, yes.

7069. I just want to clear up a rather incautious reply which you gave. I know, of course, that you are a member of a firm which has quite a bit of experience of divorce work. In defended divorce cases, where the custody of the children is in dispute, there is not the remit to a reporter?—No, because the court investigates the whole circumstances for itself.

7070. On evidence?—On evidence.

7071. And a reporter is appointed only in adoption cases or petitions for custody alone?—Yes.

7072. (Sherriff Walker): Miss Houston, you are in favour of repealing the two old Scots Acts of 1592 and 1600. Is it simply because they are in desuetude that you want to repeal them, or do you object to the principle of them?—These Acts have not been repealed, and I think that if there is going to be any legislation clearing up matrimonial anomalies, these should be dealt with. As far as I know, there is a reference to one of these Acts in Lord Fraser's book, in which he doubts whether one of the Acts is actually in desuetude, and it was to avoid any doubt on that point that the recommendation was made.

7073. But are there not two alternatives? You might either repeal them because they are obsolete and out of touch with the circumstances of the present day, or you might take up the principle of those old Acts and re-enact it so as to make it in keeping with today's circumstances. It is on that line I want to ask a question. The older of the two Acts, the 1592 Act, would apply, would it not, in this kind of case, where the wife owned considerable heritable property, and? If her paramour and herself knew that if they committed adultery they could not take her husband with them, they had to give it up, would that not to some extent possibly prevent the break-up of the marriage, protecting the wife against a fortune-hunting paramour?—I do not think so. I think that really the general principle underlying this recommendation was, firstly, that these two Acts are in desuetude and they have not been abolished, and, secondly, that the prohibitions which were laid down by the Acts are not approved by the National Council of Women.

7074. I just want your own view about this, Miss Houston. Are you taking the view that in the case of a wife who owns land, it is desirable that if she goes off with a paramour she should be able to take her land with her and settle it on her second family, leaving her first children out of it altogether?—Her husband has that right, there is no restriction against the husband doing it, and it is simply an old Act which has put a restriction on the wife.

7075. Then would you approve of the sauce for the goose being made sauce for the gander?—No, I think I would prefer to have the whole thing abolished. After all, the wife or the husband might find true happiness in the second marriage, which they never had in the first, and the mere fact that perhaps the first marriage had to be dissolved should not impose any restrictions on the wife in disposing of her property.

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[Continued]

7076. But, you see, it is her child by the first marriage who is referred to by this, is it not?—Yes.

7077. Now what about the second old Act; of course it does not fit today's circumstances, because we do not name people in the decree at all, but is the principle not good that a divorced wife should not be allowed to marry her paramour? If that law were re-enacted up to date, would it not perhaps prevent the breaking up of her married life?—I do not think so. I think that very often the reason for the second marriage is that the first marriage was unhappy, and if you are going to prevent people from having any happiness at all it is not going to deter immorality.

7078. (Mr. Maddocks): It has been stated that this provision about a wife being entitled to a proportion of the husband's income is, of course, only for the unhappy marriages, but has it occurred to you that if you were to get a law passed on the lines recommended, you might bring unhappiness to marriages which are at the moment happy? Do you not think that if it became the law, the wife could say, for instance, if the husband's salary increased, "Now, I want a bit more"? Do you not think that it might bring unhappiness to present happy marriages?—(Lady Steel-Maitland): Yes, I do.

(Chairman): Thank you very much for your memorandum, and for coming here to help us today.

(The witnesses withdrew.)

(NOTE:—Evidence was given by the English representatives of the National Council of Women of Great Britain on Friday, 21st November, 1952 (Thirty-Third Day).)

(Adjourned to Monday, 17th November, 1952, at 10.30 a.m. Hearing to be resumed in London.)

MINUTES OF EVIDENCE

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TAKEN BEFORE THE

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

TWENTY-NINTH DAY

Monday, 17th November, 1952

WITNESSES

MR. D. L. BATHSON

SIR SYDNEY LITTLEWOOD

MR. E. A. DOUGHTY

MR. E. C. HARVEY

MR. A. J. DRIVER

MISS E. E. SPICER

} representing the Law Society.

MR. H. J. BLACKHAM, B.A.

MRS. VIRGINIA FLEMING

MR. A. F. DAWN, B.A., M.Sc.

} representing the Ethical Union.



LONDON: HER MAJESTY'S STATIONERY OFFICE

1953

THREE SHILLINGS NET



THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

TWENTY-NINTH DAY

Monday, 17th November, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENRYTON, M.C. (*Chairman*)

Mrs. MARGARET ALLEN
 Dr. MAY BAIRD, B.Sc., M.B., Ch.B.
 Mr. R. BELCH, M.A.
 Mrs. E. M. BRACE
 Lady BRAGO
 Sir WALTER RUSSELL BRAIN, D.M., P.R.C.P.
 Mr. G. C. F. BROWN, M.A.
 Mr. H. L. O. FLECKER, C.B.E., M.A.
 The Honourable LORD KITH

Mr. F. G. LAWRENCE, Q.C.
 Mr. H. H. MADDOCKS, M.C.
 The Honourable Mr. JUSTICE PEARCE
 The VISCOUNTS PORTAL, M.B.E.
 Dr. VIOLET ROBERTSON, C.B.E., LL.D.
 Sheriff J. WALKER, Q.C., M.A.
 Mr. THOMAS YOUNG, O.B.E.
 Miss M. W. DENSMORE, C.B.E. (*Secretary*)
 Mr. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 85

FIRST MEMORANDUM SUBMITTED BY THE LAW SOCIETY

This memorandum is submitted by the Law Society in response to an invitation from the Royal Commission on Marriage and Divorce. The memorandum has been divided under the following thirteen main headings:—

- A. Nature of matrimonial causes
- B. Grounds for dissolution of marriage
- C. Damages
- D. Bars to relief
- E. Auxiliary relief
- F. Children
- G. Evidence
- H. Enforcement of orders for maintenance, etc.
- I. Procedure
- J. Reconciliation
- K. Property rights during marriage
- L. Restrictions on marriage
- M. Miscellaneous

The Society's recommendations for the amendment of the existing law, procedure and administration concerning divorce and other matrimonial causes have, so far as possible, been grouped under the appropriate headings. The Society have confined their memorandum to the law, procedure and administration applicable in England.

A. NATURE OF MATRIMONIAL CAUSES

Declaration of validity of marriage, etc.

1. We recommend that the court should have jurisdiction at the instance of either party to a marriage to make declarations concerning the validity or invalidity of a marriage or foreign decree of dissolution or nullity and that it should be possible to apply to the court for such a declaration alone or to include a prayer for such a declaration in other matrimonial proceedings.

(i) Experience has shown that in recent years there has been an increase in the number of cases in which it has been necessary to ascertain from the court whether or not a marriage is still subsisting. At the present time it is not possible to apply to the court for a declaration of validity of marriage except in connection with legitimacy petitions brought under Section 17 of the Matrimonial Causes Act, 1950, and in proceedings for justification of marriage.

Particularly since the 1939-1945 war there has been a number of marriages between British women and foreigners and in a number of cases it has been difficult to advise the British wife whether or not she is still married or whether she is free to re-marry. Cases of this kind arise particularly where there has been a decree of divorce of a foreign court and it is impossible to tell whether, in the circumstances of the particular case, the English courts would recognise the decree made by the foreign court. At the present time, in cases of this nature, it is necessary to frame petitions for divorce or for justification of marriage in order to ascertain whether or not the parties are still married or are free to re-marry. These proceedings are necessarily tortuous and it is not always possible, on the facts, to frame a petition of any kind. Examples of the type of case to which reference is made are set out in the Appendix to this memorandum.

Proceedings for judicial separation

2. We recommend that proceedings for judicial separation should be abolished.

(i) There are in fact comparatively few proceedings for judicial separation instituted each year. The Civil Judicial Statistics for 1950 show that 5 petitions for judicial separation were filed during that year on behalf of husbands and 78 on behalf of wives, making a total of 83 petitions filed. During the year 1950, 56 cases were disposed of. These figures should be compared with the statistics relating to divorce proceedings. During 1950, 25,863 petitions for divorce were filed and 30,849 cases disposed of.

(ii) In the past, proceedings for judicial separation have been brought to enable a wife to obtain an order for permanent alimony and maintenance for herself and the children of the marriage. This use of proceedings for judicial separation is no longer required since the provisions of Section 23 of the Matrimonial Causes Act, 1950, enable a wife to apply for an order for periodical payments or secured periodical payments on the ground that her husband has been guilty of wilful neglect to provide reasonable maintenance for herself or the children of the marriage.

(iii) The experience of solicitors has been that proceedings for judicial separation, since a decree does not enable either party to re-marry, have generally been abused and have been instituted or threatened to be instituted for vindictive reasons or for purposes of extortion.

(iv) Now that machinery exists for obtaining maintenance for a wife and children without instituting proceedings for judicial separation we can find no sufficient reason for the retention of proceedings for judicial separation.

B. GROUNDS FOR DISSOLUTION OF MARRIAGE

Cruelty

3. Under Section 1 (1) (c) of the *Matrimonial Causes Act, 1950*, the court has jurisdiction to grant a decree of divorce on the ground of cruelty. In the statute "cruelty" is not defined but its definition has been left to case law. "Legal cruelty" has been defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. (See "*Ryden on Divorce*", Fifth Edition at page 80.) We recommend that it should not be necessary to have to show that the respondent's conduct, referred to in the definition, has been aimed at the petitioner or that the petitioner should have apprehended danger, but that it should be sufficient that the conduct has in fact caused injury to the petitioner's health or is likely, by its very nature, to cause such injury.

(i) Experience has shown that hardship has been caused in a number of cases where, although the petitioner's health has been affected by the conduct of the respondent, it is not possible to say that the respondent's conduct has in any way been aimed at injury to the petitioner. Examples of the matters which might by causing the likelihood of injury to health be brought within the definition of "cruelty" are offences against young children, gross indecency between men, cruelty to children of either party to the marriage, lesbianism, immoderate drinking, drug-taking and perhaps repeated imprisonment.

Desertion

4. We recommend that the definition of "desertion" contained in Section 1 (1) (b) of the *Matrimonial Causes Act, 1950*, should be amended and that desertion without cause for a period of three years within the four years immediately preceding the presentation of the petition should be a ground for divorce, provided that the respondent is in desertion at the time of the institution of the proceedings.

(i) This suggested alteration to the definition of "desertion" is designed to ensure that there shall be no stumbling block to reconciliation and that a petitioner will not lose his or her right to a decree merely because, in a genuine attempt at a reconciliation, the parties have lived together for a period during the time of desertion. It is also designed to prevent abuses which may arise if the deserting spouse in fact returns for a short period or makes an apparently genuine offer to return but which, the facts show subsequently, was only designed to prevent the petitioner from having a right to a decree.

Respondent's unsound mind

5. We recommend that sub-sections (1) (d) and (2) of Section 1 of the *Matrimonial Causes Act, 1950*, should be amended to enable a petition for divorce to be presented to the court either by the husband or the wife on the ground that the respondent is of unsound mind with no reasonable expectation of recovery at the time of the presentation of the petition and has been of unsound mind for a period of at least two years immediately preceding the presentation of the petition.

(i) Under the present law, to obtain a divorce on the ground that a respondent is incurably of unsound mind it is necessary to prove that the respondent has been under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The meaning of "care and treatment" is defined in sub-section (2) of Section 1 of the *Matrimonial Causes Act, 1950*, and it must be shown that the respondent has been receiving "care and treatment" as defined by this sub-section. We are of opinion that the present law leads to hardship: for example, there are some cases, where despite the progress made in recent years in the medical treatment of mental patients (e.g., by operation on the brain, by electrical shock treatment and by insulin injections), the respondent's insanity is such that there is never any real hope of a cure and it is an unnecessary hardship both to the petitioner spouse and to the children of the marriage that the petitioner cannot obtain a divorce and re-marry until after a period of at least five years.

Furthermore, the restricted definition of "care and treatment" prevents a spouse whose husband or wife has been under care and treatment in a Dominion or foreign country from obtaining relief. Experience has also shown that in a number of cases the respondent has in fact entered a mental hospital as a voluntary patient and has not been certified because he has never shown any desire to leave the hospital; in such cases, although the respondent may be incurably of unsound mind and have been in a mental hospital for over five years, his spouse can obtain no relief.

C. DAMAGES

6. We recommend that petitions for damages only should be abolished and that it should only be possible for a husband to claim damages against a male adulterer in a petition for divorce on the ground of adultery.

We also recommend that the law should be amended to enable a wife to claim damages against an adulterer in a petition for divorce on the ground of adultery.

(i) The question of damages is a difficult one. On the one hand, it is argued that damages are only claimed by husbands who are vindictive or mercenary and that public opinion is tending or has tended to the view that they are odious and that the time has come for their abolition. On the other hand, it is argued that although in the great majority of cases it is repulsive to a husband to claim damages in a matrimonial cause there are cases where special circumstances exist which more than justify a husband making such a claim often not only in his own interests but in the interests of the children of the marriage and even of the wife respondent. Further, it may be argued that the possibility of a claim for damages may act as a deterrent to some men and women and thus break up associations which might without such a deterrent become adulterous. Accordingly, we are of opinion that petitions for damages only should be abolished but that it should remain possible to claim damages in a petition for divorce based on adultery.

(ii) We are of opinion that the present law is illogical in providing that a husband alone can claim damages in a matrimonial cause and that a similar right ought to be given to a wife to enable her to claim damages against an adulterer in a petition for divorce on the ground of adultery.

D. BARS TO RELIEF

Condonation

7. We recommend that there should be no change in the existing law relating to condonation.

(i) We are aware that there has been criticism of the rule laid down by the court that if a husband has had sexual intercourse with his wife with full knowledge of her adultery such intercourse, even if only a single act, must amount to condonation of the wife's adultery in the absence of fraud. If any change in the law relating to condonation were made on this matter, we would recommend that a single act of intercourse by a husband should not necessarily amount to condonation but that, as in the case of a wife who has intercourse with her husband knowing of his adultery, the judge should have an unfettered discretion to decide whether or not, in the particular circumstances of the case, there has been condonation of the matrimonial offence.

Collusion

8. We recommend the abolition of collusion as a bar to relief.

(i) In the public mind there is considerable confusion about the meaning of collusion and often divorces are referred to as collusive by lay persons when in fact there is no collusion at all. For example, it is often suggested that all *hoax* cases are collusive merely because the adultery alleged occurred in a hotel. We are of opinion that this misconception of the meaning of collusion is a bad thing leading the public to suppose that the courts, solicitors and barristers are either constantly hoodwinked or knowingly parties to cases which ought not to be brought or, if brought, to succeed.

(ii) At the present time there is no statutory definition of collusion although by statute it is an absolute bar to a decree of divorce. The case law regarding collusion covers

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many years of legal experience and is confusing. Many fine distinctions are drawn which make it difficult for a solicitor to advise a lay client on the exact meaning of collusion.

(iii) It is our view that all cases in which relief should be barred on the ground of collusion as at present understood would equally be barred by reason of one of the other bars to relief. For example, the abolition of collusion would not enable a petitioner to obtain relief if he had requested the respondent to commit adultery for the purpose of enabling him to obtain a divorce since the petitioner in such a case would have conspired at the adultery.

(iv) We appreciate that our recommendations above sound sweeping and, if it is not acceptable in this form, we would recommend that the law regarding collusion should be clarified and that collusion should be defined in such a way that it would only amount to a bar to relief where the court is satisfied that the person seeking relief has an intention to deceive the court or to abuse the process of law and that his intention alone should be the material consideration.

E. ANCILLARY RELIEF

9. We recommend that on applications for ancillary relief it should be possible for the court to award a lump sum payment instead of, or as well as, income payments of maintenance, etc.

We recommend that the court should continue to be given the widest possible discretion in dealing with applications for ancillary relief and that this discretion should be in no way fettered.

We also recommend that there should be special registrars appointed to deal with applications for ancillary relief.

(i) We are of opinion that the making of proper orders for ancillary relief is of the utmost importance in matrimonial cases and that the court should be able to take into account all the circumstances of the case, including the financial position of the parties, their conduct and also the practical results of the break-up of the marriage. Experience has shown that in many cases it is desirable that the court should be able to award a lump sum payment as well as income payments since the result of a dissolution of the marriage may make it necessary for the wife to obtain and furnish a new home. Further, in certain cases it may be desirable that a wife should have some capital sum so that provision is made for emergencies and she does not lose entirely by the dissolution of the marriage the sense of financial security which she enjoyed during her marriage. We feel strongly that every case requires to be considered on its own merits and are of the view that no hard and fast rules can be laid down. We deplore, for example, the present tendency to whittle down the court's discretion by adherence to what is sometimes known as the "one-third rule" and the practice which existed prior to the decision in *Rose v. Rose* [1950] 2 All E.R. 311 of maintaining that in every case account must be taken of the earning capacity of the wife.

(ii) We are of opinion that if the court had power to order the payment of a lump sum to a wife as suggested above, the court would in fact have all the powers it requires to deal with all matters of ancillary relief in a proper manner but that it is essential that these powers should in fact be used to the full. We are of opinion that orders made by registrars on applications for ancillary relief, since the financial provision ordered may affect the whole future lives of the wife and children of the marriage, are as important as the decisions taken on the hearing of petitions and that at the present time the registrars who mainly deal with applications for ancillary relief have not sufficient time, owing to their other many onerous duties, to give the necessary consideration to each individual case on its own merits and that this leads to the present tendency to adhere to certain principles in every case rather than to consider each case on its own individual facts. It is for this reason that we recommend that there should be special registrars with the same qualifications as Chancery Masters appointed to deal only with applications for ancillary relief.

F. CHILDREN

10. We recommend that in a petition in a matrimonial case it should be necessary to set out the names and dates of birth or ages of any children born to the wife during

the subsistence of the marriage but that it should not be necessary to state in the petition whether the parentage of any such child is in dispute.

We also recommend that in a petition in a matrimonial case it should be necessary to set out the name and date of birth or age of any child adopted by the parties (or either of them) or legitimated by virtue of the marriage of the parties to the proceedings.

We further recommend that there should be set out in the petition the name and date of birth or age of any illegitimate child born to the wife prior to the marriage who is under the age of sixteen at the date of the institution of the proceedings and who has been under the care and control of the parties to the marriage during the subsistence of the marriage.

We also recommend that the court should have power to make orders for custody and for maintenance relating to all of such children.

We recommend further that on an application for maintenance for a specific child of the marriage the court should have power to declare that a husband is not under a liability to maintain the child on the ground that he is not the father of such child but that such a declaration should not be made unless the child has been separately represented on the application.

(i) Under the present practice there must be set out in a petition whether there are living any children of the marriage and, if so, the names and dates of birth or ages of such children and, if it be the case, that the parentage of any living child of the wife born during the marriage is in dispute. At the present time the parentage of a child may be disputed in the petition but no evidence may in fact be before the court on this matter and the court makes no definite finding regarding the legitimacy or illegitimacy of any children referred to in the petition. Nevertheless, if a husband disputes the paternity of a child in his petition and the wife does not defend the proceedings and allege that the child is the child of the husband, she is stopped from obtaining maintenance in the future for such child. Similarly, if a wife in a petition sets out the children born to her since the date of the marriage and does not indicate that she does not admit that the respondent is the father of any of the children, if she prays for and obtains an order for custody of all the children, she can subsequently claim maintenance for all such children from her husband and he cannot deny the paternity of any of them in such maintenance proceedings. At the present time the fact that the parentage of a child is disputed in the petition has serious consequences which may not be appreciated in cases where respondents do not seek legal assistance and further, a child may be prejudiced as a result of his mother not taking steps in matrimonial proceedings.

(ii) We do not consider that it is desirable that there should be a declaration of illegitimacy made in the proceedings regarding any child referred to in the petition. We appreciate, however, that a husband should have the right to prove to the court that he should not be liable to pay maintenance for a child of whom he is not the father and it is for this reason that we have recommended that in proceedings for maintenance in respect of any child, the husband, on proof that he is not the father, should be able to obtain a declaration that he is not liable to pay maintenance for the child. Primarily, however, we are concerned that no child should be prejudiced by the wilful or unwitting action of either of his parents in not defending matrimonial proceedings.

(iii) We are of opinion that it should be possible for the court to make an order for the maintenance of an illegitimate child born prior to the marriage of the parties, if the husband has, during the marriage, accepted financial liability for such child.

(iv) We are of opinion that the court should be able to make an order for custody of any child named in the petition and that such orders should not be confined, as at present, to legitimate or legitimated children or children adopted by the parties.

11. We recommend that court welfare officers should only be employed where a judge is in doubt as to the order that should be made regarding any specific children and we do not recommend the employment of a court welfare officer in every matrimonial case where there are children.

We further recommend that the court should have power, if it thinks fit, to require any children of a marriage which is the subject matter of matrimonial proceedings to be separately represented on custody applications.

(i) We are of opinion that the present procedure regarding children is in the majority of cases satisfactory. We appreciate that there are a few cases where the judge could be assisted by a welfare officer and, as we understand the position, at the present time a judge can obtain a report from such a welfare officer in cases in which he is in doubt. We are also of opinion that there are some cases in which considerable assistance might be given if the children were independently represented on custody matters and we feel that the court should have power to direct their separate representation even as power is given to the court to order this on applications for variation of settlement, etc.

G. EVIDENCE

Proof of bigamous marriage as evidence of adultery

12. We recommend that proof of the respondent's bigamous marriage should raise a rebuttable presumption of adultery.

We also recommend that the production of a certificate of conviction for bigamy should be sufficient evidence in a matrimonial case of a bigamous marriage.

(i) It is appreciated that bigamy itself is not a matrimonial offence for which relief can be obtained. Nevertheless, proof of a bigamous marriage may amount to evidence of the respondent's inclination to commit adultery and, providing some evidence can be given of opportunity for the respondent and the bigamous spouse to have committed adultery, the court will normally be prepared to infer that adultery has been committed.

(ii) We are of opinion that where a respondent spouse has contracted a bigamous marriage, proof of this fact should be sufficient evidence for the court to infer, in the absence of contrary evidence, that the respondent has in fact committed adultery with the bigamous spouse. At the present time the fact that the respondent spouse has committed bigamy is of comparatively little assistance since it is the adultery which has to be proved and if this is proved it is immaterial whether or not bigamy has been committed. Experience has shown that it is often difficult and expensive to obtain the necessary evidence of adultery, although it is comparatively easy to prove that the respondent has contracted a bigamous marriage; this is particularly so where the bigamous marriage has taken place abroad. In some cases the petitioner has been unable to obtain relief where, although it is known that the respondent has contracted a bigamous marriage, since this fact was not known to the petitioner until the parties to such marriage had separated it was impossible to obtain any evidence of their cohabitation.

Proof of rape and other criminal offences

13. We recommend that a certificate of conviction for rape, etc., should be accepted in the Divorce Court as sufficient proof of the crime concerned in the absence of evidence to the contrary.

(i) At the present time rape and other sexual offences cannot be proved by production of a certificate of conviction and the offence alleged has to be proved *de novo* in the Divorce Division. We are of opinion that this leads to hardship both to the petitioner who is put to extra expense and whose case is delayed by the need to obtain the further evidence and to the victim of the rape or sexual offence who may be required to give evidence again of matters which, particularly where the victim is a child, may be very distressing.

Medical inspector's report

14. We recommend that the medical inspector's report made and filed with the court in pursuance of Rule 24 of the Matrimonial Causes Rules, 1950, in nullity proceedings on the ground of impotence or incapacity, or on the ground that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage, should be accepted at the hearing of the case as evidence of the facts set out therein and that it should not be necessary to call the medical inspector who made the report at the hearing unless it is desired by either party to cross-examine him on his report.

(i) At the present time it is normally necessary, where the court has ordered that a medical inspector (or inspectors) of the court should be appointed to examine the parties under Rule 24, to require the medical inspector appointed to give evidence at the hearing proving his report but normally he confines his evidence to the contents of his report. It is only in rare instances that the parties to the proceedings desire to cross-examine the medical inspector on his report. If the medical inspector's report were accepted as evidence of the facts contained therein this would considerably reduce the cost of nullity proceedings in which medical inspectors were appointed, as inevitably the cost of calling a medical inspector to give evidence is substantial. Further, it would enable the majority of medical nullities to be heard throughout the term in London and would thus avoid the delay which may be caused by the present practice in London of fixing special consecutive days once a term for the hearing of these cases.

H. ENFORCEMENT OF ORDERS FOR MAINTENANCE, ETC.

15. We recommend that there should be a summary procedure in the High Court for the enforcement of orders for maintenance, etc., similar to the procedure for enforcement of maintenance orders made by courts of summary jurisdiction.

(i) We are of opinion, as previously stated, that applications for ancillary relief are of the utmost importance and that the court should have the widest possible discretion to deal with each case on its individual facts. It is, however, essential that when an order for ancillary relief has been made, after a full investigation, it should be easily and effectively enforceable, otherwise all the work and consideration given to obtain a proper order may in fact be futile.

(ii) At the present time the procedure to enforce an order for maintenance in the High Court is cumbersome and considerable delay is inevitable between the time when the husband becomes in arrear with his maintenance payments and the time when any action for the recovery of the arrears can be taken. Arrears of maintenance can be enforced by judgment summons in the High Court. Before a judgment summons may be issued it is necessary to obtain the leave of the judge. When leave has been obtained to issue a judgment summons the summons must be entered for hearing during the same term as that in which leave to issue was given. If it is not entered during the same term it will be necessary to renew the leave to issue. The judgment summons must then be served personally on the debtor at least five clear days before the hearing and at the time of service a sufficient sum of money by way of conduct money must be paid to him. An affidavit of service of the summons must be filed before or produced at the hearing and it is necessary to prove at the hearing that the judgment debtor has or has had since the date of the order upon which the judgment summons is based the means to pay the sum in respect of which he has made default and has refused or neglected to pay the same. The affidavit in proof of means must be filed at least four clear days before the date fixed for the hearing. Dates for the hearing of judgment summonses in the High Court are few and it is often many weeks after the husband has ceased paying maintenance before the case comes on for hearing. A committal order is rarely made in the first instance and if an instalment order is made, and the husband fails to keep up payments of the instalments ordered, it is necessary to apply *de novo* for leave to issue a judgment summons on the instalment order. During the Long Vacation no judgment summonses are heard at all.

(iii) Further difficulties arise if the proceedings are in a district registry, as applications relating to judgment summonses are heard only at long intervals, and (further, if a committal order is made the expenses of the tipstaff have to be paid, which include his expenses of travelling from London to the place where the respondent resides).

(iv) Arrears of maintenance can be enforced in the county court by way of judgment summons but in our view this procedure is also cumbersome and is not effective.

(v) We are of opinion that it should be possible for orders for maintenance made in the High Court to be enforced summarily by committal by order of a judge on proof of non-payment under the order. No order for maintenance, etc., is made by a registrar except after full

investigation of the means of the party and accordingly, in our view, there should be no need to obtain leave to enforce the order (except where the arrears of maintenance have been allowed to accrue for a period exceeding one year) nor should it be necessary to show that the husband has in fact had the money to comply with the order. If there was a summary procedure for enforcing an order for maintenance it would be possible to enforce the order without delay and before many weeks' payments were in arrears.

(V) We are of opinion that the present lack of an effective method of enforcing orders for maintenance, etc., causes great hardship to wives and children who are often left without maintenance for many months and even if judgment summons proceedings are taken the result, at the best, is as a rule only to require the husband to pay off the arrears at the rate of the original payments for maintenance so that he always remains many months in arrears.

I. PROCEDURE

Form of petition (*Matrimonial Causes Rules, 1950—Rule 4*)

16. *We recommend that it should, with leave of the court, be possible to file a petition without showing the petitioner's address. (Rule 4 (1) (d).)*

(i) Experience has shown that, particularly in cruelty cases, a wife is often fearful of inserting her address in the petition, a copy of which will be served upon her husband, as she genuinely fears that her husband, having obtained this information, will visit her and cause her an injury or damage the property of or injure the persons with whom she is living.

(ii) It is not intended that the wife should not inform the court of her address but that it should not necessarily be included in the petition so that the respondent on service must have knowledge thereof.

17. *We recommend that it should not be necessary in a wife's petition in which she is claiming maintenance, etc., to insert a statement in the petition in general terms regarding her husband's income and property. (Rule 4 (2).)*

(i) We are of opinion that it is unnecessary for a wife who is claiming maintenance, etc., in her petition to include a statement in general terms of her husband's income and property. Before her application for maintenance can proceed it is necessary for the court to have evidence of the husband's means and the statement in the petition may not serve any useful purpose.

Form of answer and cross-petition (*Matrimonial Causes Rules, 1950—Rule 17*)

18. *We recommend that a respondent wife should be able to claim alimony pendente lite, maintenance, etc., in an answer in the same way as she is able to do in a petition.*

(i) In our view an answer, particularly where it includes a cross-prayer, should be in the same position as a petition and it should not be essential for a respondent wife to have to apply for alimony pendente lite or maintenance by separate application for ancillary relief.

Form of answer of Official Solicitor

19. *We recommend that where the Official Solicitor acts for a respondent in proceedings brought on the ground of the respondent's unsound mind, the Official Solicitor should only file an answer when in fact he is defending the petition substantively.*

(i) The normal present practice is for the Official Solicitor to file an answer denying the allegation contained in the petition although in a number of cases at the hearing he does not in fact contest the petition. We are of opinion that it is desirable that the Official Solicitor should notify the petitioner at the earliest possible moment whether or not he is denying the charges contained in the petition.

J. RECONCILIATION

20. *We do not recommend that any special reconciliation machinery should be set up.*

(i) We are of opinion that solicitors, in general, when first consulted by a client about matrimonial difficulties, apply their minds to the possibility of effecting a reconciliation between the parties. Experience has shown, however, that normally when a matrimonial offence has been committed

and a definite decision to institute proceedings for divorce has been taken, it is only in exceptional circumstances that a lasting and effective reconciliation between the parties can in fact be achieved. We gave detailed evidence on this subject to the Departmental Committee on Procedure in Matrimonial Causes and we adhere to the opinions we then expressed. The only additional observation we should like to make is that the Commission, if it is within their powers, might consider a recommendation designed to prevent the possibility of young persons marrying as they now can within a few days of meeting.

K. PROPERTY RIGHTS DURING MARRIAGE

21. *We do not recommend the apportionment by law of the income of the husband or wife between the parties to a marriage.*

(i) We have considered what has been said on this subject by the Married Women's Association and we have considered in particular whether there should be a change in the law regarding savings by the wife made out of housekeeping moneys. We are of opinion that it may be iniquitous to say that in all cases the whole of the savings out of housekeeping moneys should belong to the husband but we do not consider that difficulties on this matter should arise while the parties are living happily together. We are of opinion that if our recommendation is accepted that the court should have power to order, on the application of a wife, a lump sum payment in addition to maintenance, this may well overcome hardships which may arise over this matter on the break-up of the marriage, since the court would be able, while still regarding such savings as being in law the property of the husband, to take into account the savings when determining the amount of the lump sum to be paid.

L. RESTRICTIONS ON MARRIAGE

22. *We recommend that marriages which, by Section 1 (2) of the Marriage Act, 1949, are not void or voidable by reason only of affinity after the death of any person, should also not be void if solemnized during the lifetime of that person.*

(i) We are of opinion that as there is no objection on the ground of consanguinity to marriages in this class it is illogical to make such marriages void merely because the former spouse is still alive. Further, hardship may be caused in certain classes of cases, as, for example, where a deserted wife has been maintained and cared for by her brother-in-law and she is prevented from marrying him during the lifetime of her former husband.

M. MISCELLANEOUS

Matrimonial Causes Act, 1950—Section 2 (1)

23. *We recommend that the restriction on petitions for divorce during the first three years after marriage contained in Section 2 (1) of the Matrimonial Causes Act, 1950, should be abolished.*

If this recommendation is not accepted we recommend that the court should be given a free discretion to grant leave to bring a petition for divorce within three years from the date of the marriage and that it should not be necessary for the proposed petitioner to show either that he has suffered exceptional hardship or that the respondent has been exceptionally depraved.

(i) We are of opinion that the present restriction does not lead to reconciliation between the parties since if within the first three years of marriage there is a matrimonial offence upon which relief can be sought, it is only in exceptional cases that a reconciliation is likely to be effected or, if effected, to be lasting. Experience has shown that in many cases the restriction only leads to increased litigation, as it may well be that a wife has to bring proceedings for judicial separation or proceedings for maintenance on the ground of wilful neglect to maintain within the three years and then further proceedings after the three years have expired for dissolution of the marriage.

Nullities under Section 8 (1) of the Matrimonial Causes Act, 1950

24. *We recommend that Section 8 (1) of the Matrimonial Causes Act, 1950, should be amended so as to give the court a discretion to allow proceedings for nullity under this Section to be brought notwithstanding that a year may have elapsed since the date of the marriage.*

PAPER No. 85. FIRST MEMORANDUM SUBMITTED BY THE LAW SOCIETY
 PAPER No. 86. SECOND MEMORANDUM SUBMITTED BY THE LAW SOCIETY

(i) Under Section 8 (1) of the Matrimonial Causes Act, 1950, certain nullity proceedings must be instituted within one year of the marriage. Consequently unless a petition is filed within this year no proceedings can be brought and this may result in considerable hardship to the petitioner, as he may, through no fault of his own, be deprived of his right of action.

Extension of the Inheritance (Family Provision) Act, 1938

25. We recommend that in a case where a wife has divorced her husband but has not been awarded secured maintenance she should, on the death of her former husband, either intestate or having made a will, have the same rights as are at present given to a wife under the Inheritance (Family Provision) Act, 1938, where a will is made.

(i) Under Section 19 (3) of the Matrimonial Causes Act, 1950, the court has only power to award maintenance to a wife during the joint lives of the parties to the marriage and it is often not possible or practicable to apply for an order for secured maintenance. We are of opinion that a wife who has divorced her husband should be able to apply to the court under the Inheritance (Family Provision) Act, 1938, both in the case where her former husband dies intestate or leaves a will so that in a proper case some provision may be made for her out of the estate of her former husband.

Deduction of maintenance from pay

26. We do not recommend that provision should be made for maintenance to be deducted from pay.

(i) We have been asked specially to give our views on this matter. We consider that the proposal is undesirable as it would put an undue burden on employers. Further, we take the view that the employer's personal affairs should not have to be disclosed to his employer. If the proposal were adopted, in our view it might well result, in some cases, in the employer terminating the employee's employment.

(ii) We are of opinion that if our recommendation is adopted and a summary and effective method of enforcing an order for maintenance in the High Court is made, this should ensure that maintenance payments are kept up where the husband is in known employment.

N. CONCLUSION

27. In preparing this memorandum we have deliberately refrained from detailed explanation, from quoting legal cases and from using technical language. For example, while we have indicated the lines on which "cruelty" should be defined we have made no attempt to frame a definition suitable for incorporation in an Act of Parliament. We would welcome the opportunity of giving oral evidence in support of this memorandum when the witnesses would be prepared to elaborate the above recommendations and the reasons for them.

(Dated April, 1952.)

APPENDIX

Examples of the type of case referred to in Recommendation 1

(a) A wife resident in England did not know whether or not she was still married to her husband, as during the war, being domiciled in Germany, he had obtained a divorce in that country the nature of which was not clear and the respondent wife had received no notification of the proceedings and had had no opportunity to defend them. A petition was accordingly filed for justification of marriage and in such proceedings a declaration was obtained that the parties were not married. The proceedings seemed particularly inappropriate in this case as in fact the husband had re-married, although this was not known at the time of the filing of the petition.

(b) An English wife heard that the husband had re-married and ascertained that he had obtained a decree of divorce in America where the parties were domiciled. The wife had never received any notification of the proceedings, nor had she had an opportunity of defending them and it was accordingly thought that the decree might be held by the English courts to be contrary to natural justice. In this case the wife had grounds for a decree of dissolution according to English law and she, therefore, filed a petition under the Matrimonial Causes (War Marriages) Act, 1944, for divorce on the ground of cruelty. The court found that there was no marriage existing at the date of the institution of the proceedings and accordingly dismissed the petition.

PAPER No. 86

SECOND MEMORANDUM SUBMITTED BY THE LAW SOCIETY

This memorandum is submitted by the Law Society in response to a request from the Royal Commission on Marriage and Divorce for the Society's view on a memorandum submitted by Mr. H. W. Wightwick, M.C., Metropolitan Magistrate at Lambeth, to the Royal Commission. There is set out in the Appendix hereto a copy of Mr. Wightwick's memorandum which raises the following three points:—

appears unreasonable that he should receive it in the particular circumstances of the case.

2. Sub-section (7) (b) of the same Section provides that the rights conferred by Part I of the Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles upon which the discretion of any court or tribunal is normally exercised.

3. If Mr. Wightwick's suggestion were adopted civil aid certificates would be granted to respondent husbands who had no defence to the proceedings instituted against them by their wives and whose only ground for contesting an order for costs would be their impecuniosity. The Council of the Law Society have always taken the view that it would be unreasonable to issue a civil aid certificate to such a respondent since it might well involve the expenditure of public moneys on his behalf for the sole purpose of enabling him to claim the protection of Section 2 (2) (e) of the Act. They take the view that such a person would not come within the provisions of Section 1 (6) of the Act.

4. Although a civil aid certificate is not issued to a respondent husband to defend a matrimonial cause on the question of costs only, the husband remains free to instruct a solicitor and counsel privately or to appear in person on the question of costs and, since costs are always in the discretion of the court, it may be that a limited order for costs will be made against him if he can satisfy the court at the hearing that it is unreasonable to expect him to pay the full party and party costs. In certain cases

- Should a certificate in a matrimonial cause be granted to a respondent husband limited to defending a claim for costs?
- Should a full order for costs in an assisted person's case be enforced against a respondent husband if the result of this is to reduce the maintenance payable to the wife?
- Should there be special machinery to enable a husband who comes within the financial limits of the Legal Aid Scheme to obtain the advantages of an assisted person under Section 2 (2) (e) of the Legal Aid and Advice Act *ex post facto*?

A. Should a certificate in a matrimonial cause be granted to a respondent husband limited to defending a claim for costs?

1. Section 1 (6) of the Legal Aid and Advice Act, 1949, provides that a person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto and that he may be refused legal aid if it

PAPER NO. 86. SECOND MEMORANDUM SUBMITTED BY THE LAW SOCIETY
17 November, 1952] MR. D. L. BATESON, SIR SYDNEY LITTLEWOOD, MR. E. A. DOUGHTY,
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in which conducting solicitors of the Society's Divorce Department have acted, unassisted respondent husbands have taken this step and have appeared in person and the judge has made only a limited order for costs against them.

B. Should a full order for costs in an assisted person's case be enforced against a respondent husband if the result of this is to reduce the maintenance payable to the wife?

5. The Council have, in the past, been asked to express a view on the duty of an assisted person's legal adviser to ask for an order for costs against a respondent husband, particularly in cases where if such an order were made it might well reduce the amount of maintenance which could be recovered by the wife. In the December, 1951, issue of the Society's *Gazette* the Council published a statement on this matter. The Council then stated and are still of opinion that costs should be prayed in a petition presented by an assisted person unless, had the petitioner been an unassisted person, he or she would have been advised to omit a prayer for costs, and that if the petition contains such a prayer it would normally be the duty of the petitioner's legal advisers to apply for an order for costs if the petitioner is successful, in order that the Legal Aid Fund may be protected. The view of the Council is supported by the judgment in the case of *Baker v. Baker* delivered on 31st May, 1951, by His Honour Judge A. H. Armstrong, who stated, in relation to an application for costs made by a petitioning wife who was an assisted person: "I think the petitioner in this case is not entitled to expect the assistance of the funds made available for that purpose, and then to deprive the funds of that interest in the sums for damages, or of the need to recover all the orders for costs made in the ordinary course of the action, which is to a great or less degree fought on her behalf. I think, therefore, that the application for costs was properly made".

6. Under the Legal Aid and Advice Act, 1949, an assisted person is required to make a contribution towards his or her own costs according to the assisted person's means as assessed by the National Assistance Board. In so far as the assisted person's costs are not recovered from a third party or covered by the contribution made by the assisted person they fall upon public funds. Accordingly, if no order for costs is made against the respondent husband the costs of the wife's proceedings fall on her to the extent of her maximum contribution and on public funds if her maximum contribution does not cover the amounts expended on her behalf.

C. Should there be special machinery to enable the husband who comes within the financial limits of the Legal Aid Scheme to obtain the advantages of an assisted person under Section 2 (3) (a) of the Legal Aid and Advice Act *ex post facto*?

7. It is difficult to envisage the machinery which Mr. Wightwick suggests should be devised by which a husband who would have been an assisted person, if he had defended the case, could become so *ex post facto*, nor does it seem in accordance with the normal principles of law that a person who does not take any steps to help himself should subsequently be able to avoid his liabilities. The Council take the view, therefore, that a respondent husband should not be able to avoid his liability under an order for costs in matrimonial proceedings, although they consider that the Matrimonial Causes Rules might be amended to provide that a person defending a prayer for costs made against him could file an affidavit of means within fourteen days of entering an appearance indicating his desire to be heard on the question of costs and that in such cases consideration should be given to the affidavit by the judge on making an order for costs against him.

(Dated September, 1952.)

APPENDIX

Memorandum submitted by Mr. H. W. Wightwick, M.C.,
Metropolitan Magistrate, Lambeth

Legal aid Divorce costs

There are many cases in which a wife obtains a divorce as an assisted person and the husband, if he had defended the case, would also have been an assisted person. If, however, the husband does not defend he is not an assisted person and in due course he recovers a bill of anything from £50 to £60 for his wife's costs to be paid at the rate of 3s. or 10s. per week.

If his wife has a substantial maintenance order against him this additional payment for costs cripples him financially and there are at that stage no means by which he can become an assisted person. Not infrequently he contends with some truth that he is unable to pay both the maintenance order and the costs, and asks on that ground that the maintenance order may be reduced.

It is suggested that machinery might be devised by which a husband who would have been an assisted person, if he had defended the case, may become such *ex post facto*.

EXAMINATION OF WITNESSES

(MR. D. L. BATESON, SIR SYDNEY LITTLEWOOD, MR. E. A. DOUGHTY, MR. E. C. HARVEY, MR. A. J. DRIVER, and MISS E. E. SPICER, representing the Law Society; Secretary to the Law Society, was in attendance.)

7079. (Chairman): We have here, as representing the Law Society, Mr. D. L. Bateson, the President, Sir Sydney Littlewood, Mr. E. A. Doughty, Mr. E. C. Harvey and Mr. A. J. Driver—and I think there are others here. Mr. Bateson, would you tell us who they are, please?—(Mr. Bateson): Miss Spicer, a member of the Law Society's staff in charge of their Divorce Department, and Mr. Horsfall Turner, a member of the secretariat.

7080. As regards Sir Sydney Littlewood, Mr. Doughty, Mr. Harvey and Mr. Driver, what posts do they hold?—Sir Sydney Littlewood and Mr. Driver are members of the Council, Mr. Doughty and Mr. Harvey are non-Council member practitioners, and as a whole we are nominees of a Committee appointed by the Law Society to prepare this evidence. The Committee was drawn more from non-members of the Council than from members of the Council.

7081. Thank you. I think most of us know exactly what the Law Society is, but would you just describe it, Mr. Bateson, for the purposes of the record?—The Law Society is the governing body of the solicitors' profession. There are some 17,000 solicitors in England and Wales, and the membership of the Law Society, which is not compulsory, represents about 16,000 out of the 17,000. May I say here that the Council, who appointed this

Committee had, of course, no mandate from the profession? In the form in which it was submitted to the Commission the memorandum did not include any of the many controversial points considered, because the Council felt, in the absence of a mandate from the profession, that it ought to confine itself largely to matters of legal implication. Many of the members of the Committee have individual views, and if those individual views are expressed here today, they are to be taken as the views of individuals and not necessarily those of the Council. On the other hand, the members of the Committee were selected largely because of their knowledge of this particular field, and most of their views would be largely representative of what we believe the profession might say if they had given a mandate to the Council.

7082. I see. I suppose the evidence was not, then, sent round to the various Law Societies in the various towns or cities?—It was made available for them, I think, my Lord, in our annual report. It was certainly discussed at our annual general meeting, and there were provincial members on the Committee, and, of course, there is a large provincial representation on the Council.

7083. Thank you. Now, is there anything you would like to add, Mr. Bateson, before I ask questions on this memorandum?—I do not think so, my Lord. We have

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[Continued]

agreed amongst ourselves which of us shall answer questions under particular heads—at any rate in the first place.

7084. In paragraph 2 of your first memorandum, you recommend that proceedings for judicial separation should be abolished and you give your reasons. I want to put to you some of the counter arguments on that proposal. It has been suggested by others that proceedings for judicial separation should be retained, particularly for wives, whose husbands are cruel, but who do not want a divorce. For instance, they may not want it for religious grounds, or they may want to preserve their status as married women, or they may seek a judicial separation in the hope of an improvement in the spouse's conduct and a subsequent reconciliation. What do you say to that?—(Mr. Harvey): My Lord, in an experience of over thirty years, almost entirely devoted to matrimonial cases, I have found, I think, only two cases where there has been a genuine religious objection. There are safeguards which I would be glad to discuss if the Commission thought it necessary—there are safeguards which can be relied upon to protect the position of the wife in the event of a divorce, if this remedy were withdrawn.

7085. We should be glad to hear about those—I should have thought, my Lord, that, if a woman takes the initiative to bring the marriage into the arena of the law, then the prospect of a reconciliation is extremely remote. I should have thought that if she takes the initiative in putting an end to the marriage, she shuts the door to reconciliation and, further, that the marriage for all practical purposes receives its death blow when she takes such a step as the filing of a petition for judicial separation. As to the hardship entailed for wives, may I refer to the preamble to what is colloquially known as the Herbert Act of 1937? That states:—

"Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship . . ."

and I emphasise that word—

" . . . the reduction of illicit unions . . ."

I emphasise that—

" . . . and unseemly litigation, . . ."

which I emphasise—

" . . . the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended. . . ."

I have read the preamble to the Act, my Lord, primarily to take out of it that which is material to the remedy of judicial separation—the removal of hardship. I suggest that it is a hardship and a very serious hardship that where there is a remedy of divorce the wife should not seek it. I think that the fact that there is no possibility of re-marriage, if the wife insists upon applying for this remedy rather than the remedy of divorce to which she is also entitled, is a hardship. I suggest that there is another hardship, a financial hardship, because it is possible, if a woman files a petition for judicial separation, to involve the husband in at least three and possibly four sets of costs in this connection. First, she gets a deed of covenant from her husband, under which he covenants to pay her during the joint lives or her life a sum of money for her maintenance and possibly that of the children. Having done that, she starts proceedings for restitution of conjugal rights, to which she is perfectly entitled after writing a conciliatory demand to her husband. She obtains a decree of restitution of conjugal rights. She then goes for an order for periodical payments under that decree with a further set of costs. Thirdly, she then starts a petition for judicial separation on the ground of desertion—that is to say, non-compliance with the decree of restitution of conjugal rights. And fourthly, if the wretched husband is lucky, she will start proceedings for divorce—which should have come first and not fourth. So much for hardship, my Lord.

7086. You are taking there rather a special case with a deed of covenant and all the rest of it. Is not the ordinary case for judicial separation one in which there has been cruelty or adultery, and the wife does not want a divorce?—Commonly, the grounds for judicial separation are the grounds upon which the wife would be entitled to a decree of divorce.

7087. Yes, but is it usual for her first to get a deed of covenant, and then to take all the steps you have described?

Is it not more usual just to apply for judicial separation?—It is possible that she might take all those steps—if the remedy is in her hands and she is vindictive, she may very well do that, testing the ground as she goes along, her object being ultimately to obtain a maximum provision.

7088. I follow that. What I was putting to you was this: that it is unusual—I might say perhaps very unusual—is it not, for a wife to go through all these stages?—I should think that it is unusual but it is possible. It is one of the reasons that we put forward as supporting our view that this remedy should be abolished entirely. May I say, with regard to the statistics shown in our memorandum, that it seems rather astonishing that this remedy should be retained? The Commission will see that, in the year 1950, 5 petitions were filed by husbands for judicial separation—that figure does not surprise us at all—and 78 were filed on behalf of wives. That represents a total of 83, and during that year 58 cases were disposed of. My Lord, this remedy has fallen into disrepute; it is superseded by the right which the wife has under Section 23 of the Matrimonial Causes Act, 1950, to ask for maintenance for herself and her children. All that is left in favour of retention of this remedy is really the somewhat tenuous argument that it is something retained from the old ecclesiastical practice of meeting the wishes of a woman who has a religious objection to divorce. Apart from that, we suggest that it no longer fulfils any really useful purpose, and it is used frequently for the purpose of extortion. Of course, a woman's pride comes into it a very great deal—the idea that "if I cannot have him, no one shall", is present. If the wife were a person of strong religious conviction she would not attack her own marriage at all. There is no obligation upon her to bring the marriage into the arena of the law; she can leave it where it is. It is true that, because negotiations fail, she may have to seek an order for maintenance under Section 23, but that is not attacking the marriage at all, that is supporting the marriage. But once the wife begins to attack the marriage she has destroyed it, and the proper course for her to adopt is to ask for its dissolution. So far as the effect on the community is concerned, it is a bad thing, I submit, that people should live in adultery. One is not going to prevent a man living with a woman he loves by depriving him of the right to marry her; he will do it in spite of that. When the Gorell Commission sat in 1910, Canon Hensley Henson, a Modern Churchman, afterwards Bishop of Durham, said that divorce should not be denied, because its denial would lead to an extensive condonation of adultery, and a general lowering of the moral standard of the community. We stress that very much. We pray that wise statement in aid of our contention that judicial separation has fallen into disrepute as a remedy. I could give this Commission quite a number of examples of cases where, in my experience, judicial separation has been used vindictively, and sufficiently generally to justify that being used as an argument in support of the abolition of the remedy.

7089. Thank you. Will you now turn to paragraph 3 of the memorandum, which deals with divorce on the ground of cruelty? The recommendation is as follows:—

"We recommend that it should not be necessary to have to show that the respondent's conduct, referred to in the definition, has been aimed at the petitioner or that the petitioner should have apprehended danger, but that it should be sufficient that the conduct has in fact caused injury to the petitioner's health or is likely, by its very nature, to cause such injury."

Then you go on to say:—

"Experience has shown that hardship has been caused in a number of cases where, although the petitioner's health has been affected by the conduct of the respondent, it is not possible to say that the respondent's conduct has in any way been aimed at injury to the petitioner. Examples of the matters which might by causing the likelihood of injury to health be brought within the definition of 'cruelty' are offences against young children, gross indecency between men, cruelty to children of either party to the marriage, lesbianism, immoderate drinking, drug-taking and perhaps repeated imprisonment."

I follow your recommendations, but as regards your examples, would it not be better, if they are to be causes

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for divorce, to make them separate causes for divorce rather than to include them under the definition of cruelty? Even if the recommendation was accepted, would it not be better to adopt that course?—(Sir Sydney Littlewood): I can answer that very simply and shortly, in one word—yes.

7090. Thank you. Will you come to paragraph 4, which is headed "Desertion"? The Law Society's recommendation as to desertion is that desertion without cause, for a period of three years within the four years immediately preceding the presentation of the petition, should be a ground for divorce, provided that the respondent is in desertion at the time of the institution of proceedings. I follow your reasons for that, but why do you prefer that to the Bar Council's recommendation in paragraph 40 of its first memorandum, which is as follows:—

"It is recommended that the statutory period of desertion be re-defined to provide that dissolution of marriage shall be granted where the spouse at fault has for a period of at least three years immediately preceding the presentation of the petition, deserted the other without cause, provided . . ."

and this is the part which I emphasise—

" . . . that a resumption of cohabitation shall not be deemed to have interrupted the continuance of the desertion unless—in the opinion of the court—it amounted to a reconciliation."

That, you see, instead of stipulating a particular period, such as three years within the four years, deals with cases where there has been a genuine attempt at reconciliation. Would that suit your purpose equally well, or do you prefer your own version?—(Mr. Doughty): We had not, of course, seen the Bar Council's recommendation. One of the objections I see to it is that there is no definition of what a reconciliation is. It might only last for a week; it might be a perfectly good reconciliation for a week and still bar the three years running—a genuine attempt to return if accepted is a reconciliation.

7091. In paragraph 6 of your memorandum you recommend:—

" . . . that petitions for damages only should be abolished and that it should only be possible for a husband to claim damages against a male adulterer in a petition for divorce on the ground of adultery."

What has been said about that is that petitions "for damages only" may possibly act as a deterrent to a would-be adulterer who would like very much to have intercourse with some other man's wife. The husband does not want to divorce her but possibly does want to make the other party pay. What do you say to that?—(Miss Spicer): We feel that it is more likely to be that than any other reason.

7092. You do not think that the existence of the remedy might possibly discourage people from making love to other people's wives?—I see no reason why the ordinary petition for divorce and for damages should not have the same effect.

7093. A husband can of course seek divorce and damages if he wishes. In paragraph 9, at the end of sub-paragraph (i), you say:—

"We deplore, for example, the present tendency to whittle down the court's discretion by adherence to what is sometimes known as the 'one-third rule' and the practice which existed prior to the decision in *Rose v. Rose* . . . of maintaining that in every case account must be taken of the earning capacity of the wife."

You think, then, that account should not be taken of the earning capacity of the wife? Other witnesses have expressed the contrary view very vigorously. I would like you to enlarge on that a little.—We do not say that, with respect. We say that it should not "in every case" be taken into account.

7094. Not in every case, but only in some cases?—Where a wife has been used to working, she should go on working.

7095. I see. You say that account should not be taken in every case, but only in appropriate cases, which you have just defined?—Yes.

7096. Then, at the end of sub-paragraph (ii), you say:—

"It is for this reason that we recommend that there should be special registrars with the same qualifications as Chancery Masters appointed to deal only with applications for ancillary relief."

Do you think that they would be fully occupied if they dealt only with that?—(Mr. Harvey): With respect, the present position is that there are five of these gentlemen, or rather there are seven now. In the early 1930's, I think, there were five. The difference in the number of cases that has had to be dealt with is the difference between 3,000-4,000 and 31,000. These gentlemen do their best; their best is not good enough. The enquiry is a casual, off-hand running through of the pleadings. Having regard to the seriousness of these enquiries, which really do affect the future of a wife and children, it has always struck me—and I am experienced in these enquiries in the Divorce Registry, I do most of them myself—that nothing like sufficient time is given to them, nothing like a sufficiently probing enquiry into the husband's means is undertaken. It is very difficult to have invoked the interlocutory powers of the court, such as discovery of documents, inspection of accounts, indeed, cross-examination of the respondent—because it is said in answer to an application that all this would add to the expense. Too much weight altogether is given to the oath of the husband, whose obvious idea is to get the allowance down to the bone. There is no satisfactory method of appeal; the appeal goes to the judge in chambers who is usually extremely busy. He will have anything up to fifty summonses to deal with between ten-thirty and four o'clock, and very often it is five and six o'clock for the judge. I generally find that the judge feels that there has been a complete enquiry before the registrar, and that it is not for him to go into the matter *de novo*. He does very often go into it as far as he can, indeed fairly exhaustively, but the machinery which exists at the Registry at Somerset House for these enquiries is not used sufficiently. The suggestion here, put somewhat naively in our memorandum, that the qualifications of the gentlemen who should deal with this very important question should be the qualifications which are possessed by the Chancery Masters, is a little curious coming from us, because those gentlemen are all members of our profession. Although we would welcome any type of official who would carry out this very important enquiry, and do it thoroughly, we should like, I think, to qualify the parallel drawn with the Chancery Masters to the extent that, although we complain that the enquiry made is too short, we would not want too protracted a one.

7097. You have given reasons for increasing the number of the registrars, but my question was rather directed to this: why should there be special registrars to deal only with these applications? Would it not meet the Law Society's point equally well if the number of registrars doing the ordinary duties of registrars were increased? They could then take more time over applications for ancillary relief?—I do not think that their training is such as to make them efficient in exercising judicial powers, as they do in a very important connection, my Lord. I myself find it very difficult to remain calm when I am dismissed after a sketchy enquiry of ten minutes, when I am fighting for the future of a wife and very often three or four children. One only has to go into the messengers' room and see the list that the registrar has to get through. He has to do summonses, which probably take the whole morning; he finishes possibly at one o'clock, goes to lunch and comes back at two, starts his list for the afternoon. In my view, and in the view of the special Committee who went very thoroughly into this matter, that is not adequate. (Mr. Bathson): I think that if we had felt it practicable, we would have gone as far as to say that we thought that this ought to be done by people of the same quality as High Court judges. We feel very strongly that it is the quality that we want to see improved, because we think the work is so important. We do not think that judges, if they could do it, would go wrong in the same way as registrars. We think that, on appeal, if the judge gets a full picture, as a rule he gets it right. Below that level we do not think that the enquiry is done by people of sufficient quality.

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7098. Then, in paragraph 11, you recommend:—

"... that court welfare officers should only be employed where a judge is in doubt as to the order that should be made regarding any specific children and we do not recommend the employment of a court welfare officer in every matrimonial cause where there are children."

Then you go on:—

"We further recommend that the court should have power, if it thinks fit, to require any children of a marriage which is the subject matter of matrimonial proceedings to be separately represented on custody applications."

What do you say to the suggestion that the court should deal with custody in every case for divorce or separation where there are children? I understand that at present the court does not deal with custody in every such case. Is that right? (Mr. Justice Pearce): If there is a prayer for custody, that is dealt with, and some judges investigate the case even if there is no prayer, but I should think that most commissioners do not. (Chairman): It has been said by other witnesses that, in every case where there are children, and divorce or separation is sought, the court should not only investigate the question of custody, but it should have a report from a welfare officer before making the order. What do you say to that question?—(Sir Sydney Littlewood): I personally am in favour of the court considering the question of custody in every case where there are children. The Committee, to which the President made reference at the opening of this session, consisted of eleven solicitors. Ten of them were opposed to enquiry in every case; one was in favour of it—I was that one. So that you see how overwhelmingly I was outnumbered. The general feeling was that in a great many cases the solicitors concerned have given most careful thought to this matter with the parties concerned, going as far they dare without being accused of collusion, of course, and that the result reached as an outcome of those discussions is entirely satisfactory. It is because of that feeling and because of that practice, that the recommendation has taken the form it has taken.

7099. Thank you. I have no questions on paragraphs 12, 13 or 14, but on paragraph 15, which deals with enforcement of orders for maintenance, etc., I have a question arising from sub-paragraph (v), where you say:—

"We are of opinion that it should be possible for orders for maintenance made in the High Court to be enforced summarily by committal by order of a judge on proof of non-payment under the order."

I wondered whether that was not a bit drastic. Must not the husband be given a chance of explaining his position before committal?—If you please, Sir, it again falls to me to answer this. Perhaps some members of this Commission know that I had almost twenty years as a clerk to magistrates and that I am a past President of the Justices' Clerks' Society. I have not been a clerk for the last five years, as the Law Society took up too much of my time. Under the Summary Jurisdiction Act and the Money Payments Act, a man can be committed unless the court is satisfied that he has not been able to meet his obligations. In other words, the burden of proof is on him, and that is the reverse to the situation under the Debtors Act, which applies in the county court and on judgment summonses in the High Court. In practice, since the enactment of the Money Payments Act, I doubt whether anyone has gone to prison unjustly for non-payment of arrears under an order. The most effective way of collecting money is a suspended committal order, and it is because this system has worked so well in magistrates' courts and is now working better than it has ever worked, that we ventured to suggest that there should be a similar system in the High Court. We realise that it would probably have to be extended to county courts too, in view of the fact that divorces are dealt with in the provinces, but the procedure should be the same, or as nearly as possible the same, as the procedure before magistrates. We realise that that would involve a great change and if the Commission so desire, we would be prepared to submit detailed suggestions. That would be a heavy work, and we did not undertake it. We felt that it might be wasted effort to undertake it before we knew whether you would like it or not. Indeed, it might be considered presumptuous on

our part if we suggested amendments to the rules of the High Court. It is the justice of the matter that appeals to us, and many wives who are dependent on High Court orders for maintenance have a very poor time. I have known of quite a lot who have given up trying to get it. In the magistrates' courts that only happens where the man disappears in a foreign country.

7100. Does it come to this—that you think that the magistrates have sufficient powers at the moment, that their procedure is working satisfactorily, and that you would like a similar procedure applied, indeed, as far as possible an identical procedure, in the High Court and the county courts?—Yes, my Lord. (Chairman): It may be that later we shall take advantage of your kind offer to supply your suggestions for a full scheme to us, but perhaps at the moment we can leave that. [See Question 7182.]

7101. (Mr. Maddocks): Might I say that in a magistrates' court the man is, of course, always heard before a committal? (Chairman): I thought that that was so, that is why I put the question—I am sorry. He always has the chance of being heard. Sometimes he refuses to say anything when you get him there. (Mr. Maddocks): The onus is on him, and if he does not say anything a committal order is made against him.

7102. (Chairman): I think that I have stated this before, but it might interest you to know that, in my first year as a Chancery judge, I enquired as to the result of suspended committal orders, which you praised highly, and I found that I had made thirty-nine suspended committal orders, and only one man went to prison. In all the other thirty-eight cases, the man paid up.—That is my experience, too, in magistrates' courts.

7103. I will now turn to paragraph 20, in which you deal with reconciliation. You do not recommend, I see, that any special reconciliation machinery should be set up and you say:—

"We are of opinion that solicitors, in general, when first consulted by a client about matrimonial difficulties, apply their minds to the possibility of effecting a reconciliation between the parties. Experience has shown, however, that normally when a matrimonial offence has been committed and a definite decision to institute proceedings for divorce has been taken, it is only in exceptional circumstances that a lasting and effective reconciliation between the parties can in fact be achieved."

I follow that, but what do you say as to recourse to reconciliation machinery at an earlier stage, before a definite decision to institute proceedings for divorce has been taken?—(Mr. Harvey): I think that it would be very valuable. The reconciliation machinery that exists, particularly in the magistrates' court, gives rise to some startling statistics which resulted, I think, a fortnight ago in a statement which struck us as quite a bold one. It was said that with regard to 830 matrimonial cases, I think in Stratford, there were 324 reconciliations. Our comment upon that would be that they must have been *ad hoc* reconciliations that lasted a very short time. We would welcome, I am quite sure, any machinery, if it is possible to devise it, which attempted reconciliation before the case comes into our hands, but any practising solicitor who has had any very great experience in matrimonial work knows perfectly well, that when the wife—it is particularly the case with the wife—comes to her solicitor, her mind is made up. She may not ask his advice, or if she does, she does not take it. Her decision has been made, and it is a matter of the utmost delicacy for him to suggest to her that she should go home and think over the position again. Personally, I try as far as I can to see if there is any possible back left. I have a familiar phrase that I use. It is this: "Is your husband worth forgiveness?" We all are in grave need of forgiveness! I think that for a woman to take up the position that she insists on absolute fidelity from her husband is wrong—to rush into a divorce where the husband has failed on one occasion, or with one particular woman, and has freely confessed it to his wife and has placed the weapon in her hands. In such circumstances, it might be suggested to her very strongly that she should overlook the offence. She will be a long time divorced and nobody cares to pause to ask, "Did he divorce her or did she divorce him?" I remember so well, when I was a younger man, my senior

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partner discussing on the telephone once in an attempt to persuade the opposing solicitor to use his efforts for a reconciliation. I was very much impressed by it. It is very difficult to see the position as black or white, it shades away. The ministry of reconciliation is performed by the solicitor as far as he can. I am glad to be able to say here with the utmost confidence that in my experience the solicitor does his best within well-defined limits, and that the question of giving advice against his interests is one which he faces conscientiously. (Sir Sydney Littlewood): I would like to say that, one way and another, as a practising solicitor or as clerk to magistrates, I have seen the inside of some thousands of broken marriages. I do not think that any person, man or woman, ever wanted to see the marriage break in the early stages, and I believe that if there was a body, a really efficient body of standing, which could be approached in the early days of trouble in the marriage, a great many marriages would be saved. I have seen hundreds, I expect, of people persuaded to go back after they have sought to start proceedings, either in magistrates' courts or the High Court, and those responsible for the persuasion have called it reconciliation. I know of one successful case, by that I mean one that has endured for long years, where after fifteen years the people are as happy as they ever were before. I think it wrong to try to compel people to submit themselves to reconciliation machinery when they are determined to go ahead, but I think it highly desirable that we should have even better reconciliation machinery in the early days of trouble than we have at this present time.

7104. I gather from what you have just said that you do not think it is much use merely to tell people to go back unless you try to remove the friction. Is that right? I understood you to say that in hundreds of cases they went back, but in only one was there reconciliation?—That is after proceedings had been attempted. In the earlier days, I have seen very fine work done by probation officers. People in the lower walks of life have a way of approaching the probation officer. They do not go with a view to getting a summons, they go and say, "My husband (or my wife) is giving me a bit of trouble", and the probation officer goes round with help and does a tremendous amount of good. I have never seen any good of that kind done after there had been the determination to commence proceedings, except in the one case I have mentioned. I do know of a case where a couple lived together for twelve years. I persuaded the husband to go back to his wife, and after twelve years he came in to me—it is some years ago now—and said, "Twelve years ago you thought you were doing me a kindness. Actually you did the most unkind thing you have ever done in your life. I went back and lived with my wife for twelve years; twelve years of misery. I have left her now and nothing will induce me to go back. I am well over sixty now, and I shall not find happiness anywhere. If you had let me go when I was fifty, I might have done".

7105. In the last sentence you say:—

"The only additional observation we should like to make is that the Commission, if it is within their powers, might consider a recommendation designed to prevent the possibility of young persons marrying as they now can within a few days of meeting."

I think that the Commission presently feel that that is not within their powers, but I wish to ask this: have you framed a concrete recommendation on the basis which you suggest?—(Mr. Bateson): No.

7106. Would you be prepared to frame such a recommendation if we asked the Society to do so?—Yes. (Mr. Harvey): Could I speak very shortly? There is the question of preparation for marriage, which is very important. Is that not involved here to prevent the possibility of young persons marrying, as they now can, within a few days of meeting? The idea that I would hope would underlie any recommendation that is made by this Committee would be that there should be adequate preparation for marriage. Adequate preparation for marriage would mean, I would suggest, that young persons should be approached and educated for marriage.

7107. Of course, we have had a great deal of evidence to that effect which we have very well in mind, and it may be that we shall be able to refer to it in our Report.

But our view is that preparation for marriage is plainly not within our terms of reference.—It is for that reason that we used the wording we did in our memorandum. Apparently we have gone outside the terms of reference.

7108. I asked the question because you say that the Commission "might consider a recommendation", and I wondered what the recommendation was. If we ask you to frame one you will do so?—(Mr. Bateson): Yes, certainly. [See Paper No. 88.]

7109. In paragraph 22 you say, in effect, that you agree with the Bill which was brought into the House of Lords by Lord Mancroft?—I think that that is so.

7110. I do not know if you are familiar with the objections which have been raised to that, Mr. Bateson?—I do not think we are.

7111. I think that perhaps it would be right to put, very briefly, the objections, as I understand them. It is said that brother-in-law and sister-in-law, for example, is a very intimate family relationship, and that it can remain such so long as there is no possibility of these parties marrying unless and until the wife predeceases the husband. But it is suggested that if it becomes possible for a man, having divorced his wife, to marry his sister-in-law, a new emotional disturbance is introduced into the family circle, which affects the extremely intimate and friendly relationship which so often exists. It is said that that would be a bad thing and that it would be better to leave the law as it stands. On the other hand, the point has been made many times that the sister-in-law is very often the person who knows the children best and who is well-known by them, and that if the wife has been divorced it is the most natural thing in the world for the husband to marry his sister-in-law. What do you say to the objection I have sketched?—I should have said that the average member of the public would not know that the law was not the same, whether you read "dead" or "divorced", and it would make very little difference in the ordinary case. Having heard that objection, I would not personally regard it as a good one.

7112. In paragraph 23 you say: "If this recommendation is not accepted we recommend that the court should be given a free discretion to grant leave to bring a petition for divorce within three years from the date of the marriage...." Could you elaborate that a little? Why do you think that it is better that discretion should be free, rather than it should be necessary for the petitioner to show exceptional hardship or exceptional depravity on the part of the respondent?—(Mr. Dougherty): One of our difficulties in these cases is to know what exceptional hardship and exceptional depravity mean. It is very often a question as to which judge you happen to come before. I know of one case where the age of the petitioner alone was a factor determining exceptional hardship, because he was over sixty. I should be quite happy to leave it to a judge's discretion, having regard to all the circumstances, to decide whether it is a proper case. If he thought that the parties got married in a hurry because they were young and silly—

7113. Of course that would lead to a certain extent to uncertainty in the law. It would be very difficult to advise your clients, would it not?—So it is now.

7114. What occurred to me was that at any rate the present law gives some guide to a judge as to what are sufficient circumstances to lead him to grant leave for a petition for divorce to be presented within the first three years, whereas you would give him no guide at all.—I do not think that it would be any worse than the present position. (Mr. Driver): May I add something on that? We feel that the restriction on the presentation of a petition should be eliminated completely, and one of the reasons is that this was imposed by the Matrimonial Causes Act, 1937, with a specific object in view. Prior to that Act there was no such restriction. The object was to encourage reconciliation during the early years of married life. Our experience is that that object has completely failed, and we therefore feel that we should go back to the old law.

7115. Then, in paragraph 24, where you suggest a discretion in the court, I suppose that you had in mind that the facts might not come to the knowledge of the petitioner within the twelve months' period?—(Mr. Dougherty): I believe that that happened in the then Services Divorce

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Department, where there was some muddle on the part of different officials in the Army sending in the papers, and there was no way of getting over the difficulty.

7116. Was that what you had in mind?—Yes. It is a very remote possibility in the ordinary way, but it has happened, through no fault of the petitioner.

7117. In paragraph 25 you make a very interesting suggestion, which I think was not made to the Committee on Intestate Succession?—(Mr. Battison): That is correct, it is the first time that it has been made.

7118. (Mr. Justice Pearce): I want, first, to deal with your second memorandum. There you refer to the memorandum submitted by Mr. Wightwick. Is not this the real trouble to which Mr. Wightwick was referring? In the old days, in a Poor Person's case a wife would have been represented by a Poor Person's solicitor and a husband would have had to pay Poor Person's costs, which would be very small indeed. Now the wife gets legal aid. The position of a man in the same circumstances is this, is it not, that a judge under the existing machinery is compelled to make a full order for costs?—(Sir Sydney Littlewood): No, my Lord, he must make such order as he sees fit, having regard to the man's means and conduct.

7119. He has got to make an order disregarding the fact that the wife is in receipt of legal aid?—Yes, that is so.

7120. Take the case of a man earning just a few pounds a week, and his wife has brought a successful petition against him and the costs are, shall we say, £50; undoubtedly, if the wife were not in receipt of legal aid you would—since she was quite blameless—have extracted that £50 from the man, if necessary over a long period of years?—Yes.

7121. If one is honestly to carry out the Act of Parliament which says that one must disregard the fact that the wife is in receipt of legal aid, you would make a full order for costs against the husband, though in small instalments?—Yes—you are talking about a husband who has not defended?

7122. Yes.—Then the maximum order is made, I quite agree.

7123. I wonder what is the best way of dealing with that difficulty. At present, a judge really has no discretion, but he makes a full order for costs against a husband who, in the old days, would only have had a very small order for Poor Person's costs. I have found that that comes up very frequently, so it is a serious difficulty. That difficulty is avoided if the husband has started by getting a legal aid certificate and then perhaps has ceased to defend, because then he has had legal aid and still has it?—That would depend on the course which had been taken on legal aid, because if he ceased to defend because he was advised that that was the right course to take, the legal aid certificate would either be revoked or discharged.

7124. Of course, if it is revoked or discharged then we are back in the original difficulty?—If a certificate has been issued and then it is found that there is no defence, it is the duty of the solicitor, and indeed of the barrister acting under the legal aid certificate, to report to the area committee, and the certificate is then rescinded. The trouble on legal aid which leads to this is that the Law Society has had cast upon it by the Government the responsibility for administering legal aid as inexpensively as it can. The Law Society in administering legal aid is concerned with legal aid alone. We are not given any discretion, neither is a judge given any discretion, which enables us to help the wife in a case such as you have in mind.

7125. To help the husband?—To help the husband or the wife. You want a husband helped because of the amount of maintenance a wife can collect, I imagine?

7126. That is one aspect of it, but the other is that you are making him pay a sum of costs which he would not have had to pay before the Legal Aid Scheme, and which is probably going to cripple him for years.—He would not have had to pay in a Poor Person's case, but had the former Poor Persons' law continued, and even if it had been possible to get the Bar and solicitors to run it, it would have been necessary to change the limits considerably, because the upper limit was £4 a week gross earnings.

7127. I was assuming that that would have been increased with the fall in the value of money. But is there no suggestion you can put forward by which the harshness to which I have referred could be mitigated?—There is no suggestion which I can put forward within the framework of the present Legal Aid and Advice Act, and the Regulations and Scheme made under it. Any amelioration of the conditions which are causing this trouble would have to be approved by the Treasury, and it would be very difficult to get approval. I do not think that the Law Society, as the persons responsible for the administration of the Legal Aid and Advice Act, would be the proper people to ask for it. If this Commission made a recommendation, I have no doubt that the Law Society would be consulted, and as a result of our experience we could say that we have often known of cases of hardship. We get them reported to us constantly from all over the provinces, but we cannot do anything within the framework of the Scheme as it stands at the present time.

7128. I see. With regard to your observations on cruelty, dealt with in paragraph 3 of your first memorandum, I want to clarify the nature of your complaint about the requirements that the conduct was "aimed at" the petitioner. Perhaps it is not quite clear to members of the Commission what is being referred to there. The situation is this, Sir Sydney, is it not, that in the last year or two, owing to a case in the Court of Appeal, it has been thought that there is a limitation placed on the court's power to find that certain conduct was cruel, by the necessity that it should be found to be aimed at the petitioner? Is your view that that should not be imposed on the wording of the Act of Parliament, which says that the judge must decide whether the respondent has treated the petitioner with cruelty?—With the utmost respect, that is our view.

7129. Of course, whether conduct was aimed at the petitioner must be one of the matters which one considers in testing the weight to give to a particular act. Let me suggest this, that an insult in public, which was deliberately aimed at a wife, is obviously far more unkind and reprehensible than a staid observation which it had never occurred to the husband would place his wife in an unfortunate position. You would agree to that?—I agree, so far.

7130. What you complain of, I imagine, is that one of the tests which are convenient in weighing up whether an act is cruel should be excluded into being an essential qualification for an act of cruelty? Does that put your complaint sufficiently clearly?—It does, yes.

7131. (Chairman): Arising out of that, may I say that? You say that you have made no attempt to frame a definition suitable for incorporation in an Act of Parliament. Personally, I should be very grateful if the Law Society would frame a definition of cruelty which they think should be incorporated in an Act of Parliament.—My Lord, we welcome that and will do it with the greatest of pleasure. But may I ask one question on that? You raised the point of the specific grounds and asked whether we thought that they ought not to be substantive grounds?

7132. Yes.—Do you want us to accept that?

7133. I want you to set out the definition exactly as the Law Society would like it to be in the Act of Parliament, including the addition of the acts which are specified in paragraph 3 of your memorandum.—We will do that, Sir. (See Pages No. 88.)

7134. If you think that these acts should be separate grounds for divorce, then put them in that way.—(Mr. Battison): We should probably set out alternative formulae. (Sir Sydney Littlewood): Going back to this question of cruelty, we do find it an extremely difficult thing upon which to advise people, and we find cruelty cases very difficult cases to fight, most unpleasant. They have a way of going on for days and days. When we are advising the husband or the wife—it does not matter which it is—we know full well that our client, the petitioner, has suffered, and suffered grievously, as a result of the conduct of the other spouse. Do not think that I am saying that the fault is always on one side, I know that it rarely is, but we do know that the whole question is whether, having regard to the state of the law as it is at the moment, we can persuade the court to believe that the petitioner has suffered, and when you bring a case of cruelty which is fought, and fought successfully, there is

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not the slightest hope of those people coming together again, because every bit of mud which can be thrown has been thrown, and the petitioner is much worse off at the end of it than he or she was before. It is a most unsatisfactory thing.

7135. (Mr. Justice Pearce): There is one thing to be remembered about definitions. If you have a really close definition which will help you in advising your clients of the extent to which they can hope to succeed, you are removing it from the power of the judges to alter the standard of cruelty, perhaps, as the world goes on.—Yes. Provided the definition is sufficiently wide, I do not think that anyone at this table would see any objection to that.

7136. I refer now to paragraph 6. Is it really worth abolishing petitions for damages? I suppose that one might say that some of those, of the very few which there are, are actuated by spite, some by a genuine desire to warn off a home-breaker when the home has held firm despite his advances?—(Mr. Douglas): I have never had one personally, though I have had them threatened against my clients.

7137. On the ground, I suppose, that your client had broken up a home and the husband was very angry with him?—Yes.

7138. Was there any reason why your client should not have that threat? It is one of the consequences if you break up a home.—If the threat were carried out, the husband and wife would remain married.

7139. But then the husband would not get much in the way of damages from a judge, if it was brought in spite, would he?—No.

7140. Is there any great harm in the existing situation?—There is all the publicity attached to it, which is very unpleasant.

7141. But are they ever fought? Has there been one in the last year?—I do not know of one.

7142. So the furthest your objection to it goes is that a gentleman who had broken up one or two homes had the unpleasantness of the threat, but not the publicity of the case?—Proceedings have not been brought, in fact.

7143. Now I want to ask you about condonation, which is discussed in paragraph 7 of your memorandum. It is an unfortunate feature of the present law of condonation that if a wife, shall we say, has a right to divorce her husband because he has committed adultery once or twice, and wants to consider whether she shall break up the home or go back to him, yet, as a solicitor, Mr. Driver, would really have to advise her not to go back to the home and see how it works, unless she is almost certain that the reconciliation will be successful?—(Mr. Driver): Yes, my Lord.

7144. Because, you point out to her, she will then lose her right to divorce, and if the attempt at reconciliation is a failure she will be in difficulty?—Yes.

7145. The only way for a wife in such circumstances really to try out whether reconciliation is possible, is to go back to the home and see how, in spite of the past, they get on when they try to live a normal married life?—Yes.

7146. And that the present law forbids?—Yes.

7147. It is obvious that there must come a time when the hatchet is buried in order that matrimonial life may become once again secure. Do you think that it would be a good plan if, shall we say, any attempt at cohabitation lasting for under three months, were not to be held a bar to relief, if subsequently the innocent party wanted it? Have you followed what I mean?—I have, and I would not object.

7148. You can then say to your client, the wife: "Now go back to your home, see how you find it; if you find that it will not work, come back within three months and you can then go on with your divorce"?—I should not object to that solution.

7149. Would you think that that was a welcome addition to the law of matrimony?—I would.

7150. On the question of abolition of the law of collusion, in paragraph 8, do you not think that your alternative recommendation is really more practicable than your first

recommendation, that is to say, it is preferable to have a clear definition of collusion instead of abolishing it altogether?—(Mr. Douglas): Yes, but it depends upon the definition. There are a good many things which are technically collusion, which we do not think ought to be collusion.

7151. There is some confusion as to exactly what is collusion, is there not?—I see that the President of the Probate, Divorce and Admiralty Division defined it as a corrupt bargain, but at present a great many of the things that we should like to be able to do are not in the nature of collusion.

7152. But then you would be safe in doing them. But you would, I agree, in the present state of affairs be in this danger, that it may be that some people would think they were improper...—Legally improper.

7153. Certainly.—But not morally.

7154. But if you abolish the law of collusion altogether, you do open the way to quite a definite class of case, do you not, in which the one spouse simply buys a divorce from the other?—I have never known it happen.

7155. Because the law of collusion exists. But if it were abolished, it would be perfectly easy for the parties to come to any bargain they like, and the husband could buy the divorce from his wife for £10,000?—Can you suggest any sort of case like that where they would not be caught under some other branch of the law, perjury or connivance, or conduct constituting?

7156. Yes, I can. Take the case where the husband has some complaint against his wife in the way of cruelty, such that a solicitor would undoubtedly advise him, on what he has said, that he would probably succeed. Suppose he would not have a hope if the case were fought because his account would then be reduced to its proper perspective. Suppose then that the wife is paid £10,000 not to defend. There is no perjury involved in that, there is no connivance, there is only the law of collusion to make such a bargain objectionable, is there not?—It might be conspiracy.

7157. (Chalmers): But if there were no law against collusion?—But I cannot see why a wife should put herself in the wrong, for whatever sum of money, and lose her rights of maintenance.

7158. (Mr. Justice Pearce): There it is, but I would suggest to you that as a matter of fact there are quite a lot of cases like that, of desertion or cruelty, where if only one side is presented there is a case on which a judge could probably grant a decree, but when it is really fought out, it turns out that the petitioner is not entitled to a decree. One sees them fought daily, does not one?—Yes.

7159. In such a case, surely it must be wrong to let the husband pay a sum of money for the wife not to defend?—It probably would not pay the wife.

7160. To let the husband win on a thin case of desertion, and she to get a lump sum, £10,000 or anything you like?—It is conceivable.

7161. I see what you say about clarification of the law with regard to collusion. If the President's definition of it were adopted, would that be satisfactory?—I do not think that we can define it as simply as that.

7162. Ultimately you have to make it a question of corruption, have you not, and the only difficulty is that somebody may think that an arrangement is corrupt when it is not? If a corrupt bargain is improper, when a husband offers generous maintenance to his wife, someone may suggest that that is corrupt, in which case the court would look into the matter, and if it was a perfectly honest case nothing would happen. Would not that be a sufficient safeguard?—Yes, but we are particularly anxious that payments made by the respondent to the petitioner should not be collusion if that is done properly. For instance, there are many cases where a wife as a wife is entitled to a pension on her husband's death. It is now collusive, if the wife has perfectly proper evidence and could divorce her husband, for her to say to her husband, "Take out a policy or provide in some other way the pension I would have got if I were a widow". Yet I cannot see anything immoral about that.

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7163. Mr. Dougherty, we will not argue the matter. But the fact that there is some doubt between us seems to make it clear that any doubt there is should be set at rest?—Absolutely, Sir.

7164. But on the President's answer, if you have read his evidence, namely, that he himself first suggested the rule that an application for maintenance should be made at the same time as the divorce proceedings were started, that was plainly intended to make it clear that it was to be open to the parties to arrange matters of maintenance even before the decree was granted?—I know of no solicitor who dare do it.

7165. But provided that matter were made clear by definition so that really any reasonable arrangements between the parties about money, if they were not for a corrupt intention of bringing an untrue case or suppressing a true case before the court, were allowed, you would have no objection?—If collusion were limited to bringing an untrue case or suppressing a true case, then I think that the law would be much more reasonable than it is now. (Mr. Harvey): May I, on that particular matter, give you some statistics, which I have received from Miss Spicer, in respect of cases of legally aided persons, which represent about two-thirds of the total petitions filed? I would suggest that those cases have passed already through a very fine sieve, since they have been investigated by the Legal Aid Committee. I would suggest, with great respect, that as to those cases there can be no question of collusion at all. We, as practising solicitors, are familiar with suggestions of collusion—not often, rarely—and we have to make up our minds, with no proper, clear definition of the meaning of the word, whether the case lies on this side or on that. It seems to me that the suggestion is directly against the integrity of the practising solicitor.

7166. What suggestion?—The suggestion that there might be collusion in any given case. The solicitor has to decide whether the case should ever be allowed to come into court at all, and if he exercises his professional integrity he would not allow collusion to take place. The tragedy of the situation is this, that the deception is practised and the agreement, if agreement there be, is completed before the matter ever comes into the hands of the solicitor. I think that most of us are familiar with cases where we have been kept completely in the dark, and it has turned out afterwards that there has been something smothering of collusion.

7167. I accept that entirely, Mr. Harvey, but I am not sure how it bears on the questions I was asking Mr. Dougherty.—It may not, my Lord, but it is implicit in this difficulty in which the practising solicitor finds himself, in not knowing where to draw the line, and I am looking at the safeguards which exist already, because I feel very strongly that we are right when we suggest that collusion should be abolished altogether. Looking at the safeguards which already exist, one of the principal ones is of course the integrity of the practising solicitor....

7168. But, if I may interrupt you there, why is the integrity of the practising solicitor any safeguard, if there is no objection to collusion?—That is perfectly true, and, if I may say so with respect, a most apt comment on what I have said, but if this evil exists, how is it going to be tackled? At present it is tackled by us, primarily. We are the first barrier in the way of collusion, and I should have thought that this bone of collusion has been very much magnified. That is the way we feel about it, and it is that which has led us to include in one memorandum the suggestion that it should be abolished.

7169. Mr. Harvey, I am not crossing swords with you at all on the question of whether it has been magnified. All I am suggesting is that it might be laid down quite clearly that if a proper and honest bargain adjusting the rights of the parties is made, that is all right, but if it is a corrupt bargain for the purpose of blinding justice, then that is wrong. Would not that be a help to a solicitor, to have that as a guide so that he can control his client, whereas if there were no law against collusion would not the solicitor be in a much more difficult position? Is not that fair?—It is fair from the point of view you put, my Lord, but if this is not a very serious danger, is there any reason why the bar of collusion should not be abolished? I do not think, personally—and I think it is due to us to be allowed to say it here—that a suggestion such

as has been made before the Commission, that a solicitor would commit professional suicide for the pittance of costs which would result to him from an undefended divorce case, as anything but frankly incredible. (Mr. Benson): My Lord, would it be of any assistance to this Commission if we were to offer, under our alternative recommendation, to submit to you a definition of what we thought might be more suitable than the present one? [See Paper No. 88.]

7170. (Chairman): Yes, I think that it would be very helpful.—Without departing from our evidence, that that is only the alternative.

7171. (Mr. Justice Pearce): On your suggestion, in paragraph 9, that it should be possible for the court to award a lump sum payment instead of, or in addition to, income payments, would you add to that a suggestion that the court should have power to extinguish the rights of a wife in respect of maintenance? The lump sum payment is obviously a useful method, but if the situation is left in the present state, where a court cannot finally extinguish the rights of a wife to come back again, your lump sum payment is really not very much use? In fact, it may work a serious injustice if the wife spends it all and comes back for more?—(Mr. Harvey): I think that that is a very good point, if I may say so with respect.

7172. You would agree that that power should be added?—Yes, I would. I should agree that it was a very dangerous situation to put her in possession of a lump sum of money which might be dissipated in many ways. (Mr. Benson): I think that we should all agree that that is a good suggestion.

7173. On paragraph 12, you recommend that proof of the respondent's bigamous marriage should raise a rebuttable presumption of adultery. Would you agree, in addition, that a certificate of marriage, or other proof that the respondent has gone through a form of marriage abroad, which may not necessarily be bigamous according to the law of that country, should raise a rebuttable presumption of adultery?—(Miss Spicer): I certainly would, and I thought that was implicit in the recommendation.

7174. On paragraph 15, on the question of enforcement of orders for maintenance, would you be in favour, instead of introducing summary procedure into the High Court, of sending to the courts of summary jurisdiction the collection of a wife's maintenance?—(Sir Sydney Littlewood): No, my Lord, I would not. The amount of an order in the Divorce Court is often quite a substantial one, £2,000, £3,000, £4,000 a year. In a magistrates' court, two or three magistrates may be dealing with these matters, and quite often you will get magistrates who would regard such sums as far too high for any wife to receive. They are figures far outside their everyday ken, and I do not think that they would be a suitable tribunal to enforce payment, especially as it is implicit in our recommendation that the court considering an application for enforcement of arrears should have the right to wipe out arrears. You see, magistrates have the right to do that. We gave a lot of thought to this, and we were quite satisfied, unanimously, that it would be a mistake to remit these orders to magistrates' courts. We would not draw a line and say, "If over a certain amount it goes there, and if below that amount it goes somewhere else", because we think that it would be a bad thing to draw that distinction.

7175. Why do you think that it would be bad? I see your difficulty about the large orders. There is probably a further difficulty, that the man who is earning very large sums is probably a man whose finances require detailed investigation, and the registrars in the High Court are probably the most suitable tribunal for that. But what would be the objection to sending to the magistrates' courts all orders for maintenance up to, say, £200 or £300 per annum, and leaving in the High Court the larger ones?—Our feeling was that it would be a mistake to let the poor man think that the High Court could not be bothered with him.

7176. The poor man, or the wife who is getting the money?—Both.

7177. Would the wife really worry, if the local magistrates get the money out of her husband?—My experience is that they are not all like that. I find that some wives

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are very reluctant to take steps against their husbands after matrimonial proceedings—there are some, of course, who will get as much as they can, and more if possible. But I am definitely opposed to making a difference between Mrs. A. and Mrs. B. because of the amount of the order.

7178. Yes, but will you agree that the magistrates' courts are really better qualified to deal with the small orders, £2 or £3 a week, in view of the type of cases which they are constantly handling?—I think that they are better qualified to deal with the type of cases where they grant orders at the moment, but I should be very reluctant to send some people before magistrates, and people who might well have orders within the range which you have in mind. Magistrates' courts are known to the public, they are held locally, there are columns in the local papers, and lots of women are very sensitive and would not like to go there. I think that it would be a mistake—we all felt that it would be a mistake, and that is why we recommended that, instead of sending the orders down to magistrates' courts, we should make the procedure in the other courts resemble more closely the magistrates' procedure, which has proved so effective. Of course, there is no real facility in a magistrates' court to investigate balance sheets, and you can quite easily get that in the comparatively small orders. When you get the man with a business, making £1,000 a year, the order in favour of the wife being about £300, and to get at the full figure you have to investigate balance sheets. In a magistrates' court I have had that happen. It is very difficult indeed. The clerk gets the account handed to him, he does his best to go into it with his magistrates taking evidence there, then he discusses it with the magistrates—but nowadays even that cannot be done.

7179. I was proposing to except the one-man business, to except the cases where the investigation of balance sheets, and so forth, is necessary, and to except the cases of large amounts. Even so, you would not agree to the others going to the magistrates?—No, I would be opposed to it. May I say this? In spite of my long experience of magistrates, I do not think that they are a good tribunal to deal with matrimonial matters, but that point is not raised here just at the moment. I have held that view very strongly, and I have said so in public and to many magistrates. We certainly are not in favour of extending their jurisdiction in this way. I know that they have power now to award £5 a week to a wife, but we do not want to see their jurisdiction extended.—(Mr. DRIVER): My Lord, would you allow me just to support Sir Sydney? I sit as a magistrate, and I feel that it would be quite wrong to remit these smaller orders to the magistrates' courts. My reason, apart from those which Sir Sydney has given, is that, rightly or wrongly, there is a stigma attaching to proceedings in a magistrates' court amongst the middle classes, and possibly the lower middle classes, and I think that it would be grossly unfair to make these people ventilate their personal affairs in the magistrates' court, where the Press is present and the proceedings would be reported in the local papers.

7180. (Mr. MADDOCKS): Could I follow up just for a moment this point about the transfer of small orders? Take a concrete case which actually happened. A woman gets a High Court order of £25 for the maintenance of an infant of which she was given custody. Her husband is a man in quite a decent position. He did not pay, and the woman came to me, as a poor man's lawyer, six months afterwards, in terrible circumstances. Ought not that woman to be able to go to her local court to take out a summons against the man? It is a small amount, and she could get him brought before the court and dealt with in about a fortnight or three weeks.—(Sir SYDNEY LITTLEWOOD): I think that that is a somewhat exceptional case, but even so, we are not in favour of transferring High Court orders to magistrates—I do not want to repeat the reasons—but if our suggestion of procedure akin to the procedure before the magistrates were adopted in the High Court and in the county courts, then that particular woman's trouble would be met.

7181. Would it, Sir Sydney, because if the procedure is in the High Court, unless there is to be a special procedure for small orders, there are steps to be taken, and costs incurred, before ever the hearing can come before a registrar?—That is what we do not understand,

why it should be thought that you must make the High Court procedure complicated on this particular matter. We believe that it is possible, and easily possible, to set up a procedure in the High Court and in the county courts which is just as expeditious and effective, and almost, if not quite, as inexpensive as in a magistrates' court.

7182. If there were this arrangement in the High Court, could a woman handle her own case without assistance in the High Court? I cannot visualise a woman herself going to Somerset House and taking out a summons.—If we are asked to put forward a scheme, we think we can put forward a scheme which would make it quite simple and quite possible. (CHAIRMAN): In view of your answers to Mr. Madocks, I think that I can say now that we should be glad to have your scheme. [See Paper No. 87.]

7183. (Dr. ROBERTSON): Just one question regarding the enforcement of orders for maintenance: it has been suggested that difficulty is experienced in enforcing these orders in Scotland; have you knowledge of husbands disappearing in Scotland as if it were a foreign land?—Yes, I have had experience of that once or twice.

7184. Not very frequently?—Not very frequently, but it is difficult, and real hardship occurs as matters stand at the present time.

7185. Then one question on paragraph 13, on the necessity of belaying a child as a witness in cases of rape. Might it not only be a question of the difficulty of expense, but of the impossibility of securing the child's evidence?—(Mrs. SPIER): Yes, that, of course, is one of the difficulties, but then there probably would not have been a conviction. Here we are suggesting that the conviction should be sufficient evidence, and presumably there would be available the same evidence as was available when there was a conviction.

7186. (SHERIFF WALKER): Would you make no distinction between a certificate of conviction which follows on a plea of guilty in bigamy or rape, and a certificate of conviction which proceeds from a verdict of a jury?—No, none at all.

7187. Would you turn to paragraph 22, which deals with restrictions on marriage within certain degrees of relationship? The effect of that would be to enable a man, in the event of his being divorced, to marry any woman whom he could marry after his wife's death. It would enable him to marry his divorced wife's sister, but would it not still leave a certain gap? Take the case of a man and his son's widow, for instance, that is a relationship by affinity, is it not? A man cannot marry his son's widow, can he?—(Mr. BATHEN): I am not sure that I quite have your point. We were only suggesting here that divorce should amount to death, and we were not going any further than that.

7188. Would you consider the following case? Where a wife has died a man cannot marry his wife's daughter, his step-daughter. Whether his wife is dead or divorced, he can never marry his step-daughter, am I right?—Yes, I think so.

7189. According to English law, am I right in thinking that it is not a crime if he lives with his wife's daughter, that is to say, his step-daughter?—No, I do not think that it is a crime.

7190. Is it very logical, or very right from the social point of view, to say that a man may lawfully live with his wife's daughter, that is to say, his step-daughter, but he may not marry her?—We have not considered that aspect of the question at all.

7191. Then have you any personal view about that? What is concerning me is the dovetailing of the criminal law of incest into the law prohibiting marriage within certain degrees of relationship. Would you, or would you not, accept the view that the law of incest and the law of the prohibited degrees ought to coincide?—I would not like to express an opinion on that at short notice.

7192. You were asked some questions on paragraph 3, about cruelty and especially the words, "aimed at". If you take the case where a husband is engaged in some dangerous occupation to the very great upset of his wife, and injury to her mental health, shall we say her nervous condition, are you advocating that that should amount to cruelty—an act not aimed at his wife, but such an act as becoming a test pilot or something of that kind, which upsets his wife very much and leads to her having a

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nervous breakdown? Would that be cruelty?—(Sir Sydney Littlewood): I think that he would be a brave man who would go so far as to say that that should be cruelty. It seems to me that the wife who objected to it, and said that it was ruining her health, would probably be an utterly unreasonable woman. You have taken the case of a test pilot—as you were speaking I was trying to think of an illustration, and a test pilot was the only case which came to me—a man becomes a test pilot as a result of long years of flying, and his wife most certainly must have known he was going to be a test pilot, before she married him, and I do not think that a woman can be heard to say that a husband's honest livelihood in itself could be a ground of cruelty. I cannot think that anyone would go so far as that.

7193. I thought that would be the answer, but still that might be conduct on the part of the husband which had the effect of injuring his wife's health?—He would be in an unfortunate position, because he would not be any good for anything else.

7194. (Chairman): Your definition will probably clear this up.—We will do our best, anyway.

7195. (Sheriff Walker): There is one other question I want to put to you, and that is about insanity as a ground of divorce. I do not think that your Society has expressed any opinion as to whether or not it approves of divorce on the ground of insanity. In paragraph 5 you refer to it, and suggest some amendment to the present ground. I wonder if you could help me as to whether the Law Society approves of incurable insanity as a ground for divorce?—(Mr. Bateson): I think, unquestionably, yes.

7196. Then could you tell me, in your view, Mr. Bateson, what is the principle underlying this as a ground of divorce? There is no matrimonial offence—I think the general principle would be that it is wrong to maintain a marriage when there is no foundation for it.

7197. When the whole structure of the marriage must have gone?—The whole structure of the marriage must have gone by reason of this unfortunate circumstance.

7198. How far can you generalise on that?—I should hate to generalise on a subject which leads one into very dangerous ground, but that would be the principle I would adopt.

7199. Should a principle not be capable of being applied to all circumstances?—Under modern conditions of civilisation I should have said "No".

7200. (Mr. Young): I would like to have your help on the English law of cruelty. Would you refer to paragraph 3 of your memorandum, where you say, "Legal cruelty" has been defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger? Assume that cruelty is abundantly proved in a case, but a respondent comes along and says: "I am a reformed character". What is the result in English law?—I think that it would depend upon the alleged reformation. If he alleged that his conduct was not aimed at the petitioner, and satisfied the court that it was not aimed at the petitioner, I think that the court would be bound to find that it was not cruelty.

7201. I am asking you to assume that all that has been proved.—Then the fact that he is a reformed character I do not think would affect it, in English law today.

7202. I want to be quite clear about that.—You are assuming that when he gets into court he says: "Yes, all this happened, I am very sorry, but I am a reformed character"?—

7203. And satisfies the judge.—And satisfies the judge. I cannot think that it would make any difference—at least, I hope it would not. (Mr. Driver): The matrimonial offence has been committed.

7204. May I ask you a question about the case where an order for costs is made against a man whose earnings are small? What is your experience in trying to recover the costs from a man who says, "I can only pay one shilling, and you can have that either for alimony or for costs"?—(Sir Sydney Littlewood): I do not know that we have had that happen exactly. We do know that the two things clash, and that there are difficulties,

but so far as I am aware the Legal Aid Committee has not had brought to its notice a specific case where a man has said that. But we feel that we have got no choice in the matter, we have to press for our costs.

7205. Is it not the fact that a great many of the cases under legal aid are amongst what we will call the working classes?—A good many of them.

7206. And a man who is ordered by a decree of court to pay a certain sum per week for alimony has only, as a rule, a very limited amount out of which to pay that. And if you ask him to pay costs as well out of this margin, you cannot have both?—We are in a number of cases collecting by very small instalments.

7207. Can you tell me whether in these cases where you are compelling the man to pay those instalments, the wife is still getting her alimony?—I cannot tell you. We have not had any specific cases reported to us, so far as I am aware, but where maintenance is being paid, we are accepting payment of the costs by very small sums, as low as 2s., 3s. or 4s. a week.—Miss Spicer tells me that she has one case of 2s. 6d. a month.

(At this stage the Commission adjourned for a short period.)

7208. (Mr. Justice Pearce): Sir Sydney, might I refer to the question I discussed with you as to the difficult position of the husband who is so poor that he would be required to make practically no contribution if he were contesting the case? Yet, at present, owing to the fact that he does not contest the case, he finds himself compelled to pay his wife's full costs. Do you think that it would be possible, if the rule or statute were altered, for the Legal Aid Committee to investigate the financial position of a respondent and to notify the court as to what was a fair contribution within his means?—That would easily be possible, and, I think, desirable. It would require statutory authority. The assessment of income for the purposes of the Legal Aid and Advice Act is, of course, done by the National Assistance Board, but if we were allowed to adopt that procedure there would be no difficulties on our side. It could be done quite easily, and it would save the Law Society the burden of trying to collect impossible sums in foolishly small amounts. During the adjournment I have been told of one case where the amount ordered is £75, and on a judgment summons it has been ordered to be paid by instalments of 2s. 6d. per month. That must cost the Fund a lot of money, and so if the suggestion could be adopted it would save us all the trouble in those cases. We should then know the proper amount, and we should stand more chance of collecting it than we do of collecting the large amounts by small instalments. Thus, if the Commission could make such a recommendation, and the Government saw fit to approve it, I think I may say that the Law Society would welcome it.

7209. Would you be able to put on paper what you suggest would be the machinery?—Quite easily.

7210. (Mr. Young): I want to ask you about reconciliation statistics, Sir Sydney. Would it be fair to say that it is rather dangerous to accept these statistics which are given as true reconciliations?—That is my view.

7211. You cannot tell what is meant by the word "reconciliation", you cannot tell whether it simply means the parties going together for a night?—No.

7212. I should like to ask Mr. Doughty this question about collusion. What are the acts of circumstances in England that you want to get rid of in relation to the law of collusion?—(Mr. Doughty): Particularly we want to get rid of the idea, which we have at any rate, that we must not discuss finance at all until after the decree nisi. If we can discuss it at all, it is only to the limited extent of the legal alimony which could be made payable under an order of the court, but any special payment is, in our opinion, collusive at present.

7213. Would this be collusion according to English law? Suppose a wife has a perfectly good ground of divorce, easily provable, but has no money; her husband has money and she goes to him and says, "I am quite willing to divorce you, but I want to be sure that I will get the costs out of you before I start. Pay me £100 and I will start proceedings for divorce". That is the only arrangement between them, the arrangement with regard

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to expenses being paid before commencement of proceedings. Is that collusion in the law of England?—It depends entirely on the circumstances. There is an exact case, of *Beattie*, where the man gave his wife £15 because he said that she could not get a solicitor to start the case unless she had £15. The President adjourned the case and gave a deferred judgment, and I think I am right in saying that his decision was that in that particular case it was not collusion because the woman was going to divorce her husband anyhow, but that if the £15 had been paid prior to her decision to take divorce proceedings, it would have been collusion.

7214. I want to put this particular case to you. Assume the husband only comes into it when the wife comes to him and says, "I know you have committed adultery and I want to divorce you, but I have no money, and I want to be quite certain I have the money before I start proceedings. Give me £100 and I will start proceedings". Is that collusion?—According to the case of *Beattie*, the judge has got to find out whether she would have divorced him in any case.

7215. Would it be fair to say that it might be collusion?—Yes, and would be, I think. (Mr. Bateson): Every practising solicitor would be terrified of being associated with that state of affairs in case it might be. (Mr. Young): Perhaps I should explain that, according to my knowledge of the law of Scotland, that would not be collusion, and in my experience in running the legal section in the Army I found, as a matter of practice, that whenever any such arrangement like that was even suggested, the English solicitor was extremely alarmed. (Mr. Justice Pearce): I think Mr. Doughty has put it perfectly clearly, that if it was done to persuade her to bring a divorce action which she would not do normally it might be collusion, but if it was merely a case of furnishing her with what the husband would have to pay in any event, it would not be collusion. I know that there is a large amount of doubt about this subject, I am not suggesting that it is otherwise.

7216. (Mr. Young): There seems to be a practical point in that you are not at all sure what is collusion?—(Mr. Doughty): It is very practical, and it is very important to us.

7217. (Chairman): That is why you say that if the doctrine of collusion is not to be abolished, then you want it defined?—And limited. There was a case about two years ago where a woman had ample grounds for divorcing her husband, who was living with somebody else. She would not do so until he settled a reversion on her children. She told the judge the whole story, and he held that she was bound to find that was collusive.

7218. (Mr. Young): That was held to be collusive?—Yes, because she had an advantage for her children—she made a perfectly clean breast of it.

7219. Can you tell me if it is your experience that in those cases where a ground for divorce arises within the first three years of marriage, the innocent spouse in a great many cases takes steps to obtain a separation order in the magistrates' court?—(Miss Spicer): If it is a husband who is the innocent party, no; if it is a wife, I agree that wives do go to a magistrates' court.

7220. Am I not correct in saying that it was a very common practice in England during the war years, where a matrimonial offence occurred within the first three years of marriage, for the spouse to get an order in order to preserve the evidence of the matrimonial offence, so that when the three years expired it would be easier, as a matter of evidence, to get the decree of divorce?—Yes, that was often done. (Sir Sydney Littlewood): It is still done.

7221. And accordingly, if this three years' bar were abolished, in a great many cases it would simply mean that what was a separation order would become a divorce action?—(Miss Spicer): Yes.

7222. My last question is about reconciliation. We have had evidence that there ought to be attached to legal aid offices some form of welfare organisation for the purpose of trying to effect reconciliation. Have you any views, Sir Sydney, as to whether it is or is not a desirable thing to associate legal aid with reconciliation?—(Sir Sydney Littlewood): In my view it would be quite out. I am a great believer in reconciliation, but it should be done by a separate body quite distinct from the legal aid machinery.

7223. (Chairman): Would it meet your view if, when parties came for legal aid, the person giving them legal

advice could say, without exercising any compulsion, "I suggest that you might go to such and such a place"? Would that be a good or a bad thing?—My Lord, you have used the expression "legal advice". Legal advice under the Act is not yet in operation.

7224. "Legal aid", it was a slip of the tongue for which I apologise.—It was rather an interesting one, because with legal advice I think that a great deal of good might be done by sending people to a reconciliation body, whatever it might be, at an early stage of the trouble. It would be quite easy for any applicant for a legal aid certificate to be handed a slip saying, "If you wish to consult someone who may be able to help you towards reconciliation this is the address". But I think that it would be a mistake to go any further than that in connection with legal aid. (Mr. Driver): I would like to express the view that the bringing into force of the legal advice Sections of the Legal Aid and Advice Act might go a long way towards providing reconciliation procedure, because it would mean that the men in the street would be able at a much earlier stage to discuss his problems with the legal adviser, and I think that it might very well be that just as solicitors regard it as their duty to try to bring the parties together if possible, so the legal advisers up and down the country would regard it as their duty to do so.

7225. (Mrs. Allen): There are certain bodies which give advice now, such as the Marriage Guidance Council. Would you like to express any view in regard to the voluntary associations already in being, and do you feel that those bodies, with additional aid, could supply the service that you have intimated you desire? (Sir Sydney Littlewood): Yes, I think so, but I would like to qualify my answer at this way. I had a certain amount to do with marriage guidance clinics in the early days, and I was not very impressed by the people who were interested in them at that time. I understand from my wife, who is very interested in them, that that has changed a lot, but I have had no recent experience with marriage guidance clinics. I think that the ideal body for conciliation would be some organisation controlled from a central office so that you had uniformity everywhere, and I think you would want a group of paid people rather than bringing in more unpaid people. I am very impressed by the work that I have seen done by probation officers, particularly male probation officers and married female probation officers. I am not at all sure that it is a good thing to have an unmarried woman trying to act as a conciliator.

7226. Which would you feel would be the better of the two, the voluntary body or someone attached to the court?—I do not mind the voluntary body, I am not objecting to it, but there is a risk that you get as many opinions as there are individuals. (Mr. Bateson): May I add a word? I do not want it to be thought that our recommendation under paragraph 20 is being departed from in any way. As I understand it, individual members giving evidence have said that they approve of the conciliation, as I do, provided it is tried before the stage when the solicitor has been instructed and proceedings have been instituted. All the answers that have been given should, I think, be read in conjunction with that statement. (Sir Sydney Littlewood): I quite agree. As I said earlier, I think that it is hopeless to try to effect reconciliation after the thing has got to the court stage, and I say that as a result of experience in thousands of cases. But in the earlier stages a tremendous amount of good work could be done if you could get the right set-up.

7227. And if you could get the people to use it?—I believe that in time they would use it. You would not get them to go there immediately, but in the early stages people do not want marriages to break up. The trouble starts, and they get worried about it, and they do not know where to go to. Usually the girl goes to her mother, about the very worst person to go to.

7228. May I ask one other question? I should like to know if you have any views in regard to Mrs. Elmore White's Bill?—That, if I may say so, goes back to the remarks which I made at the outset, that the Council of the Law Society felt themselves precluded, I think quite properly, from dealing with matters of principle about which they had no mandate from the profession. But the members of the Committee which was set up by the Law

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Society, were, I think, unanimous as individuals that any form of long-standing separation ought to be a ground for dissolution of marriage. Those are personal views and are not the views of the profession as a whole.

7229. (Chairman): As the answer has been given, I think that I must pursue it, because a great deal has been said against Mrs. White's Bill, and I would like to see how the members of the Committee feel about what has been said. First, it has been said that it is wrong to compel a man or a woman who has committed no matrimonial offence to be divorced against his or her will. Secondly, it is said that if you introduce such a measure you are enabling a man (let us say a man for the sake of brevity) to take advantage of his own wrong and to say, "I have committed adultery, we have been separated a great many years, I will divorce you". Thirdly, it is said that at present if a man is living with his mistress, or if he is contemplating taking a mistress, or if a lady is contemplating taking up a home and living with him, there is no prospect of her ever becoming his wife or having legitimate children, and it is suggested that for the benefit of the community that is a useful deterrent. I would like to know how the members of the Committee deal with these matters.—My Lord, the broad principle is this, that we as practitioners—and that is really where we stand in this matter—felt that in any case where the real fabric of the marriage had irretrievably been destroyed, it was better in the interests of the community, and civilisation being what it is, that that marriage should be put to an end, and that it was time we moved towards the idea that there was no longer an absolute guilt or absolute innocence in matrimonial affairs. The lesser of the evils was to say, "This marriage can never subsist, it is bad from the point of view of the children, it is bad from the point of view of the community, and therefore it should be dissolved", and that it should not be a matter of innocence or guilt on anybody's part.

7230. I was not so much putting the question of innocence or guilt, but the fact that at present a party to a marriage knows that unless some definite thing is done by her she can always remain a wife. Further, I am not quite sure how you are going to frame your suggested ground for divorce. Is it on the basis of Mrs. White's Bill, or something wider? I gathered from what you said that you were contemplating something wider. May I just complete the arguments which have been put before us by saying this, that certain witnesses have suggested that if the criterion is to be the fact that the marriage has hopelessly broken down, then that introduces an element of great uncertainty, and a great deal would depend upon individual judges, who are given no definite basis on which they can establish a divorce decree? I do not know whether you were going beyond Mrs. White's Bill or not.—We were going beyond Mrs. White's Bill. Again I must repeat that we have not put this in our evidence, so we are speaking as individuals. The tendency was to go beyond the Bill. I think the standard of proof should be extremely high, and that, further, any experienced judge would have no real difficulty in deciding on the merits of any particular case. But we have not given that in the Society's evidence, and I am only speaking as one of many practitioners.

7231. Are you extending it to cases where one party desires a divorce and the other does not, as well as to cases where both desire a divorce?—I think, on the whole, yes.

7232. (Dr. Baird): Mr. Bateson, I am sorry to pursue the subject of Mrs. Florence White's Bill, but it is one which is concerning the Commission very much, it was really our *raison d'être*. I wonder if you have thought of how to safeguard the position of the wife, who, not having done any wrong, could be divorced and lose pension rights and so on?—(Mr. Bateson): We considered that very carefully, and we felt that if there were divorce on these grounds, the court would safeguard the rights of the innocent party, if you can call one party innocent, in exactly the same way as is done under the present procedure. It might be a hardship for someone to be divorced who did not want to be, but financially, from the point of view of the children, he or she would be no worse off than under the present procedure.

7233. (Chairman): I do not quite know how you contemplate achieving that, because at the moment a widow has very wide pension rights, she also has rights on

intestacy, and she has rights to apply under the Inheritance (Family Provision) Act, 1938; and none of these things is open to a divorcee.—It would be necessary to alter the law generally. For example, on pension rights, we took the view that if we had considered dealing with Mrs. White's Bill, we would also have had to make suggestions to deal with such matters as pension rights. Paragraph 25 of our memorandum, my Lord, would have a bearing on that.

7234. That refers to the case of a wife who has divorced her husband. Are you going to make that applicable generally?—Were the other suggestions carried into effect, that section would have to be amplified accordingly.

7235. There are two other matters arising on the question of financial provision. First, how are you going to provide pension rights for two, or perhaps three, four or five wives, under that suggestion?—We considered that very carefully. I cannot at the moment remember what we had in our minds, but I think that our main idea was that in circumstances such as that, the first wife would be the only person to be considered. A subsequent wife would have to take the facts as she found them, namely, that the first wife was provided for.

7236. And is that in the case of divorce under Mrs. White's Bill, or under your very much wider provision about the marriage having been hopelessly broken up?—We had in mind both. (Mr. Harvey): Would it be possible to deal with the matter under the question of preserving for the wife the rights under the Inheritance Act, and, of course, if she were the petitioner then she would have her right to secured maintenance after the decree?

7237. In many cases she would not be a petitioner. However, as the Committee have embarked upon this, giving their views as a Committee, might I ask the Committee to supply us with the statutory provisions which they think would remove any injustice to the party who has not committed the matrimonial offence?—(Mr. Bateson): You put us in some difficulty because, as I said at the very beginning of this, we have no mandate whatever. You would have to ask us for a memorandum from . . . (Chairman): I have not made myself clear. Speaking for the Law Society you replied that you had no mandate to deal with the matter, and you did not propose to answer a question on it. You then quite voluntarily embarked upon telling us what the Committee thought on the subject, and I am asking you as a Committee, as you have expressed a view, to show us how it can be given practical effect by legislation.

7238. (Dr. Baird): May I suggest that as the Committee was unanimous, it would be very valuable for the Commission if the members could submit a memorandum to us on it, because they have vast experience?—I am quite sure we can prepare a memorandum from the Committee, provided it is not tarred with the brush of the authority of the Law Society. (Chairman): Thank you very much. [See Paper No. 83.]

7239. (Dr. Baird): May I ask one further question, arising from paragraph 23, where you recommend the abolition of the restriction on petitions for divorce during the first three years after the marriage? Do you think, from your experience, that this might lead to many hasty and ill-considered divorces? Everybody knows that in the happiest marriage there is a period of adjustment in the first few years, when serious differences arise, but these are gradually forgotten. Do you not think that this three years' bar is valuable in giving time for adjustment?—(Mr. Doughty): First of all, I do not think that I have ever known of any two people entering into a marriage with the thought of getting out of it easily. I have heard it said, it was said in the Debate on the 1937 Act, I believe, that if in fact the marriage breaks down quickly and gets as far as lawyers then there is nothing that can be done. If the parties have separated and have gone to lawyers, it is too late for any hope of reconciliation, and if no relief is available, you are merely going to doom two people to wait an extra time for their remedy. (Sir Sydney Littlewood): May I say something on that? I do not know how many cases I have had of people coming to me in the first three years of their marriage, probably thirty to forty, and I have never known a case where the divorce has not gone through at the end of the three years if they could not get permission earlier.

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7240. (Mr. Bateson): On the other hand, there may have been others who did not come to you because of the three years' limit?—That may well be, yes.

7241. So that it is very difficult to say what is the effect of that three years' limit?—My own view is that it has not any effect in that direction.

7242. If they are going to break up their marriage quickly nothing will stop them?—That is my view, yes. (Mr. Dougherty): The ones who do come to us always think that it is a hardship. (Mr. Bateson): I have had many people who came to me who were not aware of the three years' rule.

7243. (Mr. Justice Pearce): Would you not agree that the three years' limit is widely known among people? I am only dealing with evidence of cases that one sees before one and sometimes I would say it was surprising how much it seems to have got into people's consciousness.—I would have said the opposite; on the whole, it is surprising how many people do not know of it. There are a great many who do, but I have been astonished by the people in an educated walk of life who are unaware of it.

7244. (Mr. Bateson): May I take it, my Lord, that the members of the Committee are going to present a memorandum on the position of the wife in the event of Mrs. Eirene White's Bill being approved, or is their memorandum to be wider than that? (Chairman): I certainly understood that it was to be wider and would embrace not only their approval of Mrs. Eirene White's Bill, but also their approval of certain other grounds of divorce, which perhaps have not been quite clearly defined. Is that not right?—I think so, and certainly we would deal with what might widely be called property rights arising out of those recommendations.

7245. (Mr. Bateson): I was going to ask a question about divorce by consent if they had not had that in mind for their proposed memorandum. The other questions I want to ask are about children, and the first one is in relation to paragraphs 2 and 3. In paragraph 2 you advocate the abolition of judicial separation, and in paragraph 3 you say, in effect, that it should be possible to divorce your husband or your wife because of his or her cruelty to your children.—Yes.

7246. Might it not be in the interests of the children and of the innocent spouse that she should just remove the children from her husband and still remain his wife?—(Sir Sydney Littlewood): I cannot think why.

7247. Might not the husband cease to be cruel to his children?—If they were removed, and I understood you to say they were to be removed, he would not have the chance of being cruel to them.

7248. The wife might try him out casually by letting him see the children.—I see—yes, I suppose the might.

7249. Might the wife not herself be very fond of him, and might he not himself be very fond of his wife?—I have known of a good many cases where the wife's only complaint has been cruelty to the children, sometimes her children by an earlier marriage, sometimes children of the second marriage, but I have never known a case where her affection for her husband has survived that; he kills her love while he is being cruel to the children.

7250. Yes, of course those are the cases of the wives who have taken proceedings because of that?—Of course, I cannot speak of those who do not consult anybody, but I have seen such wives in a number of capacities. I have been a poor man's lawyer in Kingston in years gone by, and, as you know, in a magistrates' court we get wives coming along in the very early stages, not with a view to taking proceedings but with a view to getting help. I have seen a great many, and my experience has been that cruelty to the children hurts the wife as much as anything, and always kills her love. I am not talking about the occasional severe tanning when father perhaps lays it on thicker than he should do, but I mean cruelty to the children over a long period. I do not think that the wife's love can then survive.

7251. And vice versa?—And vice versa. Certainly vice versa; in the case of the wife who is cruel to the children the husband is even more bitter than the wife in similar circumstances.

7252. You do not think that separation is worth retaining in that particular case?—In that particular case, no.

7253. The next question is in regard to paragraph 10 of the memorandum. In the fourth of your recommendations you say:—

"We also recommend that the court should have power to make orders for custody and for maintenance relating to all of such children."

To which children does the word "such" apply?—The wife's illegitimate children, and adopted children.

7254. And not to the children of the marriage?—Yes.

7255. It does?—To all children. We have in mind that the court should have power to make orders in respect of any child associated with the marriage, may I put it that way?

7256. Whether or not the child is mentioned in a prayer for custody?—We want them mentioned always in the petition, whether custody is prayed for or not.

7257. I notice that you want them mentioned in the petition. Do you want the judge to be free to award custody whether or not custody is prayed for?—Yes, we do.

7258. You do not want the judge to have any particulars before him of the children except what you ask for here?—I do not think we go quite as far as that. You are referring to paragraph 11, which deals with the welfare officer, are you not?

7259. Yes, I am.—The Law Society is opposed to the welfare officer being called in in every case as a matter of course. They feel that it is unnecessary, and that at times it would probably be hurtful, but they do think that wherever a judge wants to call in a welfare officer for a report he should be able to do so, so that he can have before him any details that the welfare officer can obtain. They have very strong views about that. They think that the welfare officer's report should be factual and that he should never give a recommendation.

7260. That was the point that was in my mind. How is the judge going to know when to ask for the welfare officer's report if he has no information before him about the children except what you have set down here?—He would probably have a good deal of information given to him by the counsel representing the parties.

7261. When custody is not prayed for or when the prayer for custody is not opposed?—If he wished to have it, yes. (Mr. Bateson): Once it were known that custody could be ordered, it would in effect be prayed for, that is to say, the parties would know that they had to give the necessary evidence upon which the judge could act. (Sir Sydney Littlewood): We were all agreed that if the judge had the slightest doubt he should be at liberty to call in a welfare officer. The only thing which the majority did not want was that he should investigate in every case.

7262. I fully understand that view, but may I go a little further, because I think it is very important to be clear on this? I find it very difficult to see how a judge—and let us remember that at the moment these undefended divorce petitions go through very quickly—how a judge could really decide in which instance to ask for further enquiries, unless he were merely to do it in, say, one out of every ten cases?—Presumably he could always put the case back to another day, and give both the parties an opportunity of appearing before him.

7263. How would he know which case was one that he ought to enquire into, where there is no prayer for custody?—He would presumably hear what counsel for the petitioner had to say, and that is of a good deal of importance, the help that he gets from counsel. I think that the judge would have no difficulty in finding out from counsel whether it was a case where he ought to call for a report. (Mr. Bateson): May I interrupt? Immediately you alter the law in this respect, all the parties would know that an order was likely to be made, so that in effect the parties would be able to defend on this issue alone, on the merits.

7264. May I just take it a little further? I think it was Mr. Harvey who said that he believed that there was a good deal of deception before the parties went to their solicitors. I hope I am not misquoting Mr. Harvey?—No.

7265. It has been suggested to us that this is what happens. Supposing there is a bargain between the parties as to who should have custody. Supposing, for instance,

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one of the parties says, "Right, I will give you a divorce if I can have the children". That will have been settled before they come to a solicitor?—Yes.

7266. Therefore, neither the solicitor nor counsel will be in a position to tell the judge anything about that, and, as I see it, unless the judge has some information, further than you suggest, before him, he will never be able to find it out.—(Mr. Harvey): If it is the wife's position, it is a very unusual thing for there to be no application for custody by the wife, and its absence would put the judge on his mettle. (Miss Spicer): I agree with Mr. Harvey. I cannot remember any undefended divorce case where the wife was the petitioner and she did not apply for custody. In a great many cases the same would apply where the husband was the petitioner, unless he had very good reasons for not asking for custody. As to your difficulty, all that we want to see is that the petition should contain information as to the names and dates of birth of the children. That would not prevent the petitioner at the hearing being asked, as I think he or she should be, "Where are those children? Why are you not asking for custody? What provision has been made for them?" Normally one gets information about the children, and it is put before the judge. He is told where the children are, and if there is no prayer for custody, that is explained. I did lots of cases during the war for men who were serving abroad, and quite often they did not ask for custody, because they knew that the mother would be kind to the children, and they in fact had no home for them. Therefore they did not think it right to ask for custody, but that would be included in the evidence that went to the judge.

7267. What opportunity has the judge to ask questions in the short time available in present circumstances? I understand that undefended divorce petitions go through at the rate of about one in every ten minutes. I suppose that a good deal of that ten minutes is devoted to establishing the grounds for the divorce. How much of those ten or fifteen minutes is devoted by the judge to finding out about what is going to happen to the children, and what is best for them?—As long as the judge thinks necessary for the purpose.

7268. But he does not seem to think a great deal of time is necessary?—(Mr. Barron): All questions of custody are adjourned indefinitely. (Mr. Beloe): I am not talking about contested cases at all. I am trying to ascertain whether, when it has been agreed, possibly as the result of a bargain, to whom the children shall go, the judge is in a position to find out anything about the children.

7269. (Mr. Justice Pearce): If both parties are fighting about what is to happen to the children, the judge can obviously investigate and can hope to find out the truth. Mr. Beloe's point is this: In an undefended case, the judge has no hope of finding out what the home circumstances of the children are, because he merely sees the petitioner, who may look quite a nice person, yet may be quite incapable of looking after the children properly. They may be very unhappy, but there is nothing that the judge can do unless, as Mr. Beloe suggests, he merely selects one case in ten and has that case investigated by a welfare officer. That is the point at issue.—That is quite true, but is not that the situation today?

7270. That is the situation today. I think that all Mr. Beloe is pointing out, is that you may tell the judge to find out in an undefended case whether the children are being properly looked after, but he has not a hope of doing so if there is no independent investigation.—All that we are suggesting in paragraph 10 of the memorandum is that certain information should be given in respect of any child associated with the marriage. We are not suggesting that the present practice in questions of custody should be altered.

7271. (Mr. Beloe): The information with which you want the judge to be provided is, roughly speaking, the names of the children and their ages?—We have not suggested anything more than that. (Mr. Driver): As I understand the position, Mr. Beloe is suggesting that the court should at its own instance investigate the question of custody, and should not, as happens at the moment, grant it automatically to the party asking for it when the application is not contested by the other party.

7272. I did not think that I had gone so far as to make any concrete suggestion. I was really trying to find out whether your proposal amounted to no more than that the judge should have before him the names of certain children. That is not?—(Mr. Barron): Yes, and should use the welfare officer, if the circumstances really warrant it.

7273. But you have not yet explained to me how you propose that the judge should choose the cases in which he uses the welfare officer?—That is true. We did not contemplate that he would often use the welfare officer, except in a contested case. We felt that, broadly speaking, the parent will contest on merit if there is any real question about the welfare of the children.

7274. You agree that if the parents have made a bargain about the children before the case comes to solicitors, you would not be in a position to know of that bargain?—I do not think I ever remember a case where there was anything like an improper bargain by the parents about the children.

7275. You would not know, if the parents did not tell you?—I should be very surprised if I did not know.

7276. You think that that would apply to every solicitor who deals with divorce cases?—It would apply to the vast majority. I do not think that there is any substantial bargaining with children.

7277. It has been suggested from many sources—not from the legal profession but from social service organisations—that the children are not, in a substantial number of cases—a difficult to say how many, say ten per cent. of the total—going to the right parent and are not properly looked after.—It may be that they are not properly looked after, but I should very much doubt, from my experience, whether they do not go to the better of the two parents.

7278. Are you aware of the arrangements which exist in a juvenile court where a report is laid before the justices about home circumstances?—Yes.

7279. You do not think that an independent report of that kind, automatic, reasonably short, might be of assistance to the judge?—The great danger of anything like that—I speak personally here—is that you may get the welfare officer expressing an opinion, which may be accepted by a judge, and thus you may get the welfare officer in effect trying your case.

7280. Surely that is purely a matter of whether a judge is doing his job or not?—I do not think so. Nobody would suggest for a moment that the judge is not doing his job and doing it extremely well. Moreover, I do not see how you could find a welfare officer capable of dealing with all walks of life.

7281. Which walks of life do you think he could not deal with?—It depends what walk of life he is in himself. He has to go from top to bottom and I think he would find himself much better qualified to deal with some cases than with others. Further, he is not available for examination and cross-examination.

7282. I would be interested to know which walk of life you do not think the welfare officer would be suitable for?—It depends on the welfare officer. I think that one would be very suitable in the bottom strata of society and another in the top.

7283. Do you think that a welfare officer who would be unsuitable in the bottom strata would ever be appointed?—All my life I have had a good deal to do with the appointment and training of probation officers, and I would say that in probation work you get officers qualified much better in some walks of life than in others. (Mr. Driver): May I be quite clear as to what exactly is in Mr. Beloe's mind? If he is dealing with defended cases, I entirely understand his questions and I entirely see his point in regard to the desirability of the welfare officer coming into the picture. But I do not see where we are getting to in an undefended case because, you see, at the moment the party asking for custody gets custody provided the application for custody is not contested. Is Mr. Beloe suggesting that notwithstanding the fact that a party may ask for custody, the judge, if doubtful whether that party is suitable, should call for a report from the welfare officer?

17 November, 1932]

Mr. D. L. BATESON, Sir SYDNEY LITTLEWOOD, Mr. E. A. DOUGHEY,
Mr. E. C. HARVEY, Mr. A. J. DRIVER and Miss E. E. SPICER

[Continued]

7284. (Chairman): I think that Mr. Beloe is suggesting that in every undefended case, no matter what the parties have agreed, the judge, before deciding upon custody, should get a report from an independent official. Is that right, Mr. Beloe, or is that getting it too widely? (Mr. Beloe): It has been suggested to us that that should be done. I am trying to get the view of the Law Society on that kind of suggestion.—The only reason I have raised this question is that I do not see where the proposal gets us. If the judge is going to have power to refuse custody to a party applying, to whom is he going to give custody as an alternative, if the other party does not want the children?

7285. Are you sure that the other party does not in every case?—I should have said that although it is conceivable that there are cases of the kind that Mr. Beloe is suggesting, namely, where there has been a bargain, the number of such cases is so small that one could ignore them. Generally speaking, the person who asks for the custody definitely wants it.

7286. That is perfectly possible, but the other person may want it too?—It is up to him or her to come before the court.

7287. (Sir Russell Brain): May I refer to paragraph 5 of your memorandum? Under your proposals it would be necessary for the petitioner to prove that the respondent was of unsound mind. Will you take it that there is no medical definition of unsoundness of mind? And, as I understand it, when the law has at present to deal with unsoundness of mind, it always views it against some particular requirement, so that the doctor is asked whether the person is of unsound mind in relation to fitness to plead, or criminal responsibility, or testamentary capacity, or something like that. Will you deal with the difficulty where the court has to find unsoundness of mind in the abstract, and without any clear medical definition to help it?—(Miss Spicer): You mean that it would be impossible for a doctor to say that a person was of unsound mind with no reasonable expectations of recovery?

7288. No, I mean that the doctor sees people suffering from disease of the mind in all degrees from slight—what one might call border-line—cases to extremely severe cases. Now the severe cases are easy to deal with, and are dealt with already. But if you leave "unsoundness of mind" as a general term, you will find that the doctors will have great difficulty. They will often disagree over a large number of people, who are far from normal, but in respect of whom there is no criterion which they can apply, unless, by implication, they have to deal with the question, "Is this person of unsound mind in relation to the maintenance of the married state?" (Chairman): I think that Sir Russell Brain is suggesting that there is a great difficulty in abolishing altogether the requirement of care and treatment in a mental hospital, whether voluntary or compulsory. Is that so? (Sir Russell Brain): What I am suggesting is this. If you have a period of care and treatment, not necessarily five years, then you have a rough and ready rule. You know that it is only applied to people suffering from a fairly severe degree of disorder of the mind, which is easily determined. But if unsoundness of mind is left in the abstract, it seems to me very difficult for doctors to say, in the middle of the range of disorder, whether a person is, or is not, of unsound mind, since the doctor has no medical test to apply.—Would it be possible to do it in relation to the married state, as you have suggested, and what would that mean? (Sir Russell Brain): I would rather leave that to the court than to the doctors. Theoretically, I see your point, but would it not entail the practical difficulty that doctors would be unable to agree about psychopathic individuals, about people who have been treated and partially recovered, and yet will remain indefinitely in an abnormal state?

7289. (Chairman): Might I perhaps help, if I may, by putting a concrete suggestion? The Law Society has suggested that no period of care and treatment in a mental hospital should be laid down at all, whether voluntary or compulsory. The suggestion now made is that some period, possibly two years, is really essential before the matter could be properly determined. I think that Sir Russell Brain would like to know what you have to say to that? (Sir Russell Brain): Yes.—(Mr. Bateson): When we discussed this suggestion—which we did at great length—we were fully alive to the fact that we were passing the medical profession in a grave difficulty. If they answer that there must be a yardstick, provided it was a better yardstick than the present one, then we should approve.

7290. (Chairman): I think that what is suggested is that there should not only be the requirement of incurable unsoundness of mind, but that there should be some period of detention, whether voluntary or otherwise.—I do not think, speaking personally, that we should object to that.

7291. (Lord Keith): If I might intervene, I think that the suggestion is that there are people who might be regarded as of unsound mind, who did not need any treatment at all, at least they did not need to receive treatment in a hospital or institution. How would such people be dealt with under your proposals?—I think that the answer to that is that if the medical profession say that they are being placed in an impossible position, then we should be driven to say, "All right, you must have a yardstick, but make it as small as possible."

7292. (Sir Russell Brain): There might still be people who would not come within the criterion. If there is a period of care and treatment, there would still be cases which would not be covered by it, but possibly that would be less troublesome than the greater problem of applying some rule in the absence of any period of care and treatment? That seems to be the difficulty?—As I say, I think that if the medical profession tells us so, we should have to concede that it would be wiser to have a yardstick, but let us have a better polished one than the present one.

7293. (Lord Keith): I have only one question to ask, in regard to the definition of collusion. There is a definition of collusion which is quite familiar and that is this, that collusion is an agreement to present a false case or to withhold a just defence, and that nothing else is collusion but that. Would that meet your views as to collusion?—(Mr. Doughey): It would not in my view represent the present law on collusion.

7294. Would it meet your views as to a definition of collusion that might be introduced?—I think so, but I should like to think it over. (Mr. Bateson): Can you tell us where that definition comes from?

7295. Yes, it actually came from one of your great lawyers, Dr. Lushington, and although seriously enough Dr. Lushington may have been the first to coin it, it never seems to have taken hold in England, but it has been adopted in Scotland and is the law of Scotland to the present day and was affirmed by the court in Scotland just a few months ago, in the case of *Riddell*.—If we may make use of it as our guide when we come to draft this definition, I am sure that we shall be very grateful.

(Chairman): Thank you very much for your memorandum and for coming here to help us today. You will let us have these further documents in due course. I realise that one at least may take a little time.

(The witness withdrew.)

PAPER No. 87. THIRD MEMORANDUM SUBMITTED BY THE LAW SOCIETY
 PAPER No. 88. MEMORANDUM SUBMITTED BY NINE PRACTISING SOLICITORS

PAPER No. 87

THIRD MEMORANDUM SUBMITTED BY THE LAW SOCIETY

(NOTE.—In response to a request by the Chairman (see Question 7182), this memorandum was subsequently submitted by Sir Sydney Littlewood, who said in a covering letter that the memorandum could be regarded as part of the Law Society's evidence.)

By Section 8 of the Money Payments (Justices Procedure) Act, 1935, when a man has fallen into arrears with his payments under a justices' order, the justices make an enquiry in the defendant's presence as to whether his failure to pay was due either to his wilful refusal or culpable neglect, and if they are of opinion that his failure to pay was not due either to his wilful refusal or his culpable neglect a warrant of commitment to prison is not to be issued.

It is to be observed that the justices have to be satisfied that the failure to pay was not due to wilful refusal or culpable neglect. The effect of this is to put upon the defendant the burden of proving that failure to pay was not due to wilful refusal or culpable neglect, and, if he fails to discharge that burden, a warrant of commitment to prison will issue.

In judgment summons procedure in the High Court and the county court the burden of proof is upon the judgment creditor as a result of Section 5 (2) of the Debtors Act, 1869, which is as follows:—

That such jurisdiction (i.e., to commit to prison) shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refused or neglected, to pay the same.

The result is that from the creditor's point of view the procedure under the Money Payments (Justices Procedure) Act, 1935, in magistrates' courts is most satisfactory, and judgment summons procedure in both the High Court and the county court is unsatisfactory.

The question that arises is, "Is there a hardship on the defendant in magistrates' courts?" Experienced justices' clerks have informed us that since the Money Payments Act came into operation they have never known a man to go to prison because he cannot pay. They say that men against whom committal orders are made divide themselves into two categories, namely:—

1. Those who are careless.
2. Those with a grievance.

In the case of those in the first category a committal is an effective cure, and the carelessness rarely recurs. Those in category 2 are often hopeless, they would rather go to prison time and time again than pay anything. The

result is that the percentage of wives who do not get their maintenance under a magistrates' order is very small, and no man goes to prison unfairly or unjustly.

The wife who divorces her husband sometimes has had a magistrates' order before the divorce. Those women usually choose to rely upon that order rather than have a High Court order which, in the case of a man with no assets that can be seized, is very difficult to enforce. Those who obtain a divorce but have not previously had a magistrates' order, can only obtain an order for maintenance from the High Court.

Generally, a divorced man who has an order against him for a substantial amount pays without difficulty, but the wife with an order of a few pounds a week in her favour often has difficulty in obtaining payment. When the wife cannot obtain regular payment of maintenance she, and sometimes the children, suffer hardship.

In magistrates' courts maintenance is collected by the collecting officer, and this system is very satisfactory. There is no similar system in the High Court or county court.

We make the following suggestions:—

1. That any woman who has a High Court order for maintenance or alimony may apply to the court for an order that amounts payable under it shall be paid through the collecting officer of the magistrates' court for the area in which she resides. Such an order should be made as of course. Thereafter the order, whatever the amount, will be enforced in the same manner as an order made by the justices, and be dealt with in the same way as though the order had been originally made by the justices and in no other way, except as mentioned in the next paragraph.

2. Where a variation in the amount of an order is sought and the applicant seeks an amount which is in excess of the amount which justices could have ordered had they made the original order, the application for variation shall be made to the High Court.

Notice of any such application shall be served on the clerk to the justices where the order is being enforced, and a copy of any order made on the application shall be lodged with him.

3. In the case of judgment summonses for maintenance arrears in the High Court or county court, provisions similar to those of Section 8 of the Money Payments (Justices Procedure) Act, 1935, should be substituted for Section 5 (2) of the Debtors Act, 1869.

(Dated 12th January, 1953.)

PAPER No. 88

MEMORANDUM SUBMITTED BY NINE PRACTISING SOLICITORS

(NOTE.—In response to a request by the Chairman (see Question 7238) this memorandum was subsequently submitted by nine of the eleven members of a Special Committee appointed by the Law Society to draft the two memoranda submitted to the Royal Commission on the Society's behalf. As stated in the body of the memorandum, the views it contains are solely those of the individual signatories thereto.)

1. Although we, the nine signatories hereto, are all members of the Special Committee, which drafted the two memoranda submitted to the Royal Commission on behalf of the Law Society, we present this memorandum at the request of the Royal Commission solely as individual practising solicitors. It must not, therefore, be assumed that the memorandum in any way represents the official view of the Council of the Law Society despite the fact that it deals, in the main, with questions specifically put to those of us who gave oral evidence on behalf of the Law Society on 17th November, 1952. As the Royal Commission was informed in the course of that oral evidence, the Council of the Law Society have resolved not to submit any evidence on points such as Mrs. Eileen White's

Bill, as they feel they have no mandate from the profession to express views on such controversial matters.

2. It is true that on several of the points dealt with in this present memorandum the Council of the Law Society might well be prepared to express a view if time permitted them to give proper consideration to the questions asked. It is understood, however, that this memorandum is required as a matter of urgency, in the circumstances, therefore, we have thought that we could best assist the Royal Commission by expressing our individual views even on those points where all that is required is amplification of propositions advanced in the first of the two memoranda submitted by the Law Society.

3. This memorandum accordingly deals with five specific points, namely, (A) whether there should be any additional grounds for dissolution of marriage on the lines of Mrs. Eileen White's Bill, (B) whether and if so how "cruelty" as a ground of divorce might be defined by statute, (C) whether and if so how "collusion" as a bar to relief (assuming it is retained as such) might be so defined, (D) what steps the legislature should be asked to take to prevent the possibility of young persons marrying as they now can within a few days of meeting, and (E) preservation of the widow's pension rights after divorce in the event of the husband predeceasing the wife.

(A) Additional grounds for dissolution of marriage [see Question 7133]

4. We recommend that the court should be given a discretion to grant a decree of divorce at the instigation of either party to the marriage if:—

- (a) the parties have genuinely lived separately and apart (whether by agreement or not) for a period of not less than five years within the six years immediately preceding the presentation of the petition;
- (b) the parties are living apart at the institution of the proceedings; and
- (c) there is no reasonable prospect that cohabitation will be resumed;

provided that in exercising its discretion the court shall have regard to the conduct of both parties, both before and after the date of the original separation.

5. We take the view that where the parties to a marriage have genuinely lived separately and apart for a period of years, whether by agreement or not, there is little hope of reconciliation and that it should be possible for the court at the instigation of either party to bring to an end a marriage which has so clearly failed. In our view such a ground for dissolution of the marriage is in the interests of the "true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation", these words being a quotation from the preamble to the Matrimonial Causes Act, 1937. We fully realise that this view, which largely accords with the proposals contained in Mrs. Eileen White's Bill, is to some extent a departure from the principles underlying the existing grounds of divorce as it will enable a petition to be lodged against a person who has been guilty of no matrimonial offence, but in any event there is already a slight departure from the underlying principles mentioned above in the case of divorce on the ground of the respondent's insanity. We wish to stress that if a divorce is granted on some such grounds as are suggested in paragraph 4 of this memorandum the court should always have power to award maintenance; this, indeed, would probably follow from Section 19 of the Matrimonial Causes Act, 1950, but as we regard this safeguard of particular importance in connection with divorces on the above grounds we have thought it desirable to point this out specifically.

6. We have given careful consideration to the question whether, either instead of or in addition to the existing grounds for dissolution of marriage, it should be possible to apply to the court for a decree of dissolution on the ground that the marriage has so irretrievably failed as to have ceased to advance the well-being of the parties, the children (if any) and the State. A broad principle of this nature, which would leave it entirely in the discretion of the court, having regard to all the circumstances, to decide whether there should be a divorce is superficially, at least, attractive. There are at present many marriages which have completely failed and where this failure is acknowledged by both parties to the marriage. In the existing state of the law a large number of these are in fact dissolved as the result of a deliberate commission of adultery for the purpose of giving the other party evidence upon which to have divorce proceedings and we deplore the present position which only too frequently involves adultery being committed, investigated and proved in court for no other purpose than to fulfil the requirements of the law. Although we are of opinion that marriages which have so irretrievably failed as to have ceased to advance the well-being of the parties, the children (if any) and the State should be dissolved, we are of opinion that to determine whether a marriage had irretrievably failed would put a difficult burden on those advising on and administering the law. We are of opinion,

however, that if an additional ground for dissolution of marriage were to be introduced on the lines suggested in paragraph 4 above and if at the same time "cruelty" and "collusion" were to be defined as suggested in paragraphs 11 and 12 below, this would go far towards ensuring that in fact marriages which had irretrievably failed could be dissolved, although we appreciate that in some cases hardship might still be caused where the marriage could not be dissolved until the parties had been separated for whatever period of years is mentioned in the legislation.

7. Our attention has been drawn to the provisions of Sections 10 (i), 10 (j) and 18 of the New Zealand Divorce and Matrimonial Causes Act, 1928 (which, as amended, are set out in the Appendix to this memorandum), and we have considered whether English legislation on similar lines would suffice. We have come to the conclusion, however, that although there should be some safeguard whereby the petitioner is not entitled to a decree as of right, the provisions of the New Zealand legislation do not go far enough; the New Zealand court cannot grant a decree where the respondent opposes it and the separation is due to the wrongful act or conduct of the petitioner.

(B) Definition of "cruelty" [see Question 7133]

8. We have no wish to extend the classic conception of cruelty, defined in the case of *Russell v. Russell* as "conduct of such a character as to have caused danger to life, limb or health or as to give rise to a reasonable apprehension of such danger". We should be well content if relief on this ground were always available where the respondent had, during the marriage, been guilty of such conduct and the petitioner had suffered its consequences. This would fulfil the principle, which we consider to be right, that while the normal difficulties and trials of married life should be borne with patience, understanding and fortitude, nevertheless, no married person should be expected to endure conditions created by the self-indulgence or malignity of the other party which go so far as to produce or threaten an actual breakdown of health.

9. The loophole to this conception of cruelty which we seek to stop has, as we see it, in the statement of the law well expressed by Bucknill, L.J., in the case of *Kaufsky v. Kaufsky* (1950) 2 All E.R. 461, in which he points out: "The statute which first made cruelty a ground for divorce introduced a new word on the subject. Section 2 of the Matrimonial Causes Act, 1937, which substituted a new Section 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, gave power to the Court to grant a decree of divorce if the offending party has since the celebration of the marriage 'treated' the petitioner with cruelty. The earlier Acts simply said 'guilty of cruelty'. I think the use of the word 'treated' indicates conduct aimed at the offended spouse".

10. From this judicial interpretation of Parliament's intention when making cruelty a ground of divorce, an unfortunate and probably unforeseen consequence has ensued. The behaviour of a married person may be so depraved and detestable as to wreck the health of the other spouse through shock, worry, shame and distress. The home and the married life may be broken up by drink, drugs, idleness, neglect, dishonesty or a life of crime. The suffering and injury to health inevitably so caused to the other spouse may be even more grave than would be sufficient to justify a divorce on the ground of cruelty; yet no such relief is available, because the innocent party is not the target of this misconduct but merely its victim. He or she has not been "treated with" cruelty within the limited meaning of the Section, and the misconduct is merely to be regarded, in the words of Denning, L.J., in the *Kaufsky* case, as "a defect of character and temperament".

11. To cover such cases and to provide the relief from wrongdoing which we feel Parliament to have wished in 1937, we suggest that Section 1 (1) (c) of the Matrimonial Causes Act, 1950, be amended to read "has since the celebration of the marriage so conducted himself as to cause danger or injury or a probability of danger or injury to the health of the petitioner".

(C) Definition of "collusion" [see Question 7169]

12. Assuming that collusion is retained as a bar to relief (and we still agree with the view expressed in the Law Society's first memorandum that it should be

PAPER No. 88. MEMORANDUM SUBMITTED BY NINE PRACTISING SOLICITORS
 PAPER No. 89. MEMORANDUM SUBMITTED BY THE ETHICAL UNION

whodshed), we think that the definition advanced by Dr. Lushington in 1853, namely, "permitting a false case to be substantiated, or keeping back a just defence", and quoted in that year in the First Report of the Commissioners appointed to inquire into the law of divorce, could well be adopted, provided it is made clear that conspiracy is an essential element. Dr. Lushington's definition has apparently been accepted by the Scottish courts, being quoted with approval by Lord Dunedin in *Walker v. Walker*, 1911, S.C. 163 at page 169 and in *Youngman v. Riddell v. Riddell* on 23rd July, 1952. Collusion could thus be defined as "conspiring together to permit a false case to be substantiated or to keep back a just defence". There is no obligation on a respondent to defend a case and the mere fact that he or she does not defend should not amount to collusion unless it is the result of some bargain.

(D) Possible legislation to prevent hasty marriages [see Question 7108]

13. We have been unable to agree upon the terms of legislation designed to prevent hasty marriages. We think, however, that it may be of interest to the Royal Commission to know that we are credibly informed that in well over half the total number of divorce cases handled by the Law Society's Divorce Department the marriage followed pregnancy.

(E) Preservation of widows' pension rights after divorce [see Questions 7237 and 7328]

14. Whether or not a fresh ground for dissolution of marriage where the parties have been living separately and apart for a period of years is introduced, we think a divorced wife should, at the court's discretion, be given a right to any pension which she would have received as a widow on her husband's death if there had been no divorce. This should apply, however, to pensions which result from the husband being in pensionable employment at the time of the divorce. We do not suggest that the right granted to the divorced wife should in any way prevent the husband commuting or otherwise dealing with the pension to the same extent as he may do at present. The court should, however, have power, apart from this, to apportion the whole or part of the pension to the divorced wife, subject to safeguards to deal with the position where the first wife dies before the husband. The first wife should, in other words, be deemed to remain a wife for pension purposes if, and only if, she does in fact survive her husband and does not re-marry during his lifetime. This recommendation amounts to an extension of what was said in paragraph 25 of the Law Society's first memorandum under the heading "Extension of the Inheritance (Family Provision) Act, 1938".

(Sgd.) DUNWALL L. BATESON.
 E. A. DOUGHTY,
 JOHN J. DYKES,
 GEORGE GORDON,
 EDGAR C. HARVEY,
 G. F. HIGGINSON,
 STEVEY LITTLEWOOD,
 NIEL PEARSON.

(Dated December, 1952.)

PAPER No. 89

MEMORANDUM SUBMITTED BY THE ETHICAL UNION

SUMMARY OF EVIDENCE

(i) The co-existence of religious and secular views of marriage requires a separation of religious regulations and secular law. The marriage law should be a government responsibility and not left to private initiatives and piecemeal reform. (Para. 3.)

(ii) The law has to reinforce the normal acceptance and practice of life-long monogamous union and to provide for the exceptions. (Para. 4 and 5.)

(iii) The present law is flawed because it does not adequately provide for the exceptions which exist in fact. A marriage may not be destroyed by the acts which are recognised grounds for divorce, whereas frequently a marriage is destroyed without any such acts. A general

RESERVATION

I agree with the above memorandum subject to a reservation which I desire to make on the recommendation in paragraphs 4 and 5, as follows:—

I would add a second proviso to paragraph 4 as follows:—

And provided that if upon the hearing of a petition praying for relief on this ground the respondent is opposed to the making of a decree and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner, the court shall dismiss the petition unless it shall consider that such dismissal will cause exceptional hardship to the petitioner.

This proviso follows the wording of the second portion of Section 18 of the New Zealand Divorce and Matrimonial Causes Act, 1928, save that in cases of exceptions] hardship the court would nevertheless have power to grant a decree in the circumstances therein mentioned.

The reason why I have made this reservation is that, in my view, if the proposal in paragraph 4 of the memorandum became effective, the granting of relief in contested cases would depend so much upon the particular views or even the whim of the trial judge, that the law would become uncertain with no settled principles laid down as to how the judge's discretion should be exercised.

(Sgd.) ARTHUR J. DRIVER.

APPENDIX

Sections 10(i), 10(j) and 18 of the New Zealand Divorce and Matrimonial Causes Act, 1928

10(i) That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years.

10(j) That the petitioner and respondent are parties to a decree of judicial separation made in New Zealand, or to a separation order made by a Stipendiary Magistrate in New Zealand, or any decree, order or judgment made in any country if such decree, order or judgment has in that country the effect that the parties are not bound to live together, and further, that such decree of judicial separation, separation order, or other decree, order, or judgment is in full force and has been in full force for not less than three years.

18. In every case where the ground on which relief is sought is one of those specified in paragraphs (i), (j), and (k) of section ten of this Act, and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of a petition praying for relief on the ground specified in paragraph (i) or paragraph (j) aforesaid the respondent opposes the making of a decree, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition.

ground for divorce is needed to provide relief when in fact a marriage has hopelessly broken down. (Para. 6.)

(iv) A marriage law reformed on this principle would retain its deterrent, and would ensure that in all cases the sanction of withholding divorce lay solely with the law, to be used solely in the public interest. (Para. 7.)

(v) The Ethical Union endorses in general the proposals of the Marriage Law Reform Society, and, in particular, stresses: (1) the proposal to grant divorce on grounds of mutual consent and breach of faith; (2) the proposal that all matrimonial cases should be heard in the first instance in magistrates' courts. (Para. 9 and 10.)

(vi) The Ethical Union urges the importance of preparation for marriage, and the development of marriage guidance as a national public service. (Para. 11.)

THE ETHICAL UNION

1. The Union of Ethical Societies was formed in 1896 and incorporated as the Ethical Union in 1928. Its object is to promote the study and application of ethical principles, and work for this object is carried out by means of regular and special publications, research, conferences, summer schools, and by the promotion of permanent local groups. The present president is Lord Chorley.

2. Members of the Ethical Union are interested in the marriage law because of their general ethical concern, since personal happiness and social order are so closely affected by the condition of marriage, and also because some of them (for example, the late Mrs. Seaton-Tiedeman, who founded the Divorce Law Reform Union in 1906) have concerned themselves particularly with the problems of marriage and made themselves familiar with the facts and have persistently called the attention of their fellow members to these facts. Therefore reform in this field is a long-standing interest of the Ethical Union. It need hardly be stated, but it may be stressed, that this interest is a concern for human happiness and for a moral order which is fully accepted and observed, and is not an attack on religious views nor a demand for personal freedom.

MARRIAGE LAW IS A RESPONSIBILITY OF THE GOVERNMENT

3. Room has to be found in England for the co-existence of those who believe that marriage is an inviolable divine institution and those who would regulate it in the light of experience, as any other human institution. It is intolerable that either view, with its practical consequences, shall be foisted on those who resent and resist it. The only way in which the co-existence can be maintained without serious frustration and friction is to have a secular law based frankly on the acceptance of marriage as a human institution, leaving the religious conscience to its own belief and observance and the Church to its own institutional regulations. The attempt of the Church or of Christians to keep or to get legislation in conformity with a Christian conception of marriage is as intolerable as would be an attempt of secularists to interfere in the province of the Church. The present state of the law is a confusion of ecclesiastical survivals and recent innovations. To have reform to further piecemeal legislation initiated by private parties is not good social policy. It is the responsibility of the Government, as the result of full inquiry, to give the country a coherent marriage law based on clear and settled principles. The marriage law comes home to everyone's interests and affects personal happiness and moral order so intimately that it is a prime question of public policy, a question for the Government.

THE GROUND OF BRITISH MARRIAGE LAW

4. If marriage is a human institution, that does not mean that it ought to be, or can be, reformed at will on theoretical principles. Life-long monogamous union is the norm which has regulated the ideals and conduct of the Western nations so long, and is so established in use and rooted in sentiment and characteristic of the social order, that the strong motives which would be needed to institute a change are likely to prevail with only a very small minority. At its best, spontaneously chosen and self-sustained, it is the most highly desired and desirable form of sexual union. If the law is based on this assumption (as we think it should be), its force is to reinforce the natural and social tendencies which make this norm prevail, and to regulate provision for those who, for one reason or another, fail to conform. How is the reinforcement to operate, and how is the failure to conform to be treated? But, first, why is it in the public interest that there shall be social conformity to one pattern of sexual union?

5. If no more were involved than administrative convenience or property inheritance, there could be no unanswerable case for one social norm. The essential of morality is reliable behaviour founded on mutuality of interests. In a matter of such universal emotional concern to human beings as sexual relations, it is particularly important that there shall be settled expectations and reliable behaviour, not least for the sake of personal health and happiness, and it is only on such a foundation that any dependable system of mutual welfare, such as the family

is, can be built. If there must be a normal pattern of sexual relations, and if among Western nations that pattern has historically and ideally been determined as life-long monogamous union, the law must confirm this and protect the institution of the family as the assumed and approved foundation of the society. If that is the first function of the marriage law in our society, how is it to be carried out?

FUNCTION OF THE MARRIAGE LAW AND ITS PRESENT FAILURE

6. Obviously the function would be rigorously discharged by a stringent law which recognised and rewarded life-long monogamous unions and prohibited and penalised all others. Such a law, with or without religious sanctions, is too obvious of human experience to hold the public conscience and would defeat itself. It is because the present marriage law in this country is basically a law of this kind, braced by anomalies and concessions, and flouted by widespread defiance and deceit, that reform is needed. Marriage commonly takes place between the young, and mistakes are easily made. The partners may be both excellent persons, and the partnership ruinous: they may be ready and anxious to bear with one another, and yet with the best will in the world they may find in the later intimacy of married life that they are radically unsuited, that they wear one another down, that in spite of themselves they are mutually destructive. In such a case there is nothing right nor reasonable in compelling the two to continue to live together, nor in preventing their seeking more hopeful unions with better suited partners. Such an allowance does not undermine marriage and the family; the withholding of it does; the provision of legal release from a hopelessly unsuitable union is a constructive measure, a measure of protection, a measure which enables more people to fulfil the ideal of life-long monogamous union. Or it may be the case that one of the partners proves radically unable or unwilling to fulfil the partnership, and in that case the other is entitled to be released by law and enabled to seek a proper union. It cannot be pretended that the present marriage law protects and promotes life-long monogamous unions by facilitating the adjustments which help to make them more common and more real. By allowing divorce only for specified offences and disabilities it offers a way out in cases which might be remedied by married affection or human charity, and closes the door in cases which are beyond the powers of married affection or human charity to remedy. Marriage is not necessarily destroyed by isolated injurious acts, such as those which are the present grounds for divorce, and it may be destroyed without any such acts. What is needed is a universal ground for divorce by which, at the discretion of the court, a marriage may be honourably dissolved if it is in fact a mockery of that life-long union it is intended to be. Provided that the law allows divorce only on the basis of ascertained facts and in cases in which the marriage is incapable of fulfilment, it serves the purpose of protecting the institution of marriage and confirming the normal pattern of sexual union; it is in effect enabling more people to form stable satisfying unions, and unless it does so it fails to conform to and reinforce the actual morality informed by the realities of experience.

POWERS OF A REFORMED LAW

7. If divorce is granted on universal grounds (breach of faith or mutual consent, for example) at the discretion of the court and on the petition of either party, does not this reduce the function of law to the mere registration of entrances and exits in marriage? What power has the law, then, to penalise, and so deter, behaviour detrimental to marriage? Financial liability for the responsibilities incurred in marriage would remain, and it would be all the more important that these should be assessed on the merits of the case, taking into consideration the behaviour of the parties. The inability of the guilty party to obtain a divorce on his own petition has not proved a deterrent, and has sometimes penalised the comparatively innocent, including children. Under a reformed dispensation, it may be presumed that any married person who formed another union without divorce first would not only be defying the law but would also, by his failure to get a divorce on the universal grounds allowed, be proved guilty of wantonly breaking his marriage; should he, then, be

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allowed to petition for divorce after forming the new union, the divorce he could not get when he merely wanted to repudiate his wife? Since it otherwise lies wholly with the partner to the marriage whether he gets his divorce or not, and not with society and the law, it is better that he should have the right to petition and that the matter should be decided in the public interest and not in the manner of a personal feud.

8. It can safely be said that the law will be strengthened by reform which brings it into conformity with human experience, that the institution of marriage will gain in solidity and dignity, and that personal happiness, with the social energies and loyalty it inspires, will be spread wider in the community.

ENDORSEMENT OF MARRIAGE LAW REFORM SOCIETY'S EVIDENCE

9. Having carefully studied the evidence prepared for submission to the Royal Commission by the Marriage Law Reform Society, we wish, consistently with the views stated above, to endorse their proposals. In particular, we would stress two.

(a) For the reasons given above, we think that divorce should be sought on general grounds, and mutual consent and breach of faith, as defined by the Marriage Law Reform Society and with the safeguards specified by them, seem in principle to cover the cases in which marriage should be terminated.

EXAMINATION OF WITNESSES

(MR. H. J. BLACKHAM, B.A., MRS. VIRGINIA FLEMING and MR. A. F. DAWN, B.A., M.Sc., representing the Ethical Union; called and examined.)

7296. (Chairman): We have before us, as representatives of the Ethical Union, Mr. H. J. Blackham, the General Secretary of the Union, Mrs. Virginia Fleming, and Mr. A. F. Dawn, B.A., M.Sc. What positions do Mrs. Fleming and Mr. Dawn hold in the Union?—(Mr. Blackham): They are members of the Council of the Union.

7297. I am going to invite you to add anything to your memorandum if you wish to do so, but first, I want to ask a little about the constitution of the Union. You say in paragraph 1:—

"The Union of Ethical Societies was formed in 1896 and incorporated as the Ethical Union in 1928." I need not read it all, but I wanted to ask you this, what is the membership of the Union today?—It is some 2,400 members with a direct subscription of 7s.

7298. What is the constitution, how is it governed?—By a council, with an executive committee for the carrying out of business authorized by the Council.

7299. How was this memorandum prepared? Was it prepared by the Council, or by a committee, or in what way?—It was drafted, after consultations, by myself and circulated throughout the membership.

7300. Did you get any suggestions from the members for its alteration?—There was no dissent actually to any matter of principle.

7301. Is there anything you wish to add to this memorandum before I ask you some questions?—Yes, I would like to make a further statement. First, that our standpoint in relation to the matters before the Commission is that we have a moral concern with the question of marriage without theological presuppositions. That is the general standpoint of the movement.

Then, in connection with our general support of the written evidence submitted by the Marriage Law Reform Society, and, in particular, our support of their plea for a comprehensive ground of divorce, it seems to us that cases fall into three main classes, which it is important to distinguish: (1) Cases of invincible incompatibility, for which the appropriate remedy would seem to be

(b) We regard as specially important the Society's suggestion that all divorce petitions should in the first instance be heard in magistrates' courts, and that these courts should be adapted for this purpose. The importance, we think, lies in the availability to these courts of the service of probation officers, for their good offices in cases in which reconciliation seems possible and for their reports on cases in which children are involved and a decision about custody has to be made. With the improvement of the probation service for this work in number, quality, and training, the treatment of divorce cases would be likely to be more individual and constructive.

10. We recognise that these two proposals are the most radical of all the proposals put forward by the Marriage Law Reform Society, and the most likely to excite contention. Nevertheless, we think that they are sound, and conservative in the best sense, and that short of such major reforms no Government will be able to give the country a marriage law that will really fortify marriage.

PREPARATION FOR MARRIAGE

11. Finally, we think that preparation for marriage is of the greatest importance and should not be left to voluntary agencies. We hope that the Commission will urge the importance of developing the work of the National Marriage Guidance Council with a view to early establishment of a public service of counsellors and classes.

(Received 21st November, 1951.)

divorce by mutual consent, with proper safeguards, such safeguards as the Marriage Law Reform Society has proposed. (2) Cases of settled refusal of one partner to meet legitimate expectations in marriage, that is to say, when one partner does not, and does not intend to, make the marriage work—which would seem to be covered by the Marriage Law Reform Society's proposed ground of "breach of good faith". (3) Cases of settled aversion, regardless of the partner's behaviour and will, for which divorce after four years' separation might be the appropriate remedy. I want to make the general point that under each of these three heads, cases may be honourable or dishonourable, and it is not possible for legal decisions to be based on moral grounds. There is no possibility of discriminating on moral grounds, which would represent the actual moral situation in each case, in awarding divorces in each of these three classes.

On the point that it is the duty of the law to protect the wronged party—that would be in connection with cases in the third class that I have distinguished—it is impossible to enforce the inwardness of marriage and the attempt to do so has been abandoned. Financial responsibilities can be enforced and the interests of the children safeguarded, but, in our view, the empty status, when that is all that is left, is too poor a thing and too liable to abuse to be safeguarded at all costs. It seems to us to be a relic of a position that has been in principle abandoned. In this connection, I would like to refer to paragraph 47 of the memorandum submitted by the Marriage Law Reform Society, in which there is a quotation from Mr. Macmillan's pamphlet, *Legal Aspects of Marriage*. [See Paper No. 23, *Minutes of Evidence for the Ninth Day*.]

Finally, we think that a radical divorce law is desirable, but is only justifiable if matched by a positive public policy to encourage the making of good marriages; it is a necessary part of public policy to promote good marriages. In connection with that I should like to bring forward two points from Slater and Woodside's recently published study, *Patterns of Marriage*, in which the authors say that in this country we are coming to expect more and more in our marriages. They find a tendency to the raising of the standard of behaviour in marriage

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through greater expectations between the partners of a high standard of conduct, which the authors believe will lead to better relationships in the long run. Secondly, they comment on what they call the "remarkable specificity" which each partner in the marriage comes to assume for the other as a source of happiness or unhappiness. They suggest that, on the positive side, that is the ground principle of stability in marriage, and would, on the negative side, be a ground principle of relief. It is in the context of a constructive public policy, and with this recognition of tendencies and factors within marriage, that we ask the members of the Commission to consider the views which we have submitted.

7302. Thank you. I have very few questions to ask, for two reasons: firstly, because your memorandum is very clear, and secondly, because you say, in the fifth paragraph of the "Summary of Evidence", that:—

"The Ethical Union endorses in general the proposals of the Marriage Law Reform Society, and, in particular, stresses: (1) the proposal to grant divorce on grounds of mutual consent and breach of faith; (2) the proposal that all matrimonial cases should be heard in the first instance in magistrates' courts."

You return to that again in paragraphs 9 and 10. Now, as in your first proposal you adopt the views of the Marriage Law Reform Society, and as that has been gone into very fully with them and with other witnesses, I do not propose to ask any questions on divorce by consent or for breach of faith. I shall ask one question later dealing with your second proposal, that all matrimonial cases should be heard in the first instance in magistrates' courts. I do not think that that has been very fully discussed. I now go to the beginning of your memorandum. You start with a summary of evidence, then you give particulars of the Ethical Union, and then you go on, in paragraph 3, to deal with a matter which you sum up in the third sentence by saying:—

"The only way in which the co-existence can be maintained without serious frustration and friction is to have a secular law based frankly on the acceptance of marriage as a human institution . . ."

We already have in this country a secular law, and this Commission is concerned with alterations in that secular law. You quite appreciate that?—Yes.

7303. We are not concerned with alterations in the laws of the Church or the views of the Church on a particular matter. Opinions may differ widely as to what the secular law should be and that is the subject which it is for us to discuss. Then you go on to a section entitled, "The ground of British marriage law", which is in the nature of an introduction to your proposals. Then, in paragraph 7, you speak about the powers of a reformed law and say:—

"If divorce is granted on universal grounds (breach of faith or mutual consent, for example) at the discretion of the court and on the petition of either party, does not this reduce the function of law to the mere registration of entrances and exits in marriage?"

I was not quite sure, reading this paragraph as a whole, whether you took the view that if divorce was granted on universal grounds that would be the result. Is that your view, or is it not?—No.

7304. It is not your view?—Our view is that the function of law would certainly be a good deal more than that, and especially if one bears in mind the essential point that we want to make, that it must be part of a general public policy which goes much farther in positive provision for preparation for marriage and so on.

7305. You say that if there is a policy put into effect of proper preparation for marriage, then you can have these "universal grounds" without the function of the law becoming merely the registration of entrances and exits in marriage?—It is an abstraction to regard the State as merely serving that function in so far as it registers a *de facto* situation in the marriage.

7306. I found this paragraph a little difficult.—It was almost a rhetorical question.

7307. I was not certain what the answer to the rhetorical question was. However, I think you have cleared that up. Then paragraph 8 is comment, upon which I have no questions. In paragraph 9 we come to the specific recommendation that:—

" . . . all divorce petitions should in the first instance be heard in magistrates' courts, and that these courts should be adapted for this purpose."

I think that there are certain difficulties and I wondered how you would deal with them. First of all, the magistrates' courts are very hard worked at present. You would contemplate that there would be a large increase in the number of magistrates and in their staffs?—It may be administratively impossible, but our sole concern in this is that there shall be available an efficient and experienced service for finding out information about the cases, and providing proper reports on which judgments could be made.

7308. You say that it is, as we would all agree, I am sure, a very important jurisdiction. Is it really wise to take it away from the High Court?—Our point would be satisfied upon this if there was an adequate service of reporting on cases, as is provided by the probation service or the welfare officer.

7309. Would you suggest that there should be an appeal from the magistrates' court to the High Court or what would the appeal be?—That is assuming, I think, that there should be the possibility of appeal.

7310. Would not that possibly multiply litigation?—We have no means of saying. I think that it might. But the essential point we want to press is that there should be an efficient service in connection with the hearing of these cases, wherever they are heard.

7311. I am sure that everybody would agree with that, but you make the concrete suggestion that they should go in the first instance to magistrates' courts?—Because of the probation service, that is the reason. (Chairman): I think I understand that now.

You lay great emphasis in paragraph 11 on preparation for marriage. You say that it should not be left to voluntary agencies and you urge the development of the National Marriage Guidance Council with a view to the early establishment of a public service of counsellors and classes. As I have said, I doubt if this subject is within our terms of reference, but your recommendations on it will nevertheless be borne very carefully in mind. It may be that we shall be able to refer to it in our Report.

7312. (Lord Keith): What your Union seeks to do, as I understand it, is in the first place to maintain the dignity of marriage?—Certainly, Sir.

7313. In the matter of the dissolution of marriage, you have said in paragraph 9 of your memorandum that you propose that dissolution by mutual consent and for breach of faith should be recognised. Now, divorce by mutual consent I understand, and I can leave that out of account for the moment. Dissolution in respect of breach of faith would mean normally a divorce taken by one spouse against the other for breach of faith. I suppose that breach of faith is the second category that you referred to in your opening statement, a settled refusal to meet the obligations of marriage?—Yes.

7314. As regards the other two categories, invincible incompatibility and settled aversion, I am not quite clear who is going to initiate the divorce in those two cases, if you do not get mutual consent?—In the case of settled aversion, the person who had the aversion presumably would wish to initiate proceedings.

7315. Yes, that I see. You think that in the case of invincible incompatibility the two parties would be only too willing to consent to a divorce, so that you would have mutual consent there? Is that right?—It might be otherwise, of course.

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7316. That is what I thought, that it might be otherwise. There might be invincible incompatibility, where one of the parties was not prepared to agree to divorce?—In that case, might it not come under the third head of settled aversion?

7317. Then the person who has the aversion would bring the proceedings for divorce?—Yes.

7318. That would not come either under mutual consent or breach of faith?—No, it is a third ground, definitely.

7319. That is what I wanted to clear up. It did not seem to me that it was quite covered by the grounds set forth in paragraph 9?—We think that if you do have a comprehensive ground, you are bound to make these distinctions, which do not really seem to have been made, but when one reflects upon it, seem to be quite necessary.

7320. How would you state your comprehensive ground?—I do not think that one could integrate the various grounds into one formula, but it is a shift from the principle of specified offences to a number of general grounds, is it not?

7321. It is. It seems to me to be somewhat of a mixture of the two things, a mixture of matrimonial offences, the middle category is matrimonial offences, as it were, "refusal of the obligations of marriage"?—Of a very general character.

7322. Of a very general character, and that would mean that one of the parties would bring a divorce against the wishes of the other?—Yes.

7323. Would you let the matter stand upon a broad definition of that kind—refusal to meet the obligations of marriage—or would you need further to specify what were the obligations of marriage and the refusal to meet them?—There is this difficulty, in civil marriage there is no specified content. The parties just agree to be married, there it begins and ends, so to speak.

7324. That is one of my difficulties. I was wondering how you would propose to solve it?—I think that one would have to consider the social content in the marriage.

7325. And that would have to be defined?—Yes, to make it workable in the courts.

7326. Are you prepared to define it?—Not here and now. I think that it is something which might be attempted. After all, the ecclesiastical view on marriage does make a definition of a kind. It does propose certain purposes of marriage and give it a content.

7327. It does, but if one were to adopt that content, then your obligations would be of a very definite character, would they not?—Yes.

7328. And the corresponding system of divorce that would be set up, would probably be of a character which does not differ in any way from the present system?—I do not think that the definition need be arbitrary. I think that there are legitimate expectations which are so widely recognised that they could be written down. If it were not so, marriage would not mean anything, it would be different in every case, and no one could say what it was.

7329. My difficulty is just to see exactly where your proposals lead to, and it is a little difficult if one seeks to tie the thing down in a matter of definition. You would agree, would you not?—In respect of the second category, yes.

7330. When you come to the proposed ground of "settled aversion" you would not include that under the heading of "invincible incompatibility"?—No.

7331. When you come to "settled aversion", how is that going to be determined—simply upon the evidence of one of the spouses that he or she has a settled aversion to the marriage?—I think so. I do not know how it could be otherwise, but I think that there would have to be a period of separation, possibly the four-year rule would apply very appropriately here. Obviously it could be a cover for all sorts of reasons for getting out of the marriage. That cannot be helped in the long run, but under a four-year period it would at least be determined as something serious.

7332. (Mr. Flecker): Might I continue on that point? In the last sentence of paragraph 6, you say: "Provided that the law allows divorce only on the basis of ascertained facts . . ." Is that what you had in mind when you talked about a period of separation? It seems to me that in respect of these various reasons for which you suggest there should be a divorce, it is very difficult to use the word "facts". Aversion, for example, is not quite a fact, in the normal acceptance of the word, but perhaps you would say that that is not the point. Was it something such as a period of separation in proof of the breakdown of the marriage which you had in mind in using the word "facts"?—In relation to that category of case, yes.

7333. There are certain cases in which the word "facts" is applicable, but where it is not, you would require some evidence, such as a period of separation, to establish a "fact" before you allowed the divorce to be granted?—The general principles have to be determined by the facts before they are workable in the courts, certainly.

7334. (Sheriff Walker): Suppose you have a marriage where the emotions of the parties have changed through jealousy and aversion to indifference, and the people are living apart and are never likely to come together again. What is your view about such a marriage, should it be dissoluble or kept alive?—It surely cannot be dissolved except at the instance of one of the parties. Is your assumption that neither wishes to terminate it?

7335. I am assuming that they would not consent to divorce.—I do not think that the State should walk in and say, "This marriage is intolerable".

7336. Assume that one party wants the marriage dissolved, the other does not?—If one wants it, in that case I think our view would be that that person should be entitled to petition for divorce.

7337. You are speaking on behalf of the Ethical Union. What is the ethics of that, why should one party be allowed to get such a marriage dissolved against the will of the other party?—Because, in our view, an ethical marriage is a two-sided affair, and it has in fact come to an end unless the two parties wish to maintain it.

7338. I wondered whether you were looking at it from the point of view of ethics as between individuals, or from the point of view of the paramount interest of society, let us say, of the State?—I think both. There is, necessarily, a public interest involved here, but you have in fact three permanent sources of morality in every such case, the existing state of the law and public opinion on the law's requirements, the state of the parties in so far as they are in conflict with that, and the public interest in a norm.

7339. It has been put this way, I think: "Why should the party, who has committed no matrimonial offence, be divorced against his or her will, when he or she has been promised by the other party a life-long union?"—In our view, the answer lies in the abandonment—I do not know when the date was, in the late nineteenth century—the abandonment of the attempt to enforce a contract against an unwilling party. You cannot compel the party to such a contract to fulfil in any sense the inwardness of that contract.

7340. That is rather a case of dissolving the marriage and depriving the wife of her status as a married woman?—Our view is that all you have left is that empty status which in the public interest is not worth preserving at all costs, and the cost may be that the party desiring divorce has entered into another union and has illegitimate children.

7341. If the public interest came into conflict with the private interests, say, of the individual wife, which would you regard as being entitled to prevail?—I do not know whether there is an abstract answer to the question, but in so far as there were, I should say that it must be the public interest. (Mr. Dawk): May I say something on that? First of all, with regard to separation, I think that in the Church of England's evidence it is said that all the proper purposes of matrimony are completely frustrated by separation. Secondly, if a man has committed an offence in law, he may be sentenced to imprisonment or fined, but in matrimony if a person is

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guilty technically, or assuming in a special case that he is really guilty of breaking the marriage, he is sentenced to a life sentence of celibacy. Then, I should put another reason. It is not to the public good that people should be separated for long periods. There is some evidence of rather a limited kind in the case of people who have been separated for long periods of an enormous amount of fornication or adultery or more permanent irregular sexual relations. You get it in segregated bodies of people such as in the Forces. That is not to the public interest. In the Church of England marriage service one reason for marriage is given as "to avoid fornication". Then, I should give still another reason. If in marriage one person should leave father and mother and cleave to one spouse for life, and the State is a party to the marriage (which I agree it is), it may seem wrong that the State at a later stage should, in the community's interest, allow one party to break the contract. But I would point

out that the State in certain instances demands that a man or woman should leave the family, not for personal or family reasons, but under solemn oath of allegiance for Queen and country, and puts the family at all the risks which are entailed by long separation, the danger to children from the loss possibly of the father in war, and yet the State does not insist upon the individual committing himself permanently to that allegiance. It allows the individual the right, if he wishes, under certain conditions to secede from the particular nation and join another country. Yet in regard to marriage, there is a feeling among a certain section of the public that the marriage should be binding and that an individual should not have the right to change his mind. That is another point which should be given consideration.

(Chairman): Thank you for your memorandum and for coming to help us.

(The witnesser withdrew.)

(Adjourned to Tuesday, 18th November, 1952, at 2 p.m.)

MINUTES OF EVIDENCE

TAKEN BEFORE THE

ROYAL COMMISSION

ON

MARRIAGE AND DIVORCE

THIRTIETH AND THIRTY-FIRST DAYS

Tuesday, 18th November, 1952,

and

Wednesday, 19th November, 1952

WITNESSES

THE RT. HON. SIR FRANCIS LORD CHARLTON HODSON, M.C., a Lord Justice of Appeal.

MR. SIDNEY BULLOCK	}	representing the Federation of British Detectives.
MR. JACK BALLARD		
MRS K. M. OSWALD	}	representing the National Council of Social Service.
MRS F. E. PECK, M.B.E.		
MR. B. E. ASTBURY, C.B.E.		representing the Family Welfare Association.
MR. M. H. NIBRET	}	representing the Soldiers', Sailors' and Airmen's Families Association.
LT.-COL. R. H. RUSSELL		
LT.-COL. J. F. BATTEN, O.B.E., M.C.		
MRS. M. E. N. HIGHAM		
MR. J. H. LAWTON		representing the Association of County Court Registrars.

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1953

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MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE
THIRTIETH DAY

Tuesday, 18th November, 1952

PRESENT

THE RT. HON. LORD MORTON OF HENNINGTON, M.C. (*Chairman*)

MRS. MARGARET ALLEN
DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELOE, M.A.
MRS. E. M. BRACE
LADY BRAGG
SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.
MR. G. C. P. BROWN, M.A.
MR. H. L. O. FLECKER, C.B.E., M.A.
MRS. K. W. JONES-ROBERTS, O.B.E.

THE HONOURABLE LORD KEITH
MR. H. H. MADDOCKS, M.C.
THE HONOURABLE MR. JUSTICE PEARCE
THE VISCOUNTS PORTAL, M.B.E.
DR. VIOLET ROBERTSON, C.B.E., LL.D.
SHERIFF J. WALKER, Q.C., M.A.
MR. THOMAS YOUNG, O.B.E.
MISS M. W. DENNEHY, C.B.E. (*Secretary*)
MR. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 90

EXTRACT FROM A LETTER FROM THE RT. HON. SIR FRANCIS LORD CHARLTON
HODSON, M.C., A LORD JUSTICE OF APPEAL, TO THE MASTER OF THE ROLLS

I do not think that as a Court we should wish to put forward any proposals to change the substantive law of divorce. The same applies to the law relating to property rights and the law prohibiting marriage with relations.

So far as the administration of the law is concerned, there are questions which crop up from time to time which are fit for the Rule Committee to consider and can be dealt with by that body. I am thinking, for example, of the discretion statement, which I have always thought was rather a quaint document, but its abolition could be dealt with by Rule without troubling the Royal Commission.

My own view is that it would be undesirable to lower the divorce jurisdiction below High Court level. I know

that the work is largely done by commissioners, but the present system provides a measure of control by the reported decisions of the High Court judges. The same situation applies as all civil work since the county court judges administer the same law as their High Court brethren but are subject to the control exercised by the authority of reported cases. I also attach importance to the administrative control exercised by the President.

So far as the existing jurisdiction of inferior courts is concerned, in so far as this refers to the justices' jurisdiction, I have no suggestions to offer.

(Dated 30th October, 1951.)

PAPER No. 91

MEMORANDUM SUBMITTED BY THE RT. HON. SIR FRANCIS LORD
CHARLTON HODSON, M.C., A LORD JUSTICE OF APPEAL

1. Those in this country who have considered the problems which are now being considered by the Royal Commission on Marriage and Divorce must, I think, fall into one of two classes. The first consists of people who regard divorce as an evil thing which is destructive of family life and accordingly of the life of the community. The second class consists of those who take what may be called the humanitarian view. They do, I take it, sincerely believe that if a marriage is not a success or, to use the modern phrase, "has hopelessly broken down", it is better it should be dissolved.

2. Ever since 1857 when divorce other than by Act of Parliament became available these two conflicting views have been contending against one another and the former has been fighting a losing battle.

3. In any evidence I may tender for the assistance of the Commission I do not wish to conceal the fact that I hold the first view. I think that such extension of the grounds for divorce has been harmful and that the institution of marriage, once it loses its permanent element, is so weakened that it tends to cease to be what it should be, namely, the foundation of a healthy community.

4. I think that, in dealing with the question, it should be realised that hitherto the influence of Christian teaching has not been driven out from the legal conception of marriage. The legal definition of marriage as understood

by the courts of this country is, "the union of one man with one woman for life to the exclusion of all others". If the extreme humanitarians get their way this must, I think, mean the end of the Christian conception of marriage and the Christian section of the community which, even if a minority, has still great influence in the country and will resist such a change.

5. I do not know what the supporters of the "hopelessly broken down" theory really mean. Who is to decide that the marriage is hopelessly broken down? If both parties agree, well and good, it is quite easy for them to go to the registrar and get their marriage registration cancelled. If one only thinks so, who is to decide? No judge could do this. He is trained to ascertain facts on evidence. He can make up his mind whether adultery, desertion or cruelty, to name the three main grounds for divorce, are established. He may be wrong. If he is wrong, there is a Court of Appeal where the whole matter can be thrashed out again before a court of at least three judges, most of whom will themselves have had experience as judges of first instance. If anyone is to decide that a marriage has hopelessly broken down, I suppose a doctor would be as well qualified as anyone else; but I cannot imagine the medical profession being ready to undertake this burden.

6. To add "hopeless breakdown of marriage" as a ground for divorce would do away with the necessity of having any other categories of grounds for divorce. A

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man would, I suppose, be free to say, "My wife is dying of cancer. She complains a great deal. I want a new and brighter wife. My marriage, I say, has hopelessly broken down". He would have a ground for divorce if the extreme humanitarians carry their views to their logical conclusion. Many of these people would no doubt say a divorce should be refused in these circumstances, but I am bound to say I do not see on what ground they would take their stand.

7. From the evidence given some years ago in the courts of this country in a case involving a Soviet marriage, it appeared that the Russians then took the logical view of regarding marriage as a fact just as birth and death were facts. It was convenient for these facts to be registered but the registration did not create the fact any more in the one case than the other. As soon as the marriage in the opinion of one party had ceased to exist he or she could register the cessation. I understand, but I do not pretend to have any up-to-date information, that the Russians now find that this is not satisfactory, that they insist on the registration of all marriages and do not allow their dissolution to be effected by the mere declaration of one of the spouses in or out of a register office.

8. There is one practical difficulty which is already assuming prominence now that divorce is comparatively rare among couples who are dependent on the weekly wage of the husband. According to our law a man has to maintain his wife and if she divorces him by reason of his fault the wife still in theory retains this right. I say in theory because it is practically impossible for her to enforce her rights in a large number of cases. The wage-earner commonly gives the bulk of his earnings to his wife on their receipt and only retains enough to pay for his own weekly personal expenses including any luxuries he can afford. If he is divorced he is free to marry again and his wife, that is, the particular woman to whom he is at the time married, has herself a right to be maintained by him and, what is more, has the handling of the family purse. If she has a child or children and his wage is in the neighbourhood of £6 or £7 a week, out of which rent has to be paid, the financial prospects of any earlier wives or their children by this man are not very good. There simply is not enough money to go round.

9. This problem is not noticeable amongst well-to-do people. A super-tax payer may and quite frequently nowadays does have a number of wives living at the same time and since after divorce his ex-wives are not treated as one with him for tax purposes he can manage quite nicely, since he is permitted to deduct all his wives' maintenance allowances from his gross income for tax purposes leaving his net income comparatively slightly affected.

10. I have referred to this aspect of the consequences of divorce because I think that if the supporters of the "hopelessly broken down" solution have their way it will be impossible to maintain even in theory the legal position that a woman, innocent in the eyes of the law, is entitled to be maintained by her husband after she has divorced him. I do not know how the right to maintain is to be asserted in such cases. Once cruelty, desertion and adultery are out of the way and the intangible ground proposed is put in its place, I do not know what degree of misconduct on the part of the wife would be deemed to be such as to disentitle her to maintenance. She would presumably argue that it was just bad luck that the marriage had hopelessly broken down and so she should have her maintenance if her financial circumstances warranted it.

11. Even under the present law there is a very narrow line between divorce on grounds now existing and divorce on the ground of "hopeless breakdown of the marriage". I have in mind divorce on the ground of cruelty. The courts have never taken the stand that cruelty must consist of violence. Any conduct which has caused danger to life, limb or health, or which may give rise to a reasonable apprehension of such danger, may support a finding of cruelty.

12. Since cruelty became a ground for divorce there has been a tendency amongst comparatively newly married couples who find they are getting on badly to accuse one another of cruelty in circumstances which if they were not so tragic might be called ludicrous. Each feels the strain. Solicitors and doctors are consulted and each says that the one is by his or her conduct imperilling the health of

the other. A partner who lapses into silence when differences arise is accused of sulking and the talkative partner is accused of nagging, in each case coupled with an allegation of injury to health, actual or apprehended. It is true that these cases, when contested, usually fall to the ground, but they cannot be struck out *in limine*, and the relationship between the spouses is inevitably worsened by the raking up of detail after detail, frequently of a trivial nature, in an endeavour to blacken the other so as to establish cruelty. In these cases there is often nothing which can be reasonably characterised as cruelty in the ordinary sense of the word, but the real contention is that the marriage has hopelessly broken down because the parties cannot get on and each is wearing out the nerves of the other.

13. I know that, in some of the memoranda submitted, stress is laid on the viciousness of what is called nagging. Many of these cases in my experience follow a dismal and very similar pattern. A man and wife live together for years and may or may not have raised a family. The husband gets mixed up with a woman many years younger than himself. He thinks himself rather a success and enjoys himself until his wife finds out what is going on. She, feeling herself a woman scorned, uses the only weapon she has, her tongue. The husband, disliking the rough edge of this, begs to be divorced, saying that he wants to marry the younger woman. The wife refuses, telling her husband not to be a fool and pull himself together. The husband then hastens to the courts, saying he must have a divorce on the ground of cruelty consisting of nagging which has injured his nerves. If he gets a divorce, convention nowadays directs that he must marry the other woman. I came across one case of this kind when the later wife rapidly got bored with her elderly lover and left him with pocket sadly depleted and no doubt with little improvement in his nervous condition, having lost the wife and companion of the best years of his life.

14. Before the 1937 Act none of this dismal story would have been enacted. The wife would have probably succeeded in preventing the husband from making a complete fool of himself and a tragedy would have been averted.

15. This class of case has drawn some very acid comments from a distinguished Scottish judge who implied that the English had lost their robustness of character in their approach to cases of this kind.

16. This unhappy raking over the intimate details of married life is fortunately not as a rule necessary where desertion and adultery are the grounds for divorce, although in the former case the circumstances of the separation do from time to time necessitate an examination of details of the same sort as in cruelty cases.

17. I do not suppose that the clock can be put back and cruelty removed from the list of grounds for divorce, but I do feel that the existence of this ground has made those who have recently entered on the married state less ready to consider one another and to adjust their differences without recourse to the Divorce Court. Any further extension of the grounds for divorce must necessarily lead in the same direction.

18. I have so far only put forward some matters which in my experience have made me feel that, whatever reforms in the law of divorce may be put forward, some attempt should be made to prevent the insidious and confusing increase of divorce in this country.

19. I am not in favour of giving a general discretion to a judge or anyone else to give or withhold a divorce in all cases. This suggestion condemns itself and it would lead to an uneasy rest to get cases heard before a particular individual who would be thought likely to be persuaded that divorce was in the circumstances of the case a good thing.

20. I am not in favour of any alteration in the law of collusion. It is true that people are very vague about what collusion is and that some cases are not necessarily serious. I am thinking of cases where money passes in circumstances which amount to the purchase and sale of a divorce. This should remain an absolute bar. If grounds for divorce exist, a fresh petition can be presented free from collusion but the tainted petition *must*, in my opinion, be dismissed since otherwise defence can be

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bought off. Even if there is no defence, the court ought not to be put into the difficulty of having to ascertain whether or not a defence exists when one side has been misled.

21. Finally, I would like to say a word which is, I hope, quite unnecessary, in defence of solicitors. It has been suggested that solicitors were in the habit of putting forward false cases supported by false documents such as letters containing statements of facts known by them to be untrue. In the whole of my professional experience at the Bar and on the Bench I have never known a solicitor do anything of the kind. I maintain that the standard of professional conduct amongst solicitors is good and that the reputation of an English solicitor is

deservedly high. In writing a letter on behalf of a client he will put the client's case in as favourable light as he properly can, but he will not wilfully misrepresent the facts nor will he allow his client to do so if he can help it. This applies to divorce as well as other litigation. Apart from the ethics of the matter, dishonesty would be fatal to his practice, because no one would pay the least attention to anything he wrote on any subject once it became known that he had been guilty of unprofessional conduct of this kind. I have referred to this matter because it has received publicity and I am shocked to think that the reputation of solicitors should suffer in any degree by reason of such attacks upon their integrity.

(Received 10th November, 1952.)

EXAMINATION OF WITNESS

(The Rt. Hon. SIR FRANCIS LORD CHARLTON HODSON, M.C., a Lord Justice of Appeal; called and examined.)

7342. (Chairman): Lord Justice Hodson, you have kindly come here to give evidence today, and I will just recount the events leading up to it. The first step was that the Master of the Rolls sent the Commission a letter in 1951 saying that the members of the Court of Appeal did not wish as a body to submit a memorandum, but that they were in agreement with the suggestions made by Lord Justice Hodson in the appendix attached. Then there followed an extract from the letter from you (Paper No. 90), which deals purely with administrative matters. Then, later, you sent to us a memorandum dealing with the broader aspects of our terms of reference, and in particular, with the suggested new grounds of divorce. I would like to ask you, first, whether there is anything you would like to add before we ask you questions on your views?—(Lord Justice Hodson): I should like to say that I do not want to be thought lacking in respect to those people who take a diametrically opposite view to that which I take. I have read quite a number of the memoranda which have been submitted, and I realise that people have given very close and sympathetic study to the problem, bearing in mind that there is a very large number of hard cases. No one, I think, could be more alive to those hard cases than a person like myself who has had a good deal of experience of seeing them in the courts and hearing the stories that unhappy people tell. I have listened to cases which have moved me very much, in the sense that I have felt that the people who have been addressing me from the witness box have suffered very keenly. I have admired their patience in their suffering but, nevertheless, I feel strongly that the institution of marriage cannot be protected unless resistance is put up to any sort of general extension of divorce on the lines of meeting hard cases. That is really my fundamental view. Of course, I have drawn attention to certain particular practical difficulties. I have in my memorandum pointed out what I think is present to the minds of many of the authors of memoranda, namely, the great difficulty in providing for maintenance once one gets off what to lawyers is the well-known field, of providing a remedy for an injury suffered. Of course, I am in agreement with the memorandum of the General Council of the Bar on this point, indeed on most other points, and I should be very sorry to see that principle departed from. It has been departed from in the case of divorce on the ground of insanity, but not, I think, otherwise. That is all I would like to add on the broad aspect of the matter. There are one or two specific matters on which I have an opinion which I have not expressed in the memorandum; I did not feel I ought to go on indefinitely, trying to cover the whole field. One of those, if I might be permitted to mention it, is condonation. That is referred to in the memorandum of the General Council of the Bar, and I have a view about that. Lord Keith will correct me if I am wrong, but I rather think that in the law of Scotland the doctrine of revival does not exist in the form in which it exists in England. I think that condonation has got very much out of hand by reason of this doctrine of revival, which came into existence in the last century for reasons which are well known to you.

7343. The revival of the matrimonial offence?—Yes, possibly by way of a different matrimonial offence; possibly, as Mr. Justice Vissey put it in one case, "to bury the hatchet in a very shallow grave". I should like to see the doctrine of revival, as it is in its present form, abolished, in order that the doctrine of condonation might at any rate approximate to the theological doctrine of forgiveness. At the present moment it does not; it is merely a binding over to be of good behaviour. That is my own view, and I mention it because I saw this topic discussed in the Bar Council memorandum, in which a different suggestion is made. [See para. 82-88, Paper No. 4, Minutes of Evidence for the Second Day.]

7344. Yes. Is there any other point you wish to mention?—I do not think so, I do not want to continue indefinitely.

7345. Perhaps other matters will emerge in the course of our questions. As I know about your career and possibly some of the Commission do not, I will state it for their benefit, and perhaps you will correct me if I am wrong. You came to the Bar, I think, after serving in the war of 1914-18, and I am sure I am not overstating it if I say that you built up at least one of the biggest junior practices, your practice being primarily in divorce?—And probate. (Chairman): And probate. You then, almost in the same breath, took silk and became a judge of the High Court near the end of 1937. You are now a Lord Justice of Appeal, and I think it would not be inaccurate to say that there is probably no one on the Bench or at the Bar with a larger or wider experience in divorce cases, but I do not expect you to assent expressly to that. (Mr. Justice Pearce): That is so.

7346. (Chairman): Mr. Justice Pearce confirms me, and it is no good denying it. If I may deal with your letter, first of all, you say:—

"I do not think that as a Court we should wish to put forward any proposals to change the substantive law of divorce."

Then I think we can go on to the third paragraph, where you do make a concrete suggestion. You say:—

"My own view is that it would be undesirable to lower the divorce jurisdiction below High Court level. I know that the work is largely done by commissioners, but the present system provides a measure of control by the reported decisions of the High Court judges. The same situation applies in all civil work since the county court judges administer the same law as their High Court brethren but are subject to the control exercised by the authority of reported cases. I also attach importance to the administrative control exercised by the President."

I assume that you are these dealing with jurisdiction as far as it concerns the granting of divorce decrees?—Yes.

7347. I want to put to you certain suggestions that have been made. Mr. Claud Mullins, for example, in his memorandum [see paragraph 22, Paper No. 37, Minutes of Evidence for the Thirteenth Day], dealing not with

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the granting of divorce but with the enforcement of orders for maintenance, says this:—

"It would be valuable if the law provided that all High Court orders for alimony below the rate of £5 per week (plus 10s. for each child) should come within the jurisdiction of magistrates' courts for enforcement and, if possible, amendment on fresh evidence being shown. At present only the High Court can enforce orders made by the High Court, but High Court procedure is both expensive and dilatory and even the provision of legal aid will not make such procedure suitable for those with small incomes."

—That is a very valuable suggestion. Perhaps Mr. Justice Pearce will be able to help you about this, but I should not have thought the costs of an application to the High Court were necessarily very high. But still, I think it is a good suggestion.

7348. (Mr. Justice Pearce): I think the situation is that in the High Court, before a wife gets maintenance from a husband who is not very anxious to pay, she is a good deal out of pocket because she has to make several applications, for none of which, incidentally, she is entitled to recover the full cost that she will in fact have to pay.—I am all in favour of everything being done to save people money.

7349. (Chairman): May I now turn to your memorandum? The first four paragraphs deal to some extent with matters of belief but, as not everyone in this country holds the Christian belief, you go on thereafter to deal, on broad grounds, with certain suggestions for amending the existing law, and you say in the fifth paragraph:—

"I do not know what the supporters of the 'hopelessly broken down' theory really mean. Who is to decide that the marriage is hopelessly broken down? If both parties agree, well and good, it is quite easy for them to go to the registrar and get their marriage registration cancelled. If one only thinks so, who is to decide?"

I think, if I may say so, that the advocates of the "hopelessly broken down" theory do contemplate that a judge shall decide whether the marriage has hopelessly broken down, in this sense, that the parties are never going to come together again. I think that is the broad general trend of it. Some people contemplate also a period of separation so that the judge would have to decide—I do not suggest it is a very easy problem—whether there was no prospect of the marriage ever continuing, or of the parties ever coming together again. Assuming that that is the suggestion, what have you to say about it?—I am very touched at the faith these people seem to have in the capacity of judges and lawyers to deal with problems of that kind. I have not the same faith.

7350. I suppose that your sentence beginning, "If both parties agree, well and good . . .", is directed to this, that if this suggestion is adopted, and if both parties agree that the marriage has hopelessly broken down . . . Who is to contradict them?

7351. Who is to contradict them? In other words, if they came before the court, no judge would have any material on which he could contradict them?—I think it is a position really in which a judge is not well qualified to give a decision, any more than anybody else.

7352. You deal very fully with your reasons for thinking that breakdown of marriage is not a good ground for divorce, and I want to put to you a suggestion for divorce by mutual consent which has been put to us in considerable detail recently by the Muir Society. I would like to have your comments on it because it is, as I say, a detailed suggestion and perhaps more detailed than many. The suggestion is the Ninth Proposition of the Society's memorandum [see paragraphs 20-23, Paper No. 77, *Minutes of Evidence for the Twenty-Seventh Day*], which reads:—

"The legislature should institute an action of dissolution of marriage based on the mutual consent of both spouses. It should be incompetent to raise such an action during the first three years of the marriage."

In order to constitute a valid marriage, both in the eyes of the Church, and the law, there must be consent by each party given freely, genuinely, and seriously. Mutual consent is essential to validity, and is the basis of the marriage."

So far I think we might all agree—

"Where both parties to the marriage later find that neither of them has any longer any desire to cohabit, the whole basis of the marriage vanishes, and in logic it is difficult to see how a continuance of cohabitation can be justified. Where such a situation arises it is believed that the spouses should be able to raise an action of dissolution of marriage based on mutual consent."

I should say at once that later on the Society proposes certain limitations as to living apart for a certain time and so on, but have you any comment on that paragraph?—I think the objection in principle to divorce by consent is that it assimilates marriage to an ordinary contract, whereas marriage is not only a contract but it is a state or an estate, and therefore, in my judgment, it is not capable of being destroyed in that particular way, as a matter of principle. Of course, I know that other countries have adopted divorce by consent and there are strong arguments in favour of it but, at the same time, I think it must inevitably tend to weaken the permanent element which I regard as an essential element in marriage.

7353. Then I will read on:—

"There is, however, another ground on which the institution of such an action is urged. At present the law provides no honourable remedy for spouses who have decided that they have no longer any desire to live together and wish the marriage to be dissolved. The result is that spouses in such a position must infrequently obtain divorce on perjured evidence. In the opinion of many lawyers, familiar with court practice, many actions of divorce based on adultery, or on desertion, are arranged divorces or proceed upon perjured evidence. In cases based upon adultery, the evidence led is frequently intended to prove that the allegedly guilty spouse has spent the night in a hotel bedroom with a third party. It is difficult in many cases not to view such evidence with marked suspicion."

Then the memorandum goes on to develop the state of affairs which the writers think exists today. The concluding sentence is:—

"The choice is between providing an honourable remedy, namely, an action of dissolution, and the continuance of the present system under which otherwise honourable persons are compelled to resort to perjury to obtain their freedom."

Would you like to make any comment on that?—The last sentence shocks me—"honourable persons are compelled to resort to perjury"—I think it speaks for itself as being a shocking expression. Honourable persons are not compelled to resort to perjury. So far as the general picture which is painted by this paragraph is concerned, I think there is a great deal of exaggerated talk on this subject. I think, as you know from my memorandum, that solicitors, so far as my experience goes, do their work honourably. They are not parties to perjury or to conspiracies to defeat the ends of justice, both of which are criminal offences. So far as I know, they do not concoct false documents, as one of the witnesses who has given evidence before you has suggested they are in the habit of doing. Of course, naturally I am not prepared to say that the court has never been deceived, but I do not believe that solicitors act as panders, concocting evidence of adultery, or that they urge their clients to commit adultery or anything of that kind. I think that some of the foundation for this kind of opinion, which is prevalent in this country, may be that people who have been divorced sometimes like to pretend that the whole matter has been adequately arranged, whereas that is not the truth. They think it sounds better than to disclose facts which those of us who practise in these courts know, or think we know, really exist in those cases. It is difficult of course to deal with a general statement of that kind without considering particular cases.

7354. I will just read the first half of the next paragraph and ask you a question on that, and then I think we can pass from it. The next paragraph says:—

"But while the introduction of an action of dissolution of marriage based on mutual consent is urged, it is essential that such an action should be bedged with reasonable safeguards. In the first place, it should not be competent to raise an action of dissolution of marriage during the first three years of the marriage."

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[Continued]

Secondly, the parties, before being entitled to come into court for the first time, must in fact have been living apart continuously for at least nine months. The first appearance of the parties should be before a judge in chambers, where the parties would require to state on oath that they had in fact been living apart for at least nine months, and that each spouse had ceased to have any desire to cohabit. Not less than nine months after this first appearance both parties would require to appear in open court, and swear that they still had no desire to cohabit and that they had lived apart continuously since their first appearance. In addition, the court would require to be satisfied by other evidence that the parties had in fact been living apart continuously for eighteen months. If the court were satisfied, a decree of dissolution would then be pronounced."

Would these formalities remove your objection to divorce by mutual consent?—No, I do not think they would make any difference. Of course, I realise they provide safeguards, but I also repeat that I do not really see what good it is employing a judge for this particular purpose.

7355. Apparently, on that suggestion, assuming that the parties proved the necessary absences, the judge would merely be registering a decree?—It looks rather like it.

7356. Then, going back to your memorandum, in paragraph 19 you deal with the proposal to give a general discretion to a judge. You say:—

"I am not in favour of giving a general discretion to a judge or anyone else to give or withhold a divorce in all cases. This suggestion condemns itself and it would lead to an unseemly rush to get cases heard before a particular individual who would be thought likely to be persuaded that divorce was in the circumstances of the case a good thing."

I suppose it would also lead to this, would it not: that there would be great uncertainty on the part of those who have to advise their clients as to whether they have grounds for divorce or not?—Yes, I think it would. Of course, I am not in favour of giving judges wide discretion about anything, more than can be avoided. I would not like to extend the area of a judge's discretion more than is necessary.

7357. (Mr. Justice Pearce): There is only one point I would like to ask you about, and that is on condonation. It is of course desirable, is it not, that one should have forgiveness and reconciliation where that is possible?—Yes.

7358. Would you agree from your experience that at present the position is this: suppose that a wife has a right to divorce on the ground of a matrimonial offence by her husband and is doubtful whether to try again to make the marriage work, then any responsible lawyer has to advise her against going back to her husband unless she is almost certain that the attempt at reconciliation will work, because he must tell her that she will lose her remedy if it does not prove satisfactory?—Yes.

7359. The result of that is, is it not, that any attempt at reconciliation tends to take place either in solicitors' offices or in tea-houses and the like? Do you follow what I mean, is there they have to decide?—Yes. They do not go home.

7360. When really the right thing to do is to go home and try living in the home? There is then a real chance of seeing whether reconciliation is possible?—Of course that entails putting the other spouse on probation.

7361. I quite agree, and what I am suggesting is not necessarily antagonistic to your suggestion, that when the hatchet is buried it should be buried deep. But I am going to put to you a suggestion that the Bar Council, I think, thought was a reasonable one and the President of the Probate, Divorce and Admiralty Division thought might be a helpful one. Supposing the suggestion was that for a specified period, let us for the moment assume three months, the parties were able to try reconciliation without being held to have buried the hatchet up to that time, but thereafter the hatchet was buried and, if you like, buried deeply. Would not that give a far greater opportunity for reconciliation?—Yes, I think it would. You mean that condonation is not to be a bar unless the parties have lived together for three months?

7362. Yes. I suggested to the President that it would be a discretionary power, but he was against that—from what you have said you would possibly be against that for the same reason. He wanted something out-and-dried.—Yes, it is always better, I think, to have rules that we know and that clients can be advised about.

7363. Would you agree that this is a really important problem that one ought to consider?—Yes, I would. I think the suggestion is a very valuable one. We could get into difficulty, I suppose. I was thinking about the law of Scotland. I do not like going off on a line of our own if the law of Scotland remains as it is. It is a pity to have different laws on each side of the Border.

7364. The Bar Council has suggested that it would be better if the three-year bar were a discretionary bar. A divorce could, at the judge's discretion, be allowed within the three years where there was serious hardship, the likelihood of reconciliation being taken into account. I think of the various suggestions the President proffered that one. Some people wish to abolish the three-year bar altogether. Could you give us your views on that?—I am not very enthusiastic about the three-year bar, it seems to me very arbitrary. Perhaps it is rather cynical to say so, but I think it does cut down the number of wives a man can have in his life to a reasonable number. As it is, the number of divorces one man may have is very great, and I suppose that if the three-year bar were abolished there might be even more divorces in that man's life.

7365. (Chairman): If there is to be a three-year bar, do you think the present discretion is wide enough, the discretion being, if I may quote the Section:—

"... a judge of the court may ... allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent ..."

Do you think that is the right amount of discretion, or would you make it wider, or have no discretion?—I think that there ought to be discretion in these cases. I should not myself want to alter the language of the Section as it stands, but I do not feel strongly about it if other people think it ought to be modified.

7366. (Lord Keith): Since the question of condonation has been raised, perhaps I should say that what you have expressed as to the law of Scotland is accurate. Of course it is subject to this, that an act of adultery which has been condoned, although it cannot be revived, may be looked at if later adultery takes place with, say, the same person with whom the condoned act of adultery took place. It is purely a matter of evidence, I think you will appreciate that?—I appreciate that.

7367. I do not say it is impossible, if some probationary period were introduced for the purposes of trying out reconciliation, that that might be introduced as a modification of the law of condonation in Scotland; that I think you can appreciate?—Yes.

7368. I do not know whether the Scots lawyer would like it or not, but the present law of condonation would not be an impossible bar to the introduction of some such measure as Mr. Justice Pearce has suggested. I think you would agree that that could be worked quite consistently with adhering to the general law of condonation in Scotland?—Yes.

7369. I think, subject to that explanation, that there is nothing I really want to say further upon the question of condonation. I would like to ask you something with regard to a matter in your memorandum which interested me, namely, the question of divorce on the ground of cruelty.—That was the case of *Jamelson* I was thinking of.

7370. Yes, I was not concerned with that case, but I wanted to know exactly what was in your mind. Is it this: that the question of deciding whether cruelty has taken place is a matter of extreme difficulty and delicacy in the present state of the law?—Yes.

7371. And were you using that as an analogy to say that if one introduced a consideration such as "the marriage has irretrievably broken down" as a ground for divorce, you would be faced with something of the same difficult and delicate questions?—You would, or even more difficult.

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7372. I can see that they might be more difficult; they might certainly be more varied. Would you tell me this for my information, because I am afraid I have forgotten: in England was cruelty always a ground for judicial separation?—Yes.

7373. The difficulty that you seem to see in deciding whether there has been cruelty is a difficulty that the courts seem to have faced, I suppose, for many centuries?—I suppose the practical answer to that is that judicial separation cases brought on the ground of cruelty were usually settled, they were not worth fighting. They used to be settled in terms of a legal separation and a contribution or payment towards the wife's cost.

7374. But my question was this: the question of assessing cruelty is just the same as it has always been?—Yes, but it has become more troublesome because of the infinite number of cases which have been brought, since divorce has been available on the ground of cruelty.

7375. I quite see that the number of cases has multiplied. I was just wondering whether in essence there is any real difference in the problem with which the judiciary is faced today?—Not at all, but, as you will see from my memorandum, what has troubled me very greatly about these cases is that so many of them have failed and, having failed, so much harm is done to the marriage relationship between these two spouses by having had this dreadful matter in court.

7376. I think I can quite agree with you that once an action of divorce has been taken for cruelty it is perhaps unlikely that the parties will ever get together again, even if the action fails?—Yes.

7377. Perhaps I should not enter into a personal experience, but I have had quite a number of defended cases of cruelty, and I think I may say that on the whole a defended case of cruelty perhaps is more likely to fail than to succeed?—Yes, I think so.

7378. On the other hand, I have known of a case, a defended case of cruelty, which failed and where the parties seemed to maintain quite friendly relations afterwards.—Yes, so have I. I have a case very clearly in my mind where, after the most bitter fight and very wounding accusations made on both sides, the parties came together, and they both wrote me letters about it afterwards.

7379. So that really one cannot lay down any general rule about that matter?—No, but I should have thought that, generally speaking, the effect of this terrible strife would be destructive of marriage. (Chairman): There is a morrow of dissent from Mr. Justice Pearce. He thinks most defended petitions for divorce on the ground of cruelty succeed.

7380. (Mr. Justice Pearce): I would not go as far as that, but I would say that more are successful than not.—It depends on the class of case, but the kind of case I have been discussing in my memorandum in my experience usually fails.

7381. I think it is fair to say this, that the obvious case of cruelty is never fought because it is not the sort of case which the husband, or the wife if she is the guilty party, wants to advertise, and the cases that are fought tend to be border-line cases?—I am thinking of the case of the nagging wife; that has been overdone, I think.

7382. (Lord Keith): I see you have a reference in your memorandum to some said comments from a distinguished Scottish judge. Could you tell me what the case is?—The case of *Jameson*.

7383. I thought it was.—The judge said that the Scottish people were of robust character, implying that the English were not. I took that to heart.

7384. I suppose you have seen the judgments of the House of Lords in the same case?—Yes, that is where I traced it from.

7385. These perhaps did not wholeheartedly adopt the views of the Scottish judge. I do not know if there is anything else I really want to go into except perhaps this. Broadly speaking, I think, the attitude of the people who want reform of a radical character in the divorce laws is that divorce should not really be a matter of litigation between two parties?—Yes.

7386. But that it is a social problem in which not only the parties but the State are interested, and the question is whether the litigation aspect of divorce has not really been overdone?—Yes.

7387. Do you think there is anything in that point of view?—I am sure there is, or people would not hold it in such large numbers. Many people whose opinions I respect hold that view; it is not my own view. (Chairman): May I say, arising out of that, that if both people want a divorce then you might conceivably have it without litigation, but I cannot quite see how to avoid litigation if one person, who wants divorce says, "The marriage has broken down", and the other person says, "I do not think it has and I want to maintain it"? (Lord Keith): I quite agree, I was stating it very broadly and very generally.

7388. (Mr. Maddocks): Lord Justice Hodson, you took very strong exception to the paragraph about "honourable people" which was read from the Muir Society's memorandum. Can you tell me how two honourable people whose marriage has, let us assume, completely broken down, perhaps from the fault of both of them, can get a divorce honourably today?—They cannot.

7389. That is all the Muir Society say, is it not?—They say that people are compelled to not dishonourably; that was why I mentioned it.

7390. If both want a divorce they are compelled to act dishonourably, they have got to concoct a case?—I object to the "got to"; nobody is compelled to do wrong.

7391. But the point I am making is this: if they want to get a divorce—there is nothing dishonourable in both of them wishing to have a divorce—they have got to act dishonourably in order to get it?—I suppose that what they have to do is to agitate for some alteration of the law which would enable them to get a divorce.

7392. Which is what they are doing?—Yes, but they are not compelled to act dishonourably.

7393. I have one other question, on a matter which is not mentioned in your memorandum. Would you be in favour of extending the definition of cruelty to cover the husband who is habitually drunk?—No, I would not extend the definition of cruelty and, on the whole, I agree with the Bar Council's memorandum, which is against divorce on the ground of drunkenness *per se*.

7394. There are many cases where women are suffering very badly from nothing else except just habitual drunkenness on the part of their husbands?—Yes, I know.

7395. You would not think that we should do anything to assist?—I think the Bar Council pointed out, did they not, that in serious cases of drunkenness you can generally get a case of cruelty on its legs as the law stands?

7396. Yes, the President also said that. But there is a section of society whose women cannot get a cruelty case on its legs very often. Their husbands do not hit them or knock them about, they do not do anything else except to be habitually drunk and those women are helpless today, one cannot do anything for them?—I should think that the legal aid people could tell them to go to a doctor and see what the effect on their health has been.

7397. (Sheriff Walker): Would you agree, speaking very generally, that the trend of legislation in recent times has been to take the grounds for a judicial separation and to make them also grounds for divorce?—Yes.

7398. I am wondering whether that is a good method of legislation. Would you agree that in judicial separation it might be right to take into account the rights and wrongs of the individual spouses—a wife may need protection and therefore a decree of separation—but that, when coming to the dissolution of the marriage, the interests of the State ought to become paramount? Or do you think that such a difference could not be drawn?—Yes, I think that distinction is a valid one.

7399. Taking it from that point of view, if one looks at the present grounds of divorce, say adultery—it may be a single act of adultery—it is rather difficult, is it not, to see how it is in the interests of the State that one party should have a right to dissolve the marriage?—Yes, it is.

7400. But if you take the extreme case of two parties who have been separated perhaps by agreement for years and have set up separate establishments illicitly, and the

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question arises should that marriage be dissolved, where does the interest of the State lie? That rather puzzles me at the moment.—Of course I feel that the interest of the State lies in doing everything it can to preserve the family unit, and I think that quite apart from questions of religion. Permanent marriage is an essential element in a stable state, it is the foundation of a discipline . . .

7401. I was assuming that, from the purely secular point of view, it is desirable that marriage should be regarded as a life-long union. But where in fact the marriage has broken down, take the extreme case where most people would say there is no probability of those people coming together again, is it in the interest of the State that the marriage should continue as an empty shell, as it were, or that it should be dissolved?—I think it is in the interest of the State that it should continue because the more you break up those marriages the more borderline cases you bring into that area, so that divorce tends to increase.

7402. So that, if one looks at it from the point of view of the interest of the State, one really gets back to the Church's attitude that marriage is indissoluble?—Yes, and I see no way of getting over that. I suppose the best compromise is one which I rejected in my memorandum, that is, to have a religious ceremony indissoluble and a lay ceremony dissoluble, but I do not really like it.

7403. Let me take again the extreme case, where the parties have been living separately for seven years, or some given number of years, and they are never likely to come together again. You say in your memorandum that if the second point, the improbability of their coming together again, depends on the evidence simply of the petitioner saying, "I will never go back," there would be nothing for the court to decide. That would be right, would it not?—Yes.

7404. Except the honesty of the petitioner?—Yes.

7405. But suppose there are two factors; one is that they have lived separately for so many years, and the second question is—Is there any reasonable probability of their coming together again? That second question could be decided, could it not, if there were evidence of the circumstances in which the parties had separated and of the conduct throughout the past years? That would be the kind of question, would it not, which the court is quite accustomed to decide—the reasonable probability as to what may happen in the future? (Chairman): I am not sure whether you are addressing the question to a case where both parties desire a divorce or where one party desires it against the wishes of the other? (Sheriff Walker): To the latter case. It is really Mrs. White's Bill I am thinking of, where there are two things to be proved before the court; one is that the parties have lived separately for a year, and the other is that there is no reasonable probability of their resuming cohabitation. I follow what you have said in your memorandum, that if the latter point depended on the evidence of the petitioner saying, "I will never go back" there would be nothing for the court to decide. But supposing it were laid down that that should not be sufficient evidence, then would you not agree that the court would have to proceed on the evidence of the circumstances in which the parties separated and of the conduct since? Would not that be a perfectly good . . . —Mrs. White's Bill merely contemplates a man going to a court and asking for judgment on account of his own wrongdoing. That seems to be contrary to all ideas of the way we function in the courts. I should not like to bring the courts into it if Mrs. White's Bill became law. If that sort of approach is to be made, I would rather the judges were kept out of it.

7406. I wanted to confine my question to whether it is a properly triable issue.—I feel there is that difficulty about it. A man might be seeking to set up his own wrong, might he not, in the circumstances you are envisaging, as a ground for bringing the marriage to an end? He may say, "It is all my fault, I have done this, that and the other, but the marriage has hopelessly broken down and I want a divorce." I do not think that is the sort of thing that judges like being asked to deal with.

7407. I follow that but, so far as deciding questions of fact, the question—Is there a reasonable probability of the parties resuming cohabitation—would be a simple fact, would it not, which, however difficult, courts of law do decide?—I suppose the judges ought to tackle the problem if it is put before them, but I must confess I do not contemplate it with any pleasure.

7408. Turning to divorce by consent, I would like to put to you this point of view. It is said—I am going to assume it is rightly said—that if two parties want to get divorced, if they are both divorce-minded, they can under the present law honestly do so if one party goes and commits adultery without saying a word to the other and then gives evidence of the fact. I think we have been told that that would not be collusion and it would be a perfectly fair ground of divorce.—Collusion does not consist in both parties wanting the same thing.

7409. The view of some people is that if the law permits that, why not allow parties to do directly what they can do indirectly? That is to say, people who want a divorce can get it indirectly by one of them committing adultery, so why not allow them to get divorce directly by simple consent?—I do not see that that touches the problem at all. People who want a divorce can get one in this sense: supposing a man has deserted his wife, there is no objection to his going to his wife and saying, "I have been away three years, please divorce me." She says, "Poor man, I do not want to divorce him but he wants to be divorced and I will divorce him." There is nothing against the law in that, that is not collusion, but it seems to be going a lot further to say that you can have divorce by consent.

7410. It would go further, it would allow people to get a divorce without committing what we call a matrimonial offence?—Yes, it would; divorce by consent of course would go the whole way.

7411. And, as I understand the views of some sections of the community, they say it is far better to allow parties to get a marriage dissolved by consent than to require them, as it were, to commit a matrimonial offence?—Yes.

7412. Is there any possible answer to that, such as by making a single act of adultery not a ground for divorce, or by making adultery no longer a ground for divorce unless it is shown to play some part in breaking up the home?—Once you introduce these qualifications you add to the difficulties of administering the law, I think. "Qualification" is not the right word, but some "additional characteristics".

7413. In practice one does find cases where the marriage has already broken down, perhaps for financial reasons or some quite extraneous reasons, and the adultery plays no part in the breakdown. That is a well-known type of case?—Who is to say what part the adultery has played in the breakdown? It is so difficult.

7414. I am thinking of the case where the parties have quarrelled, there is incompatibility, they have separated and been living apart for years, then one of them commits adultery. *Prima facie* that would have little to do, would it not, with the breakdown of the marriage?—I agree.

7415. And still in that case the law seems to say that the adultery, although it has played no part in the breakdown of the marriage, is a ground for divorce?—Yes, it is a wrong inflicted on the other party, of which the latter party is entitled to take advantage.

7416. It is rather an odd kind of wrong in this sense—that the other party does not feel it to be a wrong? It is rather a relief from the tie?—It may be, I do not know.

(Chairman): Thank you very much, Lord Justice Hodson, for your memorandum and for coming here to help us this afternoon.

(The witness withdrew.)

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MR. SIDNEY BULLOCK AND MR. JACK BALLARD

EXAMINATION OF WITNESSES

(MR. SIDNEY BULLOCK and MR. JACK BALLARD, representing the Federation of British Detectives; called and examined.)

7417. (Chairman): We have here Mr. Sidney Bullock, the President of the Federation of British Detectives, and Mr. Jack Ballard, the Honorary Secretary of the Federation. Before I ask any questions would you tell us something as to the constitution and membership of the Federation of British Detectives? How many members have you, and what is the governing body?—(Mr. Bullock) My Lord, the membership of the Federation of British Detectives is exactly 200 at the moment. It was founded in 1949, primarily as a result of very adverse comments which had been made by certain of His Majesty's judges about the conduct of some private enquiry agents in various parts of the country. We thought that it was about time, for the benefit of the calling and also in the interests of members of the public, that we should form this association to constitute a membership of private enquiry agents of good repute. Before a man can join this Federation he has to have certain legal qualifications, and he must be a man of very good character. References are taken up, including two from solicitors, and others from persons who can speak as to integrity. The membership covers practically the whole of the British Isles, and we are very jealous of our good name. No one realises more than we do the very great number of black sheep who call themselves private enquiry agents. In fact, only five days ago, Sir, in the Divorce Court here, one of Her Majesty's commissioners directed that the papers in a case be sent to the Director of Public Prosecutions, and speaking of an enquiry agent who gave evidence in that case the commissioner said that the agent had conducted a seditious and collusive case. Unfortunately, that enquiry agent was referred to as a member of the Federation of British Detectives, which is not the case. He is not a member of the Federation, but we do fully appreciate that when the commissioner said that, he had been led to believe that he was. During the past three or four years, several enquiry agents have been proceeded against for various offences, including perjury and false pretences, and we think that the authorities should devise some scheme of licensing people of our calling, because we do not think it is right that any man—even an ex-convict discharged from Dartmoor—can set up as a private enquiry agent tomorrow. There is nothing to stop him. That man can get hold of money, advertise extensively, and then he proceeds to bleed his clients with no intention of doing his best for them, and he himself frequently falls foul of the law. He carries on for a time and then he falls by the way. One of the primary aims and objects of our Federation is to achieve a system of licensing enquiry agents. That would, we think, do away with a lot of disguised abuses. Is there anything else, my Lord?

7418. Only this: what is the governing body of the Federation? Have you a committee or a council?—There is a governing Council consisting of nine, Sir, elected at each annual general meeting.

7419. I understand that all the members are private detectives and are not in the service of the State?—About seventy per cent. are retired police officers.

7420. But are they all carrying on business, as private enquiry agents?—Yes, Sir. (Mr. Bullock): They have to be fully employed as enquiry agents, not in a part-time capacity, nor can they carry on any other job for any firm. That is their sole livelihood.

7421. Your Federation offered in August, 1951, when the Commission was first appointed, to assist the Commission either by answering a questionnaire or by oral evidence, and you received a copy of our initial Press announcement, setting out five questions to which we invited answers?—Yes, Sir.

7422. But at that time you did not communicate with us. Then, on 30th May, 1952, Mr. Ballard, the Secretary of the Federation, submitted a letter in which it was stated that certain evidence given before the Commission might have a very harmful effect upon members of the Federation, and you asked to be allowed to attend before the Commission to state your views upon the matter, the

conduct of private enquiry agents generally, and to answer any questions which might be directed upon that subject. Would you now make any statement you wish either in answer to anything said against your profession or on any matter which you consider relevant to this Commission's inquiry?—(Mr. Bullock): I would like to say this, if I may, in view of evidence which I have heard given here this afternoon. I think that it is undoubtedly reasonable to assume that some divorces are arranged. By that, I mean that someone has got hold of an enquiry agent, and that agent has given certain advice, as a result of which the respondent has been found in such circumstances as to provide the evidence required to place before the Divorce Court. And whilst personally I am quite satisfied that no reputable firm of solicitors would be a party to that kind of thing—and I do not think for one moment that they have the slightest knowledge as to how the evidence was obtained—the enquiry agent has probably been paid very well for his services. In fact, if I may digress here, there is one case which stands out very vividly in my mind. Some two years ago, a man came to see me in my office, and told me that his wife wanted to divorce him. He was quite agreeable to be divorced, and he wanted to know if I could arrange for him to be introduced to a lady of a certain character and then for the two of them to be found in a compromising situation. When I showed him the door he was very much annoyed, and he told me—and I felt very much inclined to believe him—that he genuinely did believe that that was the kind of business carried on by certain enquiry agents. That again, Sir, is, I think, another reason why the authorities should do something to lay down some standard for private enquiry agents, either by licensing them or by some other means.

7423. Yes, I see. Do you wish to add anything, Mr. Bullock?—(Mr. Bullock): Not on that aspect, but I think that it was Sheriff Walker who mentioned a little while ago hotel evidence and whether it should be admitted. In the majority of cases which my own firm handle, and we handle a reasonable number, when the information comes into the hands of the petitioner it has not been obtained through the respondent. It is unknown to him that it has been learned that he has stayed at a certain hotel with a Mrs. or Miss A. Speaking from my own experience, this business of going off to a hotel and sending the bill through the post to the wife is not what usually happens.

7424. You mean that there are cases where a man or woman suspects the spouse and employs you to see whether there are any grounds for suspicion or not?—Not exactly, but you quite often find that a man who has gone on business, or on holiday on his own, tells his wife that he is at hotel X. The wife at first believes implicitly that everything is above-board, but afterwards for some reason gets a little suspicious and has the necessary enquiry made at the hotel—it may be six months afterwards. It may be because his cheque-book shows rather unusual drawings, it may be through his talking to somebody else and that person talking to somebody else, and eventually it gets back to his wife—there are all sorts of ways in which her suspicions may be aroused. But it is the last thing in the world he wanted his wife to learn—that he had stayed at the hotel with a woman.

7425. (Lord Keith): Your membership, you say, is 200?—(Mr. Bullock): Yes.

7426. That will not cover a very large part of the country?—We are located all over the British Isles and our associate members cover most of the Continent and the United States. We fully realise, however, that our membership is only 200 and there are probably 2,000 enquiry agents who are not Federation members.

7427. I realise that. I was trying to find out where the bulk of your 200 members are located?—(Mr. Bullock): The largest numbers are round the bigger cities—London, Birmingham, Manchester. The 200 are in the British Isles, including Ireland. Others are in France, Germany, Holland, all over America and as far, I think, as China. I think that is the furthest place east. We can actually

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get jobs done through our agents in any part of the world. I have used agents in the last twelve months by picking up the transatlantic telephone and phoning somewhere in South Africa about a plane that has already left.

7428. I am not so much concerned with agents in other countries. They are not members, are they?—Associate members.

7429. They are not in the 200?—No.

7430. How many members of your Federation are there in Scotland?—(Mr. Ballard): About eight, seven or eight, Sir. (Mr. Bullock): There are three in Glasgow, others in Edinburgh, round the bigger cities in Scotland, Sir. I would like to say this: out of every ten applications we get for membership we do not accept anywhere near all of them, because of our screening methods. We have a lot of applicants who would like to be members but we feel that it would be rather unwise if we allowed them to become members, and we do not.

7431. (Chairman): Mr. Ballard, I think, said something about certain legal qualifications. What are the legal qualifications that you require?—(Mr. Ballard): We insist that members must have been in business on their own account as private enquiry agents or private investigators for not less than two years, or they must be ex-police officers of not less than fifteen years' service, and we then get legal references from two firms of solicitors as to each applicant's legal qualifications.

7432. (Lady Bragg): I should like to ask one question, Mr. Ballard, about your scale of charges. Do you have a tariff? I notice in various memoranda which we have received—I cannot recall exactly which—references to cases where it was impossible to find the money necessary to pay the enquiry agents.—As regards interchange work—that is, work done between one agent and another—there is a maximum of £3 3s. a day, a day of eight hours, or 7s. 6d. per hour. But dealing with members of the public, there are no fixed charges because we have found that it is not possible to establish a rate, as we never get any two enquiries alike. But it is included in our rules and constitution that charges to members of the public must be moderate and that any case of overcharging brought to the notice of the Council of the Federation will be dealt with as a disciplinary offence. So we do keep charges down to something moderate.

7433. Do you ever make any allowance for people in very poor circumstances?—Definitely, we have to. A lot of our agents do a fair amount of work through the Law Society, too, and it frequently happens that they might just about get their out-of-pocket expenses and no more for doing those enquiries. In fact, I personally—and I think that our members would all agree with me when I say this—have no objections to doing some work absolutely free, if it is a deserving case. (Mr. Bullock): We do have a greatly reduced rate of charges for the Law Society Divorce Department. They are approximately one-third of the charges to the private client, but when we are sent for by solicitors, quite often they tell us that the client has nothing at all. It may be that what we lose on the swings we may gain on the roundabouts later on if someone has the money.

7434. (Sheriff Walker): Is the normal case in which you are employed the case where one spouse suspects but does not know that the other is committing adultery?—(Mr. Ballard): We get both types of case. We get cases like that, and cases where the spouse knows that her husband is committing adultery.

7435. What she is really wanting is to get evidence?—Yes.

7436. So there are two branches of your business is divorce work, the one where you are enquiring to find out whether a person is committing adultery, and the other where it is known that a person has committed adultery, and evidence of that is desired?—Yes.

7437. You told us about your charges. Is there any difference in your charge according to whether you are successful or unsuccessful in the enquiry branch of your business?—No, and there should not be, Sir, because one of the first things I tell the client is that results, of course, cannot be guaranteed.

7438. Take the case where it is not known that adultery has been committed and you are enquiring to find out. If you are successful in finding that adultery has been committed, do your members get a higher charge?—No, I think that that would be a very wrong attitude to adopt.

7439. That obviously would be a temptation?—It would be an inducement to some people, I quite agree.

7440. You do not make any difference?—No, Sir.

7441. (Mr. Mansfield): Do you draw any distinction amongst applicants for membership between the C.I.D. and the remainder of the uniformed police? Would an ex-police officer, of fifteen years' standing, be accepted whether he was C.I.D. or not?—(Mr. Bullock): Yes, provided he left with an exemplary character.

7442. What is the subscription?—(Mr. Ballard): The membership fee is £3 10s. and the annual subscription is £3 3s.

7443. What do you do if you find that one of your members has been guilty of malpractice?—A charge is made against him and he is given notice by registered post to appear before the members of the governing Council on a given date. He is previously notified of the terms of the charge and given every opportunity of speaking for himself or bringing other persons to speak in his defence. If the case against him is adjudged to be proved, he is either expelled from the Federation outright, or his membership may be adjudged *sine die*, or he may be cautioned. Or the charge may, of course, be dismissed. (Mr. Bullock): A person who feels that he may have been maltreated by any agent is entitled to lay his complaint before our body. We take it up on his behalf and he can attend the hearing himself.

7444. (Mrs. Jones-Roberts): I wonder if you could tell us to what extent you operate in respect of legally aided people? Could you tell us what proportion, roughly, of your cases take you into that group?—At present I should say eighty per cent. of the cases. I find that myself, and I have rather a large divorce practice.

7445. You would agree that before a legal aid certificate is granted a certain amount of evidence must be collected?—Yes.

7446. And it has been put to us by one body that there are a great many cases of hardship, because, before the certificate is granted, there is this work to be done, which I imagine your Federation would do. Have you found that there is a great deal of hardship?—With the utmost respect—if, say, a wife merely suspects that adultery is being committed by her husband, she has not grounds for a divorce and she cannot get a legal aid certificate. If the case is that A and B are living together, she must still have the necessary evidence to obtain her legal aid certificate. I have found, at least with my firm, that we do not draw the moneys from the client himself; we put in our bill, which is taxed by the registrar after the decree absolute has been granted, and then we get our fees.

7447. So you are not in a position to say that really there is not substantial hardship?—We can only speak from personal experience on this, in the North—it may be different in London. All my business is done through solicitors, who ask me to make the necessary enquiries. I send my report and account to the instructing solicitors, with a copy to the client. They then start proceedings, if the report warrants it, and eventually, after the decree absolute, a taxed bill goes before the registrar. He examines it, and, subject to his approval, it is passed for payment, and then the solicitor receives his disbursements, including a sum in respect of our bill, from the Legal Aid Fund, and then we get our money.

7448. (Mr. Justice Pearce): I suppose that your divorce work falls into two main groups, one of watching on behalf of a suspicious spouse the other spouse, who does not know that he or she is being watched, in order to try to find evidence of adultery, and secondly, of producing reliable evidence for a court of a fact, which is not conceded, that two people are living together. Is that correct?—Yes.

7449. I suppose that you sometimes are asked by a suspicious wife to check up hotel records and ask the maids whether there had been two people staying there when there should have been only one?—Quite so.

18 November, 1952]

MR. SIDNEY BULLOCK AND MR. JACK BALLARD
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[Continued]

7450. But that, I take it, is a rather more rare event than the other two types of case?—Round about ten per cent. of the actual divorce work involved, I should think. In fact, I have one in my brief case to attend to after this Commission, Sir.

7451. Yes, and that, of course, is where the spouse has not been informed by the other, she is merely suspicious, because if she had been informed, there would be no need to approach you, she would go direct to the hotel?—We have found that a lot of the hotels, for

example, the Blackpool hotels, will not see us unless we produce our membership card, and we invariably have to write and obtain permission to go along. If a lady goes, she does not really know what she is looking for. Thus, we do go quite often, even where the spouse knows of the adultery.

(*Chairman*): Thank you very much for coming here and giving us this information, and for answering our questions so helpfully.

(*The witnesses withdrew.*)

(*Adjourned to Wednesday, 19th November, 1952, at 10.30 a.m.*)

THIRTY-FIRST DAY

Wednesday, 19th November, 1952

PRESENT

THE RT. HON. LORD MORTON OF HENLYTON, M.C. (*Chairman*)

MRS. MARGARET ALLEN

DR. MAY BAIRD, B.Sc., M.B., Ch.B.

MR. R. BELLO, M.A.

MRS. E. M. BRACE

LADY BRAGO

SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.

MR. G. C. P. BROWN, M.A.

MR. H. L. O. FLICKER, C.B.E., M.A.

MRS. K. W. JONES-ROBERTS, O.B.E.

THE HONOURABLE LORD KEITH

MR. D. MACE

MR. H. H. MADDOCKS, M.C.

THE HONOURABLE MR. JUSTICE PEARCE

THE VISCOUNTSSE PORTAL, M.B.E.

DR. VIOLET ROBERTSON, C.B.E., LL.D.

SHERIFF J. WALKER, Q.C., M.A.

MR. THOMAS YOUNG, O.B.E.

MRS. M. W. DENNENY, C.B.E. (*Secretary*)

MR. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 92

MEMORANDUM SUBMITTED BY THE NATIONAL COUNCIL OF SOCIAL SERVICE

Preamble

The National Council of Social Service has for its general purpose the promotion and co-ordination of voluntary social work in Great Britain and its membership includes most of the principal voluntary agencies. Through its headquarters departments and regional offices it maintains contact with the work of local organisations in all parts of the country and works in close association with its member agencies, particularly in matters which affect the welfare of the community as a whole.

In compiling this statement the Council has drawn upon the experience of the following of its headquarters departments and associated groups:—

The Women's Group on Public Welfare

The National Federation of Community Associations

The Citizens' Advice Bureaux, Councils of Social Service and Rural Community Councils

and is especially indebted to the National Council of Family Case-work Agencies, the National Association for Mental Health and the National Marriage Guidance Council for the contributions which they have made.

The points raised in this memorandum are based on the general experience of these organisations over a period of many years and are supported by case evidence from Citizens' Advice Bureaux (which during 1950 dealt with over 110,000 enquiries on marriage, family and personal problems) and Family Case-work Agencies, some of which is submitted to the Commission in an Appendix to this memorandum. The Citizens' Advice Bureaux, of which there are today 500 working in communities ranging from large cities to small country towns, are, together with the Family Case-work Agencies, mainly responsible for providing the informal legal advice service (formerly known as the poor man's lawyer service) which, pending the full implementation of the Legal Aid and Advice Act, are the

only means by which those unable to meet normal solicitors' fees have been able to obtain the advice and help of members of the legal profession.

The National Council is in agreement with the views expressed in the Final Report of the Committee on Procedure in Matrimonial Causes (the Denning Report, Cmd. 7024), to which detailed reference has been made by other organisations. The Council regards the preservation of the marriage as of the highest importance to the community generally and with this in mind would urge more adequate provision of education for marriage and home-making, both as a part of the educational curriculum and increasingly through the work of appropriate social organisations. In addition, we would stress the importance of adequate and widely known services of reconciliation as an essential part of a constructive approach to marriage.

These views are not regarded as inconsistent with the suggestions made below for amendments in the marriage laws or in procedure relating to them.

1. Legal aid

The National Council regrets the Government's decision to postpone the implementation of a large part of the Legal Aid and Advice Act, 1949, and especially the lack of provision for aid in the lower courts which this has entailed. This may well have created an impression that the main purpose of the Act is to make possible easier divorce.

The National Council is particularly anxious that that part of the Act providing for a nation-wide legal advice service should be brought into operation, and agrees with the view expressed by the Lord Chancellor's Advisory Committee to the effect that an adequate legal advice service "would deter headstrong litigation of all kinds . . . and especially would it make an onslaught upon the terrible statistics which show that four-fifths of the litigation at present receiving legal aid is composed of cases for dissolution of marriage".

2. Conciliation

The National Council has been particularly impressed by the evidence of Citizens' Advice Bureau workers as to the increased number of matrimonial problems in recent years and by the number of cases in which the reasons given for seeking separation or divorce appear to derive from an inadequate appreciation of the ordinary responsibilities of family life. The Council is of the opinion that improved means should be found of providing education for marriage and home-making, whilst recognising that this is outside the immediate terms of reference of the Commission.

The Council is conscious of the need for more and better facilities for reconciliation. In particular, we wish to stress:—

(a) That reconciliation machinery, if it is to be successful, must be brought to bear on marriage problems at an early stage; it is our view that the chances of effecting permanent reconciliation once a husband and wife have had recourse to the courts are remote. In those places where there are adequate family case-work or advice services many people bring their problems before they have reached an acute stage; this is the point at which outside help may be effective.

Whilst, therefore, we would recommend that provision for reconciliation should be made at High Court level comparable with that which is provided in the lower courts, we would strongly urge the need for reconciliation services that would not be dependent on the machinery of the courts but would operate before any question of legal proceedings has arisen.

(b) That such reconciliation services would need to be free from any element of compulsion and hence would provide invaluable opportunities for service by appropriate voluntary societies adequately equipped and staffed for the work.

We agree with the conclusions as to the qualifications for marriage guidance counsellors set out in the Report of the Departmental Committee on Grants for the Development of Marriage Guidance (Cmd. 7566).

(c) That the law should be amended so that genuine attempts at reconciliation should not prejudice subsequent legal action if the attempt should fail. We quote from the Denning Report:—

"The law as to collusion and condonation hampers attempts at reconciliation. When grounds for divorce exist, the would-be petitioner often feels and is sometimes advised that he may endanger his case by collaboration with the other party and so is reluctant to make or accept any advances. Further he feels that any final attempt to mend the marriage would probably involve condoning the offence and the consequent cancellation of his grounds for divorce. Whilst he would be quite ready to attempt reconciliation if it involved no adverse consequences, he can never be sure that the attempted reconciliation will be successful and is reluctant to try when it may lay him for ever to an unhappy marriage." (Denning Report, para. 22 (vii).)

In this connection the National Council of Social Service supports the view of the National Marriage Guidance Council to the effect that the law relating to desertion should be amended to require an aggregate period of three years in five (of which one year or possibly six months should be immediately prior to the petition) as an alternative to the period of three consecutive years at present required. We consider that the present law militates against partners themselves attempting conciliation in the knowledge that if the attempt should fail a further period of three consecutive years of desertion will be required before an action for divorce can be brought.

(d) *Privilege.* Confidence in the impartiality and secrecy of marriage counsellors, Citizens' Advice Bureau workers and family case-workers is essential if they are to receive people's confidence and trust.

It is found that efforts to effect reconciliation are seriously hampered by the fear that statements made in the course of consultation can be used as evidence in divorce and other courts.

In the Denning Report it is stated:—

"It is very desirable that any communication between a party to a marriage and anyone whom he has consulted with a view to reconciliation should be

privileged from disclosure; but we do not think it needs any enactment for the purpose. The Courts already protect probation officers, medical men and clergymen from disclosure except when the interests of justice demand otherwise, and there is no reason to suppose that they will not grant the same protection in these cases also." (Denning Report, para. 29 (x).)

It is assumed that this is a correct statement of the practice of the courts, but it is impossible to know when the interests of justice may demand disclosure of confidence.

It is desirable that counsellors in matrimonial matters should be able to state definitely that anything said to them will never be revealed without the person's consent.

Recent decisions of the courts have shown that communications may be made "without prejudice", so that disclosures then made between one party and the other cannot subsequently be used for legal proceedings, but there is nothing in the relationship between a marriage counsellor and the person who consults him, as there is between a solicitor and client, to prevent the other party summoning the counsellor to give evidence of facts which have been made known to him in confidence.

It is appreciated that the privilege accorded to a solicitor's client is not to be lightly extended to other relationships, but the problem of encouraging people with matrimonial difficulties to consult those who may be able to help them is such a serious one that the possibility of statutory protection from disclosure in appropriate circumstances should be considered.

3. Divorce

The National Council does not regard it as within its competence to suggest amendments to the law of divorce, but wishes to draw attention to certain anomalies in its administration.

(a) *Custody of children.* It is generally agreed that in a broken marriage the situation bears most heavily on the children, to whom permanent damage may be done by unwise handling in the early years. The National Council supports the views expressed by the National Association for Mental Health on this subject (see para. 35 et seq., Paper No. 20, *Minutes of Evidence for the Seventh and Eighth Days*) and in particular would stress that much more care is needed in investigating the suitability of one parent as against the other to have custody of the child in case of dissolution of marriage or separation. We understand that it is at present possible and in fact common for such a decision to be taken in the High Court on affidavit without either of the parents being brought before the court. We support the views expressed in the Final Report of the Committee on Proceedings in Matrimonial Causes and we welcome the experiment being made at the Divorce Court under which a court welfare officer (at present seconded from the London probation service) is available to advise on this matter. We think that the possibility of using officers of the children's departments of county and county borough councils in this kind of work should be considered and, further, that the training and experience required for this difficult work should receive careful study.

(b) We would suggest that where a wife has been a party in divorce proceedings it should not be necessary for her to describe herself in legal and official documents as "divorced wife"; we suggest for consideration the use of the term "former wife". [See Questions 7469 to 7472 and the footnote thereto.]

(c) We are impressed by the difficulty experienced, particularly among people in the lower income groups, in obtaining evidence on which a divorce action may be brought, even though there may be the strongest possible presumption that the evidence exists. This situation is not wholly met by the provisions of the Legal Aid Act since the question of whether or not a legal aid certificate is to be issued depends, necessarily, on the production by the applicant of sufficient evidence to show that a case can reasonably be brought.

We are aware that discussions on this point took place when the Legal Aid Bill was before the House and we recognise the very great difficulty in the way of the State being asked to subsidise any kind of private enquiry service. Nonetheless, it is clear from the cases brought to

Citizens' Advice Bureaux and case-work agencies that a great deal of very real hardship exists because of the difficulty experienced by some people, chiefly on financial grounds, in securing the evidence needed to sue for divorce or even to apply for a legal separation. The attached Appendix illustrates the points we have in mind.

4. Property rights

We should like to draw attention to some further anomalies. In particular:—

The possession of housing accommodation and the ownership of equipment of the home. Citizens' Advice Bureaux and case-work agencies have many instances of hardship arising from the fact that the husband is normally the tenant of the house in which a married couple live and is assumed to be the owner of the home (i.e., of the actual furniture and equipment). This often results in wife and children being rendered homeless as a direct result of their having recourse to the law which exists for their protection. In other cases aggrieved wives are reluctant to take action, either for divorce or separation, because of the fear of losing their homes. In two cases brought in the course of one month to a small Citizens' Advice Bureau of wives who had made enquiries regarding a legal separation and of whom all but one appeared to have adequate grounds for seeking this, eight were deterred from applying for an order on the grounds outlined above.

We would like to recommend:—

(i) That in separation cases where children are concerned and where their custody is given to the wife, magistrates should have power to make provision for the wife to obtain the tenancy of the home. We regard this as of great importance, whilst recognising the difficulty of interfering with contractual and property rights.

(ii) That the courts be given power in appropriate cases to allocate a part of the household effects, as well as part of the husband's income, to the wife. It is suggested that some amendment to the laws should be made so as to enable a claim relating to the ownership or retention of domestic chattels to be brought in the same court in which the separation and maintenance are dealt with. Hardship is caused when a person who has fought a case of separation and maintenance in the magistrates' court has to continue the struggle in the county court or High Court in order to establish or defend claims to property used in the home.

5. Maintenance orders

The National Council is concerned about the hardship incurred by many deserted wives through the difficulty of enforcing maintenance orders made against their husbands.

We are conscious of the very great difficulties of this whole situation and we recognise the fact that wives, no less than husbands, are seldom blameless in the break-up of a marriage. We recognise, too, the difficulties of men who, owing to this breakdown, have incurred another relationship and are more conscious of their responsibilities for their "illegal" wife and children, with whom they may live in daily contact, than of those to the legal ones from whom they are parted. At the same time, we feel that the widespread non-compliance with maintenance orders not only involves the deserted wife (especially if she has children) in very great hardship, but tends to bring the court which has given the ruling into disrepute. We do not think that sending the man to prison in the last resort is an effective measure since it in no way meets the needs of the wife.

We would like to suggest that the following possibilities be explored:—

(a) That some method be found of deduction at the source of the husband's income of sums owing under maintenance orders, alimony and affiliation orders, when the usual methods have failed.

(b) That in such cases, i.e., in cases of persistent non-compliance with a court order by a man having the means to pay, the court should be able to impose a sentence as of contempt of court. We understand that the serving of a prison sentence for this offence would not have the effect of expunging the arrears of maintenance as is now the case, provided that the husband has the means to pay.

(Dated 7th January, 1952.)

APPENDIX

The following notes are extracted from memoranda submitted to the National Council by individual Citizens' Advice Bureaux and family case-work organisations. The views are based on the experience of these organisations over many years and similar ones have been put forward by most of the thirty local societies whom it has been possible to consult. The comments are supported by case evidence in the day books and case papers which are an indispensable adjunct to the organisations' work.

The organisations quoted have been chosen as representing widely differing localities and types of population.

The reference in the left hand column is to the paragraph in the main memorandum to which the notes refer.

1. Information submitted by the Liverpool Personal Service Society and Citizens' Advice Bureau

This Citizens' Advice Bureau and case-work organisation serves a population of 803,000 people and deals with an average of 2,048 enquiries per month, of which 195 are listed as "matrimonial problems".

It is one of the largest of the family case-work organisations outside London. It employs eleven professionally trained social workers, carefully recruited and selected for their experience and suitability for the work.

The Personal Service Society is brought into particularly close contact with matrimonial problems since, in addition to having its own marriage guidance department, it works in a close relationship with the Poor Man's Lawyer Department of the Liverpool Law Society, undertaking social investigation and general case-work at the request of the solicitors, as well as providing accommodation and clerical services for them.

The Poor Man's Lawyer Department dealt with 1,968 cases during the year ending 30th September, 1951, of which 866 were matrimonial cases.

Para. in memorandum

1. Need for full implementation of the Legal Aid and Advice Act, 1949

The Society is deeply conscious of the need for the implementation especially of that part of the Act which provides for aid in the lower courts. Meanwhile, a special scheme is operated in Liverpool through the assistance of the City Council who, at the request of the magistrates in the matrimonial courts, have provided a fund to ensure adequate representation in court for, e.g., a wife or husband, in cases where the other partner is able to have legal representation.

Considerable confusion exists in Liverpool over legal fees for assisted litigants, the Poor Man's Lawyer Department undertaking legal representation (in a limited number of cases) for £1 is. 0d., the Magistrates' Legal Aid Scheme for £2 2s. 0d., whilst the National Assistance Board have a variety of arrangements in different cases.

2. (a) Conciliation machinery at High Court level

The Society is frequently consulted by a husband or wife who is involved in divorce proceedings and who, although desiring reconciliation, is under the impression that this is out of the question once proceedings have been started.

3. (a) Custody of children of divorced parents

The Society is of the opinion that amendment is needed in the law as it relates to the custody of children. Many cases are known to them in which the children tend to be used as "pawns" and suffer great hardship. Then again, a parent who has not the custody of the children will wait outside the school to take them away from the other parent, or will go to the house to remove the children while the parent who has the custody is out.

4. Property rights

The Society would recommend that the law be amended to enable a claim relating to the ownership or retention of domestic chattels to be

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brought in a court of summary jurisdiction so that the justices would be able to deal with the question of any dispute as to the household chattels in connection with any other matrimonial dispute that was before them.

The Society's most difficult cases are those of separation granted on the ground of cruelty on the husband's part, where the wife and children cannot move away, as the husband retains the furniture and the wife has no means to equip a new home. Such cases are numerous.

5. Maintenance orders

The Society supports the concern expressed in the memorandum on the subject of the non-enforcement of maintenance orders.

In addition, it points out that reconciliation is more likely to be effected in the case of a mutual agreement to separate, when court proceedings have not been taken, but that against this must be set: (a) the difficulty and cost of applying through the county court for payment of arrears; (b) the difficulty of taking action to obtain a divorce if this subsequently becomes necessary or desirable.

(NOTE: This last point has not been considered by the National Council of Social Service.)

II. Information submitted by Harrogate Guild of Help and Citizens' Advice Bureau

This Bureau serves a population of 52,000 people. It is open on three half-days a week and its average number of enquiries is sixty-nine per month.

During the month of November, 1951, nineteen matrimonial cases were dealt with. Of these fifteen are relevant to the recommendations made in the memorandum.

SUMMARY OF FIFTEEN CASES

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Nine couples living apart

3. (c) Difficulty of tracing partner and obtaining evidence

Two wives had been deserted by their husbands; they each had three children and neither received any maintenance, as the men could not be traced. One wife was seeking divorce on grounds of desertion.

One wife had deserted her husband. Both the solicitor who considered her case and the bureau organiser had done their best to dissuade her from taking this course. She had two young children and had taken them with her. She had no legal proof of her husband's infidelity, though there was strong presumptive evidence. She could not afford to obtain proof, if any.

5. Maintenance orders

Five wives had been granted legal separations, but only one of these was in receipt of regular maintenance from her husband. Of the remaining four, one was taking out a summons against her husband for failure to maintain her, the other three were unable to trace their husbands.

The sixth wife was separated from her husband by mutual agreement. She received a regular allowance for herself and two children and was the only one of these nine wives who had retained her home.

(NOTE: See Liverpool Personal Service Society's notes.)

Six couples living together

4. Property rights

In every case the wife had made an enquiry regarding a legal separation. All appeared to have adequate grounds for seeking this, but were deterred from doing so on account of giving up their homes. Two were seeking alternative accommodation.

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Cases (i) and (ii) were very similar. Both were middle-aged women, each had one child (now married and away from home). Both had gone out to work throughout their married life and were now incapacitated on account of ill-health. One woman had severe heart trouble; her doctor was urging a separation and would support this on medical grounds. The married daughter had offered a home. This woman bitterly resented leaving the home she had worked so hard to get together. The other woman had suffered repeated injuries from her husband's violent temper. Not long since he had broken her arm. She had ample evidence but had twice withdrawn a summons. (In this case other factors combined to prevent the wife from seeking a legal solution—in particular her loyalty to her husband and feeling that she could influence him for good.)

Cases (iii), (iv) and (v) were women between the ages of thirty and forty. They each had large families and the children were all dependent. Their grounds for considering separation were cruelty, failure to maintain, temporary desertion. Two of these husbands had recently had prison sentences, all were well known to the N.S.P.C.C. inspector and the probation officer. It would be quite impossible for any of these wives to obtain alternative accommodation.

Case (vi). The husband gambled and drank. On two occasions the home had been sold up to pay his debts, the wife had built this up again out of her own earnings and was likely to lose it again at any time, as she was now prevented from earning owing to illness. The eldest boy was earning and doing well; she was desperately trying to keep things going until she could get the younger boy started. She was literally worn out with anxiety.

III. Information submitted by Marylebone Citizens' Advice Bureau

This Bureau serves a population of 77,000 and deals with an average of 686 enquiries per month of which thirty-three are matrimonial cases.

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3. (c) Difficulty of producing evidence owing to lack of means

The Bureau quotes the case of a woman who, eight years ago, had met, and later married, a man who claimed to be, and wore the uniform of, a South African Army officer. He had told her that his Army service was over and had taken a civilian job but he never told her anything about his affairs. She found that he was dishonest and in frequent trouble with the police; he was in prison for a time and was wanted by the police—she did not know why. He had left his wife and sixteen months old baby, to avoid arrest. He sent her no money, she did not know where he was and believed the name he used to be false. Neither Somerset House nor South Africa House had any record of him under that name. She had reason to think he was married before he met her. Were she able to hire a private investigator, a great load of worry and bewilderment might be lifted from her mind.

5. Maintenance orders

The Bureau is of the opinion that maintenance orders should be enforced, if necessary by deducting from income at source, where circumstances warrant it. It adds: "The difficulty at present is of course that so many husbands disappear, and probably take another name to avoid payment of maintenance, or travel round the country doing odd jobs here and there so that their actual earnings are impossible to assess. We wonder whether it could not be made easier to trace deserting husbands and those who do not pay maintenance by

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giving additional powers to the National Assistance Board, the Labour Exchange, and the Ministry of National Insurance so that they could divulge the man's address to the police to enable the wife to bring a summons for maintenance, or to enable the police to arrest the man for arrears of maintenance. We realise that this question does involve the vital issue of the liberty of the subject; but can see no less drastic solution which could be effective."

IV. Information submitted by the Mitcham Citizens' Advice Bureau

This Bureau serves a population of 67,430 and deals with an average of 328 enquiries per month of which twenty-seven are listed as matrimonial cases.

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4. Property rights

The Bureau workers are conscious of the difficulties of the separated wife regarding the house and furniture. They say: "The tenancy of the house—or the mortgage—is usually in the husband's name; as a rule therefore it is the wife who has to leave if a separation order is made. Because she can find nowhere else to go, a wife with children may be forced to remain in the house in circumstances which are barely tolerable.

Similarly, the furniture is usually bought with the husband's money because it is customary for the wife to keep house while the husband earns the wages. If the wife goes, she leaves behind the home which she has helped to build up just as much as has her husband. If a husband is 'a thorough bad lot' it seems wrong that the family should be forced to stay with him or face the upheaval (and perhaps the separation of one child from another) which is likely to ensue if they leave home. It is the children who most need the settled home in familiar surroundings.

There does seem to be a strong case for some arrangement which would give the court power to turn out the husband if he is the guilty party and to enforce an arrangement for the sharing of furniture."

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5. Maintenance orders

On the subject of the non-payment of maintenance orders, the Bureau's comments are summarised as follows:—

The making of a maintenance order provides some security for a separated wife as it gives her the backing of the court. If, however, the husband is unwilling or unable to make his payments regularly, the wife's position may be distressing.

The court does not normally take action until payment has been in arrears for three or four weeks and during that time the husband may make some payment, though he probably does not pay all that is owing. The process of irregular payment can continue indefinitely with the result that, over a period, the wife receives considerably less than the amount fixed by the court. If, under pressure from her, the husband is sent to prison, the wife is in still worse plight.

Her alternative is to accept occasional payments and supplement them in other ways as best she may.

In many cases, particularly where there are small children, the wife can barely manage on the allowance and may be entirely without money if it is two or three days late. This involves recourse to the National Assistance Board and great personal inconvenience and sometimes hardship is involved, particularly where intermittent payments make frequent applications to the Board inevitable.

The Bureau concludes: "However efficiently the machinery of the court and the National Assistance Board functions, it is bound to remain a trouble and an indignity for a wife who has constantly to call at one or other of these offices to seek help. She has been left with the burden of bringing up the family without adequate support from her husband, and should surely be relieved of the worry which these visits entail.

Whatever the practical difficulties involved, it is submitted that there is a strong case for some system of paying the wife regularly on a pay-book issued perhaps by the National Assistance Board and leaving it to the father to recover the money from the husband, possibly by an extension of P.A.Y.E."

PAPER No. 93

MEMORANDUM SUBMITTED BY THE FAMILY DISCUSSION BUREAU OF THE
 FAMILY WELFARE ASSOCIATION

INTRODUCTION

1. The Family Discussion Bureau

The Family Discussion Bureau is a specialised case-work agency, set up by the Family Welfare Association in 1948 in an effort to explore some of the problems in case-work centred on marriage difficulties. As an exploratory and research project the Family Discussion Bureau has had a triple objective: to find out something about the problems of inter-personal relationships as they reveal themselves in marriage difficulties; to develop a technique for providing assistance in such cases; and to evolve a method of training workers in the use of this technique. Since the Bureau was established, approximately 1,000 cases have been referred for assistance; referring agencies have included Citizens' Advice Bureaux, Family Welfare Association secretaries, hospital almoners, medical practitioners, clergy, industrial welfare officers, probation officers, and various other individuals and agencies. There has been an increasing number of direct applications from clients who have heard of the Bureau through personal channels. The Family Discussion Bureau is staffed by a group of specially

selected and trained professional social workers, providing a full-time service. Workers, on engagement, spend a period of one year in post-graduate training concerned with the knowledge and skills relating to their work. This course of study is given by members of the staff of the Tavistock Clinic, Tavistock Institute of Human Relations, and the London School of Economics. The training is approved by the appropriate Home Office committee, and the senior psychiatrist who undertakes part of the training keeps in close touch with the progress of the work. Psychiatric and medical consultations are arranged for clients when desirable. As the work of the Bureau is exploratory, the number of the staff has been deliberately kept small in order that intensive work could be carried on, subject to careful checking. The size of the staff has varied slightly from time to time, but normally consists of seven workers.

The Family Discussion Bureau wishes to submit the following evidence relating to matters within the Commission's terms of reference, and arising from the experience of the workers of the Bureau in their contact with couples who are experiencing difficulties in their marriages.

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RECONCILIATION

2. General

At the present time the main emphasis of the law and of official administration relating to marriage breakdown would appear to be placed on the process of divorce, dealing with the question of reconciliation only as a side-issue, and in certain negative aspects which are considered in more detail below. The situation does not appear to have been improved by the Legal Aid and Advice Act, 1949, in spite of the fact that the majority of the procedures instituted under this Act are actions for nullity and divorce. The situation is, in fact, that the community is subsidising actions for the termination of marriages, while giving little recognition to the possibility that many of these couples, given assistance, might be capable of resuming a satisfactory marriage relationship. The Family Discussion Bureau, while not wishing in any way to oppose the granting of legal aid in divorce cases, feels it is desirable that couples who are prepared to consider the possibility of reconciliation should be given every opportunity to do so, before taking the final steps towards a dissolution of their marriage.

3. Availability of reconciliation services

Following the presentation of the Report of the Home Office Departmental Committee on Grants for the Development of Marriage Guidance (the Harris Committee) in 1948, the Home Office has recognised the work of certain existing organisations, including the Family Discussion Bureau, and has set up a Marriage Guidance Training Board which sets standards for the selection and training of workers in this field. The scope and functions of such services are, however, not yet widely appreciated, and the Family Discussion Bureau considers it is most desirable that there should be some simple and automatic means of informing persons seeking legal action that these services are available if they wish to make use of them. This should be done, if possible, as soon as the marriage threatens to break up. It would seem that this is particularly desirable in those cases in which persons applying for legal advice in connection with marriage problems have to be informed that they have no adequate grounds for instituting legal proceedings. It is felt that some simple routine arrangement could easily be instituted; and it is suggested that the Home Office Marriage Guidance Training Board might well be asked to prepare a small leaflet, giving brief information on the services available, and that it would be the duty of any person or body considering applications for legal aid to supply one of these leaflets to any individual making enquiries or applications for legal aid in connection with matrimonial procedure, e.g., at local Law Society committees, legal advice centres, and Citizens' Advice Bureaux. The Family Discussion Bureau is further of the opinion that to make an approach to any reconciliation service compulsory would completely defeat the aims of such a service, as in general it is possible to achieve satisfactory results only when the individuals concerned have some real desire to reconsider their position, and do not feel they are being forced into action against their own wishes.

4. Nature of the proposed service

(a) Name of service

The Family Discussion Bureau workers have very frequently had to deal with cases in which marriage partners have been prepared, and indeed eager, to seek assistance, but would have, at the same time, been extremely resentful of any suggestion that the worker regarded reconciliation as necessarily the only aim in view. Such couples have been prepared to reconsider their positions from a new point of view, i.e., with the object of deciding what their real feelings were about the situation, and what were the possibilities and problems with which each was faced. Such re-appraisal most commonly leads eventually to the desire to attempt reconciliation, but any suggestion of this purpose in the early stages will often result in the complete refusal of one or both parties to co-operate. The Family Discussion Bureau therefore feels very strongly that to regard any service as having a purely reconciliatory function would introduce an element of compulsion and of lack of open-mindedness which would prejudice the success of the service from the beginning; and that it is therefore desirable not only that the workers in such a service

should be prepared to undertake the discussion of the case without any prejudice as to the type of treatment desirable, but also that the name of the service should, as far as possible, indicate that this is the case. It is suggested that it could most suitably be referred to by some such name as a Personal Consultation Service.

(b) Voluntary service

The Family Discussion Bureau is very strongly opposed to any effort to establish a statutory organisation for this purpose, or to make use of persons known to be employed or directly controlled by any government organisation.

5. The law and its relation to reconciliation

It has already been stated that the present practice of matrimonial law has important negative implications in relation to reconciliation. These arise chiefly from the interpretation of the law relating to collusion and condonation. The Family Discussion Bureau has very frequently had contact with clients who, while agreeing to attempt reconciliation, have been strongly discouraged from doing so by legal advisers, probation officers, and others, on the ground that, by doing so, they seriously prejudice their chances of obtaining a divorce, should the attempt at reconciliation fail. If clients, on taking legal advice, are informed that any attempt at reconciliation is likely to involve them in serious legal difficulties, and might prevent them obtaining a divorce, even if the attempt fails from the spouse's refusal to co-operate, any such reconciliation service operating within the field of marriage guidance is, in a large percentage of cases, doomed to failure. In a number of cases, the Family Discussion Bureau has been able to assist a couple to a satisfactory reconciliation only when one of the partners, who had already instituted legal proceedings, had built up the large amount of courage required to ignore the advice of legal advisers or probation officers, and risk a direct approach to the other spouse. If reconciliation is to become, in the majority of cases, something more than a pious hope, then it is essential that a spouse who has instituted or is considering instituting legal proceedings should have his legal position in some way safeguarded from considerations of condonation and collusion.

DESERTION

6. Present position

In the case of desertion, also, it is common for legal advisers to discourage thoughts of reconciliation because of the likelihood that they will compromise the legal position. The legal demand for a continuous period of three years' desertion as a qualification for divorce has the effect of steadily reducing the willingness of partners to consider an attempt at reconciliation, as the length of the separation increases. After a period of about three years has elapsed, the risk of having the waiting period for a divorce lengthened for a further three years, should the attempt at reconciliation fail, can have a markedly deterrent effect on the willingness of the couple to reconsider the position.

7. Recommendations

The Family Discussion Bureau, therefore, would support proposals that the law relating to desertion should be amended in such a way that the qualifying period of three consecutive years should be altered to an aggregate of three years, possibly with an additional qualification to make it necessary for this three-year maximum to have accumulated over a definite period (say, five years), with some definite period (say, six months) immediately preceding the application for divorce.

PRIVILEGE

8. Recommendations

The present position appears to be that any case-worker who has been working with a person concerned in a divorce suit can be subpoenaed as witness in this suit. Until the present time, this has caused no difficulty as far as the Family Discussion Bureau is concerned, but as the success of any work of this kind is very much dependent on clients being completely convinced of the confidential nature of the service, it is fairly certain that, should this position become generally known, it could not fail to have a disadvantageous effect. It would probably not take more than a single well-publicised incident

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MR. B. E. ASTBURY, C.B.E.

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to produce a marked reduction in the trust shown to case-workers by their clients. The Family Discussion Bureau, therefore, recommends very strongly that properly accredited case-workers engaged in work of this kind should have the privilege of withholding evidence which has come into their possession as a result of professional contact with any person.

RESEARCH

9. Present position

One of the major difficulties in connection with making worth-while recommendations about divorce is the absence of reliable data on which to base them. It is for this reason that the Family Discussion Bureau has submitted evidence on such a restricted range of subjects. The statistical data available (Tables O and P in the Registrar General's Statistical Review of England and Wales) is

slight in quantity, but is virtually all that is available apart from statements based on the impressions gained by persons whose work brings them into constant touch with the problem. The amount of systematic research that has been completed is negligible.

10. Recommendations

The Family Discussion Bureau feels that if any real progress is to be made in this field it must necessarily be preceded by a considerable amount of research. The compilation of adequate statistics is one essential, but a problem based so directly on human relationships needs to be studied far more intensively than is possible in this way. A considerable increase in the quantity and quality of sociological and psychological research will be necessary for a real understanding of the problems involved.

(Dated December, 1951.)

EXAMINATION OF WITNESSES

(Miss K. M. OSWALD and Miss F. E. PECK, M.B.E., representing the National Council of Social Service, and Mr. B. E. ASTBURY, C.B.E., representing the Family Welfare Association; called and examined.)

7452. (Chairman): We have here, as representing the National Council of Social Service, Miss K. M. Oswald, Head of the Citizens' Advice Bureaux Department; Miss F. E. Peck, M.B.E., Secretary of the Liverpool Personal Service Society; and representing the Family Welfare Association, Mr. B. E. Astbury, C.B.E., the General Secretary, with whom I have had the pleasure of working on another occasion. We shall take the memorandum of the National Council of Social Service first, and then go on to the other. Before we ask you any questions on the National Council of Social Service's memorandum, do you wish to add anything to it?—(Miss Oswald): My Lord, there are two things which I should like to mention. The first is just to draw your attention to the co-ordinating nature of the National Council's work, and to point out that three or four of its constituent organisations have specialist experience in this field and have, of course, submitted their own evidence to you, so that the evidence we have submitted represents, so to speak, the highest common factor of what in the National Council's view would be acceptable to all its constituent organisations, so far as we can judge. I think that explains why it does not go very far, as it were, in any direction. The second thing, my Lord, is that one of the National Council's Committees wishes to dissent from one of the recommendations that is made in this paper. Would you like me to refer to that now?

7453. I think you should do it now.—My own Committee, the Citizens' Advice Bureaux Committee, wishes to dissent from the recommendation we have made that some means should be found for deducting at source from the income of the man who consistently fails to honour his obligations to pay maintenance to the separated wife. The Citizens' Advice Bureaux Committee takes the view that that would be an interference with the citizen which it would not wish to countenance. The Advice Bureaux themselves, in so far as we have consulted them—we have actually consulted thirty, I think—are divided on that point. They are divided as to whether or not that is a right method, but they are at one in feeling that some means should be sought of trying to enforce maintenance payments when the court has made orders.

7454. They do not think that that particular method should be adopted?—They are divided on that point and their National Committee is very strongly against it.

7455. In view of what you have said, I should like you to tell us a little more about the organisation of the National Council. You state in the preamble to your memorandum the general purpose of the National Council of Social Service and in the next paragraph you say:—

"In compiling this statement the Council has drawn upon the experience of the following of its headquarters departments and associated groups:—

The Women's Group on Public Welfare
The National Federation of Community Associations

The Citizens' Advice Bureaux, Councils of Social Service and Rural Community Councils . . ."

What is the nature of the link between these bodies and the National Council?—The Women's Group on Public Welfare and the National Federation of Community Associations are what we call associated groups, in that they were initiated by the Council and are still, as it were, under our umbrella. But they are not actually departments of the Council's work in the same way that the Citizens' Advice Bureaux, the Councils of Social Service and the Rural Departments are.

7456. These are three departments of your Service?—Yes.

7457. Could you tell me what other departments there are of your Service?—The Women's Group on Public Welfare and the National Federation of Community Associations are groups within our Service, but we do not control them in the same way that we do the three departments just mentioned. In addition, a further group is the National Old People's Welfare Committee, which is in the same category as the two first on our list. The Churches' Group is in the same category, in that we provide the secretariat and the Group works under our sepi, but it is not controlled by us. The Standing Conference of Voluntary Youth Organisations is also in the same category; it is an associated group for which we provide a secretariat.

7458. You go on to say that in compiling the statement you are:—

" . . . especially indebted to the National Council of Family Case-work Agencies, the National Association for Mental Health and the National Marriage Guidance Council for the contributions which they have made."

What relationship do these bodies have to your Council?—They are constituent members of the National Council, my Lord. The National Council is made up of members representing all the main national voluntary organisations, the associations of local authorities, the central government departments and so on, and these are three of the constituent bodies that, of course, have a particular contribution to make in this field.

7459. Will you tell me more about the Citizens' Advice Bureaux, which you have already mentioned?—I am sorry that this is so complicated. The Citizens' Advice Bureaux work is a department for which the National Council is responsible. The National Council initiated the C.A.B. Service and set it up and maintains the department, of which I am the head, for continuing the work of the Bureaux. That is done through the National Committee of the Advice Bureaux, which is made up of representatives of the Bureaux themselves (there are 500 of them in the country), plus four representatives appointed by the National Council, from its Executive Committee, and four co-opted members. That is the Committee that guides the policy of the Citizens' Advice Bureaux Service and it is the Committee that advises the National Council on C.A.B. matters.

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7460. And when you spoke of a difference of opinion, was that a difference of opinion between the 500 Bureaux?—No, Sir. It was a difference of opinion between the National C.A.B. Committee and the National Council's governing body, its Executive Committee, which is responsible for the memorandum which is before you. This is the evidence of the National Council. Because of the time factor, it was not placed before the C.A.B. Committee, in its final form, until after it had been presented to the Commission.

7461. I wanted to get the position clear before going on to your proposals. I see that the National Council is in agreement with the views expressed in the Final Report of the Denning Committee. You say:—

"The Council regards the preservation of the marriage tie as of the highest importance to the community generally and with this in mind would urge more adequate provision of education for marriage and home-making, both as a part of the educational curriculum and increasingly through the work of appropriate social organisations. In addition, we would stress the importance of adequate and widely known services of reconciliation as an essential part of a constructive approach to marriage."

Would you amplify that a little, by telling us, if you can, what specific suggestions you would make in regard to education for marriage and home-making? I ask, because although we think it is strictly outside our terms of reference, we have had a good deal of evidence on it, and I think it would be helpful to have yours on it.—My Lord, we feel that, from our point of view, it is the most important aspect of this. Our experience gained from the Citizens' Advice Bureau, and from some of the case-work organisations with which they are associated, suggests to us that at any rate a large proportion of the people who come to us with marriage difficulties do so because they are a little muddled, they have no notion how to run their homes, they have not budgeted successfully. They may be people whose financial difficulties arise, not directly from real poverty or lack of income, but from inability to lay out that income satisfactorily. Many of them have not learned how to manage and bring up their children satisfactorily. We feel that a good many of those people are not quite adequately catered for by the various forms of education for home-making which already exist. Many of them would not dream, for example, of joining a women's club, and much less would they think of taking advantage of a course of further education provided by the authorities. We feel that some much less formal approach is needed to those people if they are to be interested in education for home-making, and some of us were very disappointed when it was found that the two or three experiments that the education authorities were making in setting up home-making advice centres had to be given up, chiefly on grounds of economy. We are actually trying in my own department to make a very small contribution from the Citizens' Advice Bureau, and a good many of them are trying to provide a special service of home-making advice, which consists largely in making sure that the people who come to them are aware of the facilities that exist in the town to help them in their home-making difficulties.

7462. What you would like, then, is a larger grant from the Government?—The work of my own department, my Lord, has recently been very seriously hampered by the withdrawal of the government grant that we had throughout the war years and until two years ago. We are actually finding it difficult to maintain our C.A.B. work at the same standards as we were previously able to maintain it.

7463. And if you had a larger grant, do you think that you could get the right people to carry on your work on a bigger scale?—Yes, I think that would be so, my Lord. We were able to maintain field officers in this work, in the days when we had grant-aid, who were able to help not only with the recruiting and selecting of workers, but with their training which—from the Citizens' Advice Bureau point of view—is of vital importance. About half the Bureaux are all staffed by voluntary workers who have to be very carefully hand-picked and trained. We feel that it is better not to do advice work

at all unless it can be done extremely well, and that involves a continual process of training, because developments are always taking place about which the workers need to know.

7464. Do you want to add something to that, Mr. Astbury?—(Mr. Astbury): I would like to add to that, my Lord, that the cut in the government grant to the three organisations, of which the Family Welfare Association is one, involved our having to stop altogether, with one exception, experiments which we were carrying out in education for marriage and home-making.

7465. Coming to paragraph 1 of the National Council's memorandum, we have all noted what you say there, but I have no questions on it. In paragraph 2, under the heading "Conciliation", you say:—

"The National Council has been particularly impressed by the evidence of Citizens' Advice Bureau workers as to the increased number of matrimonial problems in recent years and by the number of cases in which the reasons given for seeking separation or divorce appear to derive from an inadequate appreciation of the ordinary responsibilities of family life."

We have had some evidence to the effect—to use a phrase that has been mentioned—that people are more divorce-minded today than they were, say, thirty years ago. Is that the experience of your workers or not? Others, I think, take a different view—I do not think that there is any possible doubt that people are more divorce-minded, and the more facilities you provide for easier divorce the more divorce-minded they will become. Speaking from my experience, going back to my student days, I would say that there is a famine of forgiveness and a lack of toleration, certainly during the last twenty years, and most certainly since the Legal Aid and Advice Act came into being and provided easier facilities for divorce. It was very rare, even during the war, to find couples among the social group, with which we work here, unwilling to consider reconciliation. In general, we find today that they are, as you said, my Lord, more divorce-minded. They are conscious of the facilities which are available for them to obtain divorce, and they are not told of, or they are not put into touch with, people who can give them advice, who can attempt to effect reconciliation, or who can help them to see their own problems more clearly.

7466. I now turn to your suggestions for more and better facilities for reconciliation. I have noted these suggestions, and I only want to ask a question on sub-paragraph (b). You say:—

"That such reconciliation services would need to be free from any element of compulsion and hence would provide invaluable opportunities for service by appropriate voluntary societies adequately equipped and staffed for the work."

Then you say:—

"We agree with the conclusions as to the qualifications for marriage guidance counsellors set out in the Report of the Departmental Committee on Grants for the Development of Marriage Guidance."

Have you any views as to how people could be brought to seek facilities for reconciliation at an early stage? You say, as many people do, that such services should be free from any element of compulsion. How do you suggest that young people, when they have begun to find marital difficulties, should be led to some reconciliation service?—(Mr. Oswald): My Lord, so far as the Citizens' Advice Bureau Service is concerned—and it, of course, covers only one small part of the work done in this field—we feel that it has the opportunity in various ways to encourage people to seek guidance at an early stage because they often come to the Bureaux with something that they have not yet recognised as a marriage problem, and which therefore they would not have taken perhaps to the marriage guidance council. They come, as I said earlier, perplexed with a problem which sometimes we are able to recognise as a matrimonial one, and for which we are thus able to get them skilled help. But I think that I ought to qualify that, by saying that although our service is available for every class of the community, and is used by people of all classes, the family and personal problems that come to us tend largely to be brought by

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people from the more humble classes of the population, so that that only affects one group. We would feel that if all organisations, with whom people come into touch in the course of their marriage difficulties, were more consciously directed towards efforts to reconciliation there might be some possibility of success. It has been suggested lately that there should be far more talks in clubs of all kinds, not only in women's clubs, but in the mixed clubs for boys and girls. There should be talks in those clubs on preparation for marriage, which would include references to the kind of conciliation services that exist, the advice services that exist for people when they have got into difficulties. We would like very much to ensure, for example, that in every legal aid office there was some quite clear guidance given to people to suggest to them that the alternative to seeking legal aid, with a view to securing divorce, was to seek the help of a conciliation service.

7467. Had you in mind the setting up of some new body to which, for example, people who come for legal aid could be referred, if they desired it?—No, my Lord. I would not say that the National Council had in view the setting up of a new organisation. They would like to see the existing ones bettered. (Miss Peck): My Lord, if I might add to that, from our experience we do find that a great many people who come for legal advice can be put in touch with reconciliation facilities. We do feel that if legal advice were more freely available, efforts at reconciliation could be made at an earlier stage.

7468. Legal advice, as distinct from legal aid, in the sense in which the latter term is usually used?—Yes, my Lord.

7469. I was a little puzzled at sub-paragraph (b) of paragraph 3. I did not know that it was necessary for a wife who had been a party to divorce proceedings to describe herself in legal and official documents as "divorced wife"—I have seen the term *feme sole* used. Is it your experience that she has to do it?—(Miss Oswald): It has been suggested to us, since we submitted this memorandum, that we were perhaps wrong in saying that she was required so to describe herself, although some members of the group thought that that was so. I think perhaps it would have been more correct to say that some wives thought that there was such a requirement and were not aware that that alternative was open to them.

7470. I think that Mr. Justice Pearce agrees that there is no compulsion on a wife on divorce to so describe herself.—(Mr. Arbury): I do not think that that is so widely known as it ought to be, because I can recall a case quite recently where the innocent party in a divorce was made to describe herself on official documents as a divorced woman. (Chairman): I can only say that in all my experience I have not come across any statute or regulation which compels that, but I am always open to enlightenment.

7471. (Lord Keith): Might I intervene to ask a question? If a divorced woman re-marries, in the marriage certificate is she not to describe herself as divorced?—I understand so. (Chairman): It is now suggested to me that the formula is "formerly the wife of so-and-so, from whom she obtained a divorce". (Lord Keith): Or she may have been divorced. (Chairman): "... by whom she was divorced", in that case? (Lord Keith): I do not know what the formula is, I am asking for information.

7472. (Mr. Justice Pearce): I think that for the purposes of registration of marriages the formula suggested by the Chairman is right—I cannot recall a case where that point has arisen.*

7473. (Chairman): Would it be convenient to pass now to the Family Welfare Association's memorandum?—Yes, my Lord. I should have said that I am a member of the Executive Committee of the National Council of Social Service and represent one of the contributors referred to in the memorandum of the National Council, the Family Case-work Agencies. I represent that body on the National Council.

7474. Is there anything further that you would wish to add, Mr. Arbury, before I ask you questions on the Family Welfare Association's memorandum?—I would only add, my Lord, what I am quite certain you already know, that since these memoranda were submitted, the Reports of the Law Society and the Law Society of Scotland on the working of the Legal Aid and Advice Act have once again underlined the anomaly in the granting of legal aid for divorce cases, while still not implementing the advice section of the Legal Aid and Advice Act. I can only say that that does support the view that we hold very strongly, that the advice section of that Act should be implemented in order to strengthen the facilities for reconciliation in cases of marital disharmony.

7475. Under the heading of "Availability of reconciliation services", you make an interesting suggestion that:—

"... the Home Office Marriage Guidance Training Board might be asked to prepare a small leaflet giving brief information on the services available, and that it would be the duty of any person or body considering applications for legal aid to supply one of these leaflets to any individual making enquiries or applications for legal aid in connection with matrimonial procedure..."

Have you any other suggestions for bringing the reconciliation services to the notice of people who are in difficulty?—We do quote one or two other useful channels, the local Law Society committees, legal advice centres and Citizens' Advice Bureaux, but we feel that if such a leaflet were available, very large demand for it would be created by voluntary organisations, particularly settlements, women's institutes, townswomen's guilds and so on, that it would very quickly achieve publicity, and people would in that way be informed as to what facilities for reconciliation existed. We feel, however, that in connection with the Legal Aid Committee the giving out of that leaflet should be compulsory, that before a certificate is granted, an applicant for legal aid for the purpose of matrimonial proceedings should be handed a leaflet and should be asked to read and consider it before going on with his or her application.

7476. It should be compulsory on the part of the person handing out the leaflet that it shall be handed out, but not compulsory that the person who receives it should take advantage of it?—That is it.

7477. Under paragraph 4, headed "Nature of the proposed services", you first of all deal with the name, and then, under heading (b), "Voluntary service", you say:—

"The (Family Discussion) Bureau is very strongly opposed to any effort to establish a statutory organisation for this purpose, or to make use of persons known to be employed or directly controlled by any government organisation."

Similar suggestions have been made to us, but I would like to know your reasons for this view.—We feel that generally when a man or a woman takes a matrimonial problem, say, to the probation officer—for whom I have a very great admiration—the chances of effecting a reconciliation are in jeopardy. We find quite frequently in our work with the Family Discussion Bureau, and in our ordinary case-work, that a woman who goes to consult the probation officer about her marriage problems will have them referred to us, or to another voluntary agency, in the belief that the chances of effecting a reconciliation, by getting the other party to come to the counsellor, are greater than if that party were invited to come to a government official.

7478. As to the need for research, you suggest:—

"... that if any real progress is to be made in this field it must necessarily be preceded by a considerable amount of research. The compilation of adequate statistics is one essential, but a problem based so directly on human relationships needs to be studied far more intensively than is possible in this way. A considerable increase in the quantity and quality of sociological and psychological research will be necessary for a real understanding of the problems involved."

Can you think of any statistical information that would be of real assistance to this Commission in the work which falls within its terms of reference?—I do not think that

* See now regulation 95 of the Registration (Births, Stillbirths, Deaths and Marriages) Consolidated Regulations, 1927, as amended by the Registration of Marriages (Registrar) Regulations, 1952 (S.I. 1952 No. 1192).

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any such statistical information exists. For the last four years now we have been carrying out a research project, in conjunction with the Tavistock Institute of Human Relations, for the Nuffield Foundation. The project is an inquiry into the pattern of human relationships with a view to ascertaining where tensions in family life first begin and what common factors are disclosed, and whether from that material we can learn anything by way of a new approach or a more effective reconciliation service. We have also been analysing the first thousand cases of marital disharmony with which our own Family Discussion Bureau has been engaged. That is an analysis of the material, the age groups, what percentage of older men marry younger women, and vice versa, and whether there is a greater percentage of breakdowns in particular marriage groups than in others. Those are experiments of a research nature which are in the process of being carried out, but I know of no other statistical information within your terms of reference, my Lord.

7473. (Mr. Justice Pearce): In section I of the Appendix to the memorandum submitted by the National Council of Social Service, it is said, with reference to conciliation machinery:—

"The Society is frequently consulted by a husband or wife who is involved in divorce proceedings and who, although desiring reconciliation, is under the impression that this is out of the question once proceedings have been started."

Do you think that reconciliation machinery in the High Court itself—if it were sufficiently well known—would be of value?—(Miss Peck): Yes, I think that it definitely would be of value.

7480. There is one other question. I fully appreciate your stressing the necessity for such a service being voluntary, but will you give me your views on this difficult problem? There are 30,000 divorces a year, to take an approximate round figure. From questions I asked, I think, of the National Marriage Guidance Council, it appeared that well over three-quarters of those would concern marriages in which there had been no advice from your, or any similar, service. In other words, in only a very small proportion of the divorces have the parties concerned consulted the voluntary advice associations. Would you agree with that?—I do not know. (Miss Oswald): I do not think that we have any means of knowing whether those figures are correct.

7481. I do not want you to comment, unless you think that those figures are grossly wrong, because I think that on investigation you will find that they are about right. The people who come to you are, on the whole, the more thoughtful people, who realise the gravity of breaking up a marriage, is that not so?—I would say that that was true of people who went to one or other of the marriage guidance services, knowingly going to ask for marriage guidance. I think that must be true. I do not think that it is true perhaps of people who come to the Citizens' Advice Bureaux. I think that many of those people come because their life is in a muddle, it has gone wrong. Sometimes they come saying, "I want a divorce", apparently thinking that that is their only way out, and not having considered any alternative means of resolving their problem. I do not think that it would be true to say that it was mainly the thoughtful people who came to the Citizens' Advice Bureaux.

7482. Suppose that out of 30,000 divorce cases, there are over three-quarters in which the parties have never had any advice from one of the voluntary associations. I am suggesting to you that possibly those are the more impetuous and less thoughtful people, because they have taken no preliminary steps to avoid the break-up. That is reasonable, is it not, as a very general assumption?—(Mr. Ashley): I should have thought that, as a general assumption, it was correct.

7483. The problem is this. Those people who have not taken advice are possibly the ones who are most in need of advice. Now, I suggest to you that unless those people are compelled or directed to consult some advisory service, the majority of them will not do so and so will never be made to realise what a serious thing it is to break up a home and will not be brought to think seriously about the possibility of reconciliation. Do you agree?—I think that their attention should be drawn to the fact that a reconciliation service is available and that they

should be advised to make use of it. I should have thought that some of them would do so, and that that would be better than the present situation. It seems to me that to require people to consult, say, a marriage guidance counsellor, would in the end mean that they would go as a more matter of form and not with the idea of a reconciliation being effected. To make it a routine procedure would, I think, destroy the very basis of reconciliation.

7484. (Mr. Mace): May I address my questions to Miss Peck? Miss Peck, are the arrangements in Liverpool for help in the magistrates' court peculiar to Liverpool alone?—(Miss Peck): As far as I know, yes, they are.

7485. I think that it would be of interest to the Commission to learn something about the procedure in Liverpool. When parties are in a matrimonial dispute before the magistrates in Liverpool, the City Council are prepared to pay for certain legal advice and legal representation?—Yes.

7486. Through your Society and through the poor man's lawyer, acting jointly?—That is quite correct.

7487. The purpose is to give an unrepresented party the right of legal representation when the other party is represented?—Yes.

7488. So that when the wife goes to court armed with a solicitor, the husband, if he is poor, can get a solicitor, and vice versa?—Yes.

7489. Do you think that the fact that solicitors are brought in has any bearing on reconciliation?—I have no evidence on that at all.

7490. The magistrates themselves use all the services available for reconciliation without regard to what the solicitors have done?—Yes.

7491. That leads me to this point. Why do you think that the extension of legal aid to the magistrates' courts will really help to solve the problem?—This point was raised by the magistrates who were members of our Executive Committee. I think that it was felt that if one party is represented and not the other, then the magistrates do not get a true picture, and it is not so easy for them to make a right judgment. I would say just from my own observation—I have no statistics to prove this—that a proportion of the cases are dismissed when there is a solicitor on both sides.

7492. (Dr. Bethel): Could I ask a question of Mr. Ashley? You talk of the training which is given in marriage guidance work and reconciliation services and so on. You apparently require quite high qualifications?—(Mr. Ashley): Yes.

7493. Do you require a degree plus a year's practical training?—Our main academic qualification is a degree or diploma in social services, and on top of that a year's specialised training, part of this spent in our own case-work agencies, part in Citizens' Advice Bureaux, and then a series of seminars which are taken by the tutors in the Mental Health course at the London School of Economics, and then each of our case-workers is for a year in the Family Discussion Bureau.

7494. I was wondering how you are going to guarantee adequate salaries and pension arrangements and so on, for such highly trained people, if you wish this service to remain in the hands of voluntary organisations?—We look on our Family Discussion Bureau, with its highly specialised staff—in addition to our case-workers we have doctors, medical psychologists and anthropologists and so on—we look upon that rather as the Harley Street of our general case-work agencies, which we would regard as the general practitioners. All our case-work officers would meet problems of marital disharmony with which they may be able to deal, but they know that behind them is the Family Discussion Bureau with its highly trained group of what one might call specialists, and I think that is what will have to happen in future also. You will have to have, as it were, a general practitioner service, and then a specialised service at the centre for more highly skilled work.

7495. I quite understand that. How do you envisage its being financed?—That has been the problem of voluntary social services for the last five years. Somehow it is financed, if the public can be satisfied that this service is really worth while. I think that the voluntary

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organisations would have to pioneer, would have to demonstrate what could be done, and possibly at a later date the Government may consider it worth while to spend a little more on reconciliation services than on providing facilities for divorce, but I do not think that there is any easy way of financing them. We have financed our Family Discussion Bureau by grants, first of all from the Goldsmiths' Company, who gave us a sum of money to carry out experiments for a year, then the Carnegie Trust gave us a sum of money to carry it on for five years. Now the London County Council have made a contribution for five years, and because of that, I imagine, money from the public is now beginning to come in—there has just been a legacy of £12,000 left exclusively for this purpose. It is a venture of faith, and I think that the money will come eventually.

7496. Would you have any objection, once your pioneering days are over and you have established the real need of such a service, to its being a statutory service?—I should. I should prefer it to be a grant-aided service, for then you preserve its voluntary status. It is really a partnership that one wants between the voluntary organisation and the local authority, and if one gets that partnership, then, I think, it will be far more successful than a statutory service.

7497. (Mr. Beloe): Miss Oswald has told us something about what is being done in youth clubs in the way of education for marriage. Could you tell us what bodies are used by the youth clubs to give this kind of help?—(Miss Oswald): Yes. I am aware that the National Marriage Guidance Council have been having consultations with some of the youth organisations with a view to including in the clubs' curricula some kind of talks, not specifically, I imagine, on marriage guidance, but rather on the value of learning about home-making, and maintaining home life. As I understand it, the idea is to create an atmosphere in which people are conscious of the importance of maintaining satisfactory home life and of taking almost any steps towards that end. I do not know more detail than that. I was present at a conference at which the possibility of something of that kind was considered, and I was aware that following that conference some experiments were going to be made.

7498. It is not in your experience very widespread yet?—No, so far as I am aware it has only just begun. I think what I was trying to say was that what we envisaged was an attempt, through all the social work organisations which have contact with large numbers of people who might need this service, to promote an atmosphere in which the need to stabilise home life would be recognised, and to try to find ways of doing this imaginatively, so that it would appeal to young people, and to those who perhaps are disinclined to think seriously about these problems.

7499. Is it your experience that on the whole the more thoughtful boys and girls go to youth clubs, but that there is a considerable percentage who do not go to any youth organisation?—We know certainly, of course, that there is a considerable number who do not go anywhere. I do not think that I am qualified to say whether it is the more thoughtful ones who go. I should imagine that some of the more thoughtful will go, but there will also be some whose home life is such that they normally devote more time to that. I do not believe I am quite competent to answer that. (Mr. Ashbury): I perhaps can help you, as governor of one of the largest settlements in the East End of London. I would fervently wish that it was only the thoughtful boys who came into the boys' club movement. I think that after a period there, they do become more thoughtful and more considerate, but I think the thing that attracts the modern boy to the boys' club is the facilities which that club has to offer. You get the raw material and you have to shape it. I think that a good deal is being done in the youth movement by way of education for marriage, though in a small way, in making it part of the training of club leaders. Both in the National Association of Boys' Clubs and the National Association of Girls' Clubs and Mixed Clubs, they now have recognised training courses of six months, which are recognised by the Ministry of Education, and in that training lectures are given as to the best way of presenting the case for education for marriage to clubs.

Education for marriage also forms part of the courses which are given to senior boys, who have a week's course and a fortnight's course arranged by the National Association of Boys' Clubs. I cannot say whether the same courses are available for the girls, but I should imagine that they are.

7500. The point I was particularly trying to get at was whether the kind of people who most need this preparation for marriage are the people who come to the clubs?—(Miss Oswald): I would have thought that generally they were not. We certainly would feel that in regard to women's clubs, with which we are most closely concerned, the ones whom we most want to get at are not the ones who come to the clubs. I am afraid that would be true, it is only a method of reaching one group. If one could make appreciation of home life fashionable again, instead of unfashionable, then that would be like throwing a stone into the pond, and it might reach some of the undubbable people.

7501. I think, Mr. Ashbury, in answering the Chairman about the general attitude towards divorce, you agreed that people were becoming more divorce-minded, because divorce was easier. Could I put another point of view to you? It has been said to us—and I would like to know what you think about it—that people are demanding a higher standard in their marriage now, and that therefore they will not put up with intolerable or almost intolerable conditions in the same way that they used to. (Mr. Ashbury): I do not know that I could say from my experience that it is because they are demanding a higher standard. I think it is the case, as I said to the Chairman, that there is less tolerance, there is less of the virtue of forgiveness, and there is a rush to end a situation which a few years ago people would have tolerated. I had a fair amount of experience during the war, and know how ready husbands were, in very many cases, to forgive the wife, and those cases I have been able to follow up—and I did follow some up, for a specific purpose, two or three years ago—where a reconciliation had been effected, where the chaplain of the regiment or someone of that kind had explained the situation to the husband, and we had done what we could to rectify the position there, in those cases the marriage had been sustained. That, I think, is the real reason—that at the moment people are, not only in connection with marriage but in connection with all kinds of social ills, less inclined to forgive, less inclined to be tolerant, more inclined to demand their rights without a corresponding sense of duty.

7502. (Chairman): As I understand your answer, in your experience, that attitude has developed within the last seven years, that is to say, since the war ended? Is that so?—I should say since the war ended.

7503. (Mr. Beloe): But it would be true to say that many of the cases, which you were describing, were at a time when the man and wife were not living together?—Yes.

7504. Therefore it might have been easier for them to get up with things?—On the other hand, the contrary is not infrequently true. The separated husband retained a picture of the attractive girl he had left behind, and the shock of finding her a mature woman when he returned was pretty great in quite a number of cases, so that absence has other results than making the heart grow fonder.

7505. Could I ask whether that is the experience of the other two witnesses?—(Miss Peck): Yes, I would say that that, generally speaking, was our experience. On the other hand, I do think that women are now used to very much more independence, and I think that that has a great deal to do with it. We find that many young people living at home have almost all their earnings to spend, they give very little at home; I should think that in certain circles it is generally recognised that the contribution is 30s., it does not matter how much they are earning, 30s. is what they give to their mothers to keep house for them, and then when they get married and they have not got all that money to spend it does tend to make them discontented. I think that is a very big factor in addition to the one Mr. Ashbury has mentioned.

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7506. But you do not think that many people demand a much higher standard in marriage?—Yes, I do think that there is a much higher standard now, it is much more of a partnership. (Mr. Ashbury): I think it is only fair to add that a contributory factor of some importance is the fact that, because of our housing conditions, thousands of families lack the first essential to married life, a common roof, and we find that where it is possible to get them a home away from "in laws", away from rooms, and so on, reconciliation is not only easier but is far more likely to be sustained. (Miss Oswald): May I just add, is there not possibly another aspect, the fact that nowadays a woman can, if her marriage situation is not to her liking, break away and support herself, whereas I suppose that fifty or even twenty-five years ago, that would not have been possible?

7507. Arising out of that, could I just ask you this question? It has been suggested to us—I hope I am putting it correctly—that the National Assistance Board sometimes is rather too quick to help a wife who has parted from her husband, that she can go and get something from the National Assistance Board rather than see if she could go back and make a go of it.—(Mr. Ashbury): She has a statutory right to that, and I should think that there would be some very uncomfortable questions asked in the House if that statutory right were denied to her.

7508. What would be your view, quite apart from the statutory right, on that? Is it so?—I have no experience of it. In general, we find that the officials of the National Assistance Board are extremely sympathetic and would do what they could to help.

7509. (Chairman): Do you mean "help the woman", or "help the marriage to become a success"?—Yes, we have quite a fair number of cases referred to us by local officials of the Assistance Board, who realise that something more than a monetary payment is required. (Miss Oswald): One would not in any case want a woman forced to go back. Surely the Assistance Board would have to do a great deal of research into the rights and wrongs of her leaving before they withheld assistance from her?

7510. May I put something arising out of that? As I recollect the suggestion, it was to this effect, that it was so easy for a woman just to go and get this assistance, and that it might be better if, while giving her the assistance which she needs, and to which the statute entitles her, she should be told, "Go and bring your husband here next week, and let us see what he says about it, and what can be done about it". What do you say to that suggestion?—(Mr. Ashbury): I was assuming, my Lord, that she was not in a position to go and bring her husband, that either the husband had left her or that she had left him.

7511. That could be a matter which could be ascertained if the officials took that line, could it not?—I should think so. I should have said that, formerly, in the days of the relieving officer, there was more likelihood of that kind of service being made available than there is today. A great deal of it now is an over-the-counter transaction, and there is not what there used to be in the old days, the weekly visit, compulsory by statute, of the relieving officer to the home, who then had first-hand knowledge of it. It is one of the few benefits, possibly, which were lost to us when the Poor Law was swept away.

7512. (Lord Kell): If I might just add to this discussion, the suggestion was, I think, that the woman who would have a claim against her husband which she might bring for support, did not bother about it because all she need do was to go to the National Assistance Board and get the payment from them, and then the just left her husband alone. I think it was suggested that that was a difficulty at the present time.—But the Assistance Board would have a statutory right to find the husband, and to compel him to support her, even to the extent of prosecuting.

7513. I know, but I think the suggestion was that she did not help them much to find him, and they had difficulties.—(Miss Oswald): My Lord, I would not say that that was generally our experience, in fact, one of our members expressed very great concern about the woman who, in the absence of support from her husband, is

obliged to go constantly to the Assistance Board. It was suggested that she is left with the bringing up of her children, and that it is an added burden for her to have to go and seek the support of the State, particularly when the husband pays a little of the maintenance due from him intermittently, and she has to go constantly and make good her case all over again. Therefore I would not feel that in our experience we could generalise in the way you have suggested.

7514. I am interested to hear that.—(Miss Peck): From our experience, we find that the National Assistance Board does urge the women to take out a maintenance order.

7515. I think it was a Liverpool witness who rather emphasised this point.—That is not our experience, anyway.

7516. (Mr. Baloe): May I put one quite different point, about which I would like your opinion? I see you say that much more care is needed in investigating the suitability of one parent as against the other to have custody of a child, and in section I of the Appendix to the National Council's memorandum it is stated that: "Many cases are known . . . in which the children tend to be used as 'pawns' and suffer great hardship". May I put this question to you? Suppose that there were some way of providing the judge with information about the children, and that it were established, in his view, that the person who was praying for custody of the children was unsuitable. Suppose that the other spouse was less unsuitable, but was unwilling to have the children. What would be the right thing to do?—(Miss Oswald): I was going to ask to be allowed to qualify what we had said in our memorandum. We ought to have said, I think, that this kind of investigation should be made only where there is a dispute, both parents wanting to have custody of the children. I do not think that our group would have pressed for that kind of investigation, where the parents were agreed between themselves and one was anxious to have the children. We would feel that it should normally be assumed that the parent asking for custody was suitable to have the care of his or her children unless there was a dispute, and that the question of suitability would not arise unless it did in the ordinary way, as it might with any home where the mother and father were living together. Have I made it clear?

7517. Yes, quite clear, but then could we just come to this point, where it is said that the children tend to be used as pawns and suffer hardship?—(Miss Peck): Could I say here that our point was not that which you have raised about the suitability of the home. From our experience, in a number of cases where the custody is given to one parent, whether it is because of divorce or separation, the other parent with sometimes, really out of spite, try to take the children away, he will meet them after school and try to take them to his home, that is the kind of thing, really offences against the person. We felt that the regulations under the Offences against the Person Act might make it an offence for the other parent to remove the children.

7518. The difficulty was more related to access?—Yes.

7519. Then are you quite happy that the best thing is done for the children, when the parents agree? Assume that the home has got to be broken up, or has been broken up, are you satisfied that the best thing is done, within those limits?—(Mr. Ashbury): Yes, although I would qualify that by saying that the exception would be where children have to spend part of the year with one parent and part with the other. Wherever that arrangement is made, I think that the effect upon the child is very serious indeed, but, by and large, where agreement is reached that the mother shall have custody of the children, even though she may have been the guilty party, provided the father has reasonable access, then that arrangement is satisfactory. (Miss Oswald): We would feel that it should be the most nearly natural thing for the child, which would be, would it not, remaining with one parent or the other? I suppose that the home life of a great proportion of children is not perfect, but the most natural thing that could be achieved would, I think, be the right one to choose.

7520. We have had a good deal of evidence to suggest that enquiries ought to be made in every case where there are children of the marriage.—I do not think we would

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support that, Sir. I do not think that our group, if we were able to consult them on this point, would take that view. I think that they would feel that the natural thing would be for the child to remain with the parent who wanted it, and that it would not be appropriate to raise the question of the suitability of the parent just because there happened to be this break-up of the home.

7521. Do you have much contact with the children after the divorce has taken place?—No, Sir. In my particular department we have in any case much more contact with marriages which have been broken up by separation than by divorce. Divorce is exceptional with the people who come to us.

7522. Mr. Ashbury, do you have much contact with families after a divorce has taken place?—(Mr. Ashbury): Yes, a fair amount. The children may come to us in various ways, from a child guidance clinic or something of that kind, or the mother herself may come with a problem. But I would have said that we had no evidence that the child living with one parent after a divorce was less well cared for than any other child who is deprived of one parent. The ideal, of course, is two, but I have no evidence that children of divorced parents living with one parent are less happy, less well cared for, than children similarly placed, though not through divorce.

7523. (Lady Bragg): Mr. Ashbury, do you have only one Family Discussion Bureau for the whole of London?—We only have the one Bureau for the whole of London. We have nine area offices covering the metropolitan boroughs of London, where ordinary work is carried out and suitable clients would be referred to the Bureau from those offices. Then, in addition, we are responsible for the Citizens' Advice Bureaux in the Central London boroughs.

7524. These are all the cases, which come to the Bureau from the area offices, discussed by what you might call a panel?—Yes, they are all discussed at what is called a case conference, of which the chairman is a medical consultant, and there is a psychiatrist, a psycho-analyst, an anthropologist and a clergyman, and then the case-workers.

7525. Is that for the purposes of your own research, or to know where next to send the client or patient?—No, it is with a view to ascertaining, if possible, the views of the group as to where the marriage has failed and the kind of treatment—I am not a psychiatric social worker, otherwise I would say the kind of therapy—that is suggested by the group.

7526. Are the couple intimidated by this?—The couple are never present.

7527. I realise that, but what I mean is, do you go further and further into treatment? Do the couple, or perhaps one spouse, go from expert to expert?—No. I think the group would say that all they do is to help the client to release his or her anxieties, so that the client himself, or, where there are two, the clients themselves, may see their problem and face up to it themselves. You cannot do something for people, in marriage problems; you may be able to do something with them, but unless they themselves desire to do something with their marriage it is very difficult.

7528. Finally, how do you know that they have become reconciled? Have you some sort of follow-up service?—That, of course, depends upon the circumstances of each case. If they told us that they were happy we would not attempt to interfere, unless they themselves came to us from time to time. The endeavour, of course, is to establish what is called a good client-worker relationship, and they would be told, "Look here, don't ever let it get as bad again as it has got now. If you have any problem, do come here and talk it over", but that would depend on the kind of relationship the worker established with the couple.

7529. (Mrs. Jones-Roberts): I would like to hear, Miss Oswald, a little more about the deserted wives you come across who have difficulty in collecting their maintenance money. In the first place, I think you said that there were 500 Citizens' Advice Bureaux up and down the country, and I have no doubt you classify your records of the type of enquiry which comes in. Are you in a position to tell us roughly the volume of cases of this kind which come to the Bureau?—(Miss Oswald): I

cannot give you figures in that amount of detail. You are quite right in saying that we classify the enquiries which come to us, and we said in our memorandum that we had helped about 110,000 in a full year with matrimonial problems, but I could not say, out of the 110,000 matrimonial problems, how many of them were concerned with the non-payment of maintenance. I have, however, quoted some figures in the Appendix to our memorandum for two or three individual Bureaux which may perhaps give you the picture you would like to have. At Harrogate, for example, the Bureau has dealt with sixty-six enquiries in a month—this is a quite small Bureau open on three half-days a week—of which nineteen were matrimonial cases. We have details about ten of those cases where there was a problem about the non-payment of maintenance, so that in that particular Bureau about half the matrimonial cases have been related to the non-payment of maintenance. I do not think I can get closer than that, except to say that the Bureaux generally are very deeply concerned with this question of non-compliance with court orders. Their experience suggests that these orders are treated rather lightly in certain circles.

7530. What advice would you give in the first place to a woman who comes with a complaint of this nature? What would you tell her to do in the first place?—We should advise her, if she had not already done so, to consult the clerk of the court to see what action he was prepared to take. If that had already been done, we might go on from there to discuss the possibility of getting legal aid for her, but I am afraid that in the majority of these cases, or at any rate in a great proportion of them, she would have lost contact with her husband and would not be in a position to bring him before the court.

7531. In the National Council's memorandum, you recommend that some method be found of deduction at the source, although I gather that not every one of your members agrees with that. I wonder if you have fully considered the difficulties, though on the face of it it sounds extremely attractive? For instance, that type of worker very often moves about and cannot be found. There is very often a second union which is a very heavy drain on his resources. Then you might very well have opposition, possibly, from employers, or from organised groups of workmen. I would like very much to know whether you have fully considered these difficulties?—Yes, we have, and I think that one of the reasons why some of us dissent from this recommendation is that so large a proportion of the men concerned would in fact not be in regular work and therefore would not be affected by such a provision if it were made. On the question of the men having set up another family, we are very well aware of that, and we think that part of the trouble is that he sees the needs of the family with whom he is living, the illegal family, so much more clearly than he sees the needs of the family he has left behind, but we do not see that that is a reason for him to flout the decision of the court. We feel that it is for the court to take that into account when it makes the order, and not for the man to take it into account. We think that the necessity to deduct maintenance payments at source would only arise in a limited number of cases, where everything else possible had been done.

7532. Would you say that the point of view of this type of woman—the deserted wife—has possibly not been put forward forcibly enough, that, whereas other people might be organised, this type of woman is very much on her own always, and has difficulty in putting her case forward?—Yes, the woman whose maintenance has not been paid and who is a little bit helpless about going to the court and asking for action to be taken.

7533. I wondered to what extent you felt that the opposition really could be overcome?—We think that some of it could be overcome, of course, if she were able to be represented when there was the need. We have ourselves experience of at any rate some cases in which the whole question of the man's payment of his maintenance has seemed to be rather lightly regarded. I have even heard a clerk at a court say, "Why does she need money? She is in hospital, why is she pursuing him?", but of course the woman needs the money for all sorts of reasons, but particularly to maintain the rent of the room she is going to when she comes out of the hospital. In that

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particular case, we arranged for legal aid, and when the husband knew that legal aid was going to be given, he immediately began to pay the arrears of his maintenance. I think it is true to say that that is a class of woman who is awfully bad at putting her case and getting it dealt with. Of course, that would be true of a lot of people who come to Citizens' Advice Bureaux, that is why a great many of them come, because they cannot put their case in a way that will be satisfactorily dealt with unless they are helped to do so, therefore I may be prejudiced in saying that, because of the kind of people we deal with.

7534. You also said that the section which opposed this recommendation still felt that some means could be found, and I wondered what they had in mind—I do not think that they had any other ideas about how it should be done.

beyond the ones we have suggested; but, in spite of that, they felt that deduction from wages was an interference with liberty, and that they would not be associated with it, though I am afraid they had not any other constructive proposals to make.

7535. Are you sponsoring the idea that the woman should immediately become a charge on the National Assistance Board, and that the Board should then see that the man pays up?—No, I do not think that I would be justified in saying that we were sponsoring it. I think it would rather be true to say that our group felt that this was one possible thing which might be considered.

(Chairman): Thank you for your memoranda, and for your help in coming here this morning.

(The witnesses withdrew.)

MEMORANDUM SUBMITTED BY THE SOLDIERS', SAILORS' AND AIRMEN'S FAMILIES ASSOCIATION

(NOTE.—The memorandum submitted by the Association has already been printed as Paper No. 65 in the Minutes of Evidence for Wednesday, 29th October, 1952 (Twenty-Second Day), when the witnesses representing the Scottish Branch of the Association gave oral evidence (Questions 5154 to 5261) before the Royal Commission. It is reproduced below except for paragraph 4 and section C which are concerned solely with the law of Scotland.)

A. PREAMBLE

Nature of the Association

1. S.S.A.F.A. is a voluntary association which was founded in 1885 and incorporated by Royal Charter in 1926. Its objects are to study the welfare of the wives, widows, children and other dependent relatives of men and women who are serving or have served in H.M. Forces. S.S.A.F.A. has approximately 1,500 branches in the United Kingdom and overseas, staffed by about 15,000 voluntary workers. In 1950 nearly 200,000 problems were referred to S.S.A.F.A. for solution.

Principles of S.S.A.F.A. work

2. S.S.A.F.A. is by nature concerned in promoting family life on a healthy, secure and permanent basis and all its endeavours are consistently applied to that end. It is, therefore, a fundamental principle of the Association that no S.S.A.F.A. worker will ever willingly help to provide evidence for, or to institute, divorce proceedings. In any marital dispute the Association invariably tries to effect a reconciliation between the parties. Should the attempt fail and the couple be determined on divorce or judicial separation, they are referred elsewhere.

The Association has adopted this attitude, apart from any question of principle, because of the absolute necessity of ensuring the frankness and confidence of those who seek its help.

Volume of reconciliation work

3. S.S.A.F.A. does a considerable amount of reconciliation work. Of the 200,000 problems referred to S.S.A.F.A. in 1950, only about 57,000 involved help with money or in kind. The remainder were advisory, and of these a substantial proportion concerned matrimonial questions, or were consequential on a marital dispute.

When a soldier or airman wishes to stop payment of marriage allowance to his wife, S.S.A.F.A., at the request of the War Office and the Air Ministry, investigates the possibility of a reconciliation before the stoppage is put into effect.

Oral evidence

5. S.S.A.F.A. would be willing to appoint representatives to give oral evidence before the Royal Commission if so desired.

B. PRIVILEGE

6. It is in S.S.A.F.A.'s view a fundamental condition of successful reconciliation work that both parties to a dispute should feel able to speak freely and frankly, secure in the knowledge that no word of what is said will ever be repeated to a third person, or be used against them.

There can be nothing more damaging to this confidence than a newspaper report of a divorce case which quotes evidence given by a marriage counsellor, S.S.A.F.A. representative, or some other welfare worker.

7. S.S.A.F.A. representatives have made the fullest possible use of the protection at present given by the law as it stands, but there are many cases, particularly in undefended divorce proceedings, where "privilege of the parties" grants no protection to the marriage counsellor.

8. S.S.A.F.A. representatives have instructions never to give evidence in divorce cases except under subpoena and then only, after protest, at the express direction of the judge. In S.S.A.F.A.'s experience most justices are sympathetic towards the position of welfare workers engaged in reconciliation and on occasions the judge has expressly commended the attitude of the S.S.A.F.A. representative.

9. Nevertheless, S.S.A.F.A. strongly urges that legislation be introduced to grant absolute privilege to welfare workers in respect only of their attempts to effect reconciliations between parties to a marital dispute.

10. It is considered necessary that this privilege should extend to marriage counsellors, probation officers, S.S.A.F.A. representatives and workers for the Family Welfare Association, etc. The difficulty of devising a legal definition which would cover all those who should be covered, but which would not be too wide, is appreciated, but S.S.A.F.A. hopes that it would not be insuperable.

C. LEGAL AID FOR DESERTED WIVES

11. S.S.A.F.A. considers that legal aid should be made available to a deserted wife (particularly if she has children) to enable her adequately to present her case for maintenance to the court. When a wife with young children has been deserted, she is most often left without means. Her husband, on the other hand, has the whole of his earnings with which to pay for legal representation. In S.S.A.F.A.'s opinion the resulting inequality in the presentation of the wife's and the husband's case sometimes results in miscarriage of justice.

D. ENFORCEMENT OF COURT ORDERS

Case on the court

12. S.S.A.F.A. feels very strongly indeed that legislation should be introduced to place the onus of enforcing an order for maintenance, alimony or affiliation upon the court which made it. It is at present far too easy for a man to evade payment. He has only to change his employment and residence to be able to ignore the order for the rest of his life. While the wife can go to court and obtain a warrant for the man's arrest, no action is taken until she succeeds in tracing him and can provide

MEMORANDUM SUBMITTED BY THE SOLDIERS', SAILORS'
AND AIRMEN'S FAMILIES ASSOCIATION

19 November, 1952]

MR. M. H. NISBET, LIEUTENANT-COLONEL R. H. RUSSELL,
LIEUTENANT-COLONEL J. F. BATTEN, O.B.E., M.C., AND MRS. M. E. N. HIGHAM

the police with his address. It is, in S.S.A.F.A.'s view, grossly unfair to place such a responsibility on a wife, particularly when she is without adequate means. The court, on the other hand, has at its disposal the police and the National Register and should surely be automatically responsible for enforcing the orders which it makes. At present, court orders are, in S.S.A.F.A.'s view, widely treated with contempt.

Enforcement overseas

13. S.S.A.F.A. is glad to see that the number of Commonwealth territories in which orders made in the British courts can be enforced is growing. With the intermingling of peoples which took place during the late war and since, this is particularly important. Notwithstanding the agreements on enforcement which have been made, it is extremely difficult for a wife resident in the United Kingdom to carry out all the procedure necessary for the enforcement of an order against a husband in, for instance, Ontario. For this reason, S.S.A.F.A. would particularly urge that the recommendation contained in paragraph 12 above should apply equally to the enforcement of orders (where arrangements exist) against men living overseas.

Payment of arrears of maintenance

14. Under the law, as it stands, if a man is arrested for failing to obey a court order and sentenced to a short term in prison, such a sentence automatically cancels the arrears which he has failed to pay. The purpose of a court order is to provide for the support of the man's dependants. This is not ensured by the man spending a few weeks in jail. S.S.A.F.A. considers that a prison sentence should not absolve a man from paying some, or all, of the arrears on the order.

E. CHILDREN**Custody**

15. S.S.A.F.A. considers that the custody of the children of a marriage should never be decided until the court has seen and heard both parents and (usually) the children themselves. This is not always so at present.

Tenancy of the home

16. In S.S.A.F.A.'s view, the courts should be empowered to award the tenancy of the family home to whichever parent is granted the custody of the children.

* See Question 7547.

(Dated 20th December, 1951.)

EXAMINATION OF WITNESSES

(MR. M. H. NISBET, LIEUTENANT-COLONEL R. H. RUSSELL, LIEUTENANT-COLONEL J. F. BATTEN, O.B.E., M.C., AND MRS. M. E. N. HIGHAM, representing the Soldiers', Sailors' and Airmen's Families Association; called and examined.)

7536. (Chairman): We have here Mr. M. H. Nisbet, Secretary of the Association; Lieutenant-Colonel R. H. Russell, honorary consulting solicitor and advisory member of the Council; Lieutenant-Colonel J. F. Batten, O.B.E., M.C., Director of S.S.A.F.A. Overseas Service, and Mrs. M. E. N. Higham, honorary secretary of the Oxford City Division of S.S.A.F.A. We have already had the pleasure of meeting representatives of the Scottish Branch. Would any of you like to add anything to your recommendations in regard to the law of England, or are they sufficiently set out in your memorandum?—(Mr. Nisbet): I have two comments, my Lord, about the evidence which was given by our Scottish Branch—I have seen the transcript of that evidence—I do not know if the Commission would like to hear our comments?

7537. Certainly.—My comments arise on paragraph 3 of our memorandum. The first concerns a clear definition of the words "substantial proportion", in connection with the S.S.A.F.A. cases which concerned matrimonial questions. I should say at once that our branches do not keep separate records of matrimonial cases, indeed we are at some considerable pains to keep our clerical work to a minimum. I cannot give the Commission a precisely accurate percentage. We have, however, by consulting a number of our busier branches, arrived at an informed guess, which puts the proportion for the Association as a whole at between five and ten per cent, or, on the 1950 figures which are before you,

Furniture

17. S.S.A.F.A. also considers that the courts should be empowered to allocate to the parent to whom custody is granted sufficient beds, bedding and other essential furniture to provide for the reasonable needs of the children, irrespective of whether that parent owns the furniture or not.

F. REMOVAL OF DETERRENTS TO RECONCILIATION**Condonation**

18. In some respects the present divorce laws provide deterrents to reconciliation. Where a couple have been separated for a prolonged period (as so often happens when the husband is a Serviceman) and a matrimonial offence has been committed by one or the other, any attempt at settling their differences by trying to live together for an experimental period would now be regarded as condonation. It is S.S.A.F.A.'s experience that when, during a period of enforced separation, there has been matrimonial trouble, a man returning from overseas is deterred from making an attempt to save his marriage by the fear of prejudicing his right to obtain a divorce.

S.S.A.F.A. suggests that, where a matrimonial offence has been committed, a reasonable period of cohabitation should be permitted without prejudicing the legal rights of either party.

Desertion

19. In the same way the present requirement that a desertion must have lasted for at least three years since the couple last lived together discourages real efforts at reconciliation. Few would risk the failure of such an attempt, towards the end of the three-year period, knowing they would then have to wait another three years for their freedom. Solicitors naturally advise their clients accordingly to the law as it stands.

S.S.A.F.A. suggests that to encourage attempts at reconciliation it should be sufficient, to obtain a divorce, if a desertion has amounted to an aggregate period of three years during the last five, of which perhaps six months of continuous desertion should have taken place immediately before the petition.

* * * * *

from 10,000 to 20,000 cases in that year. The percentage in respect of men serving overseas, about which Colonel Batten will tell you, is considerably higher. In making this estimate, we have adopted a wider definition of what constitutes a matrimonial problem than that applied by our Scottish Branch. Miss Buchan, I rather gather from the transcript, was speaking only of the cases referred to her by the Services for an attempt at reconciliation after the husband had signified his wish to withdraw the marriage allowance. We, on the other hand, in making our guess, have included less serious disputes, and the problems of separated wives—Mrs. Higham will tell you something about those, if you wish. The second point was to answer the enquiry of my Lord Chairman, at the Edinburgh hearing, as to why reference to the Admiralty was omitted from the last sentence of paragraph 3. [See Questions 5155 and 5156, Minutes of Evidence for Wednesday, 29th October, 1952 (Twenty-Second Day).] The answer is that the War Office and the Air Ministry, and the commanding officers of those two Services, deal directly with S.S.A.F.A. representatives, according to instructions laid down in the Army Manual on Pay Duties, and in an Air Council Instruction, in both of which S.S.A.F.A. is specifically mentioned. The Navy, however, deals with its family problems through its own family welfare officers at the naval ports. If the family is living away from the port concerned, the family welfare officer may well, and often does, refer the case to the appropriate

19 November, 1952]

MR. M. H. NISBET, LIEUTENANT-COLONEL R. H. RUSSELL,
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[Continued]

S.S.A.F.A. representative locally, but he is not to my knowledge compelled to do so under any Fleet Order. The procedure is different from that of the other two Services, and is indirect.

7538. Thank you. I think you mentioned that Mrs. Higham could add something. I have no specific questions to put on these first three paragraphs, but if Mrs. Higham would like to add to them, I would, of course, be glad to hear anything she wishes to say.—(Mrs. Higham): No, I do not wish to add anything.

7539. Then we will turn to the other parts of the memorandum. Paragraphs 6 to 14, inclusive, set out proposals which are already very well before us, and the proposals are of great importance, but they are so clearly set out that I personally have no questions on them, though if Mrs. Higham wishes to add anything I would be very glad to hear it.—May I refer to paragraph 11? We get a very large number of deserted wives, and their position really is very pathetic. The husband, in a lot of cases, disappears, and the woman is left without money to sue him in court, and has the utmost difficulty in making ends meet. If she goes to the National Assistance Board, they will give her 5s. to summons the husband in the court. But of course it takes time to come up before the court, and in the meanwhile she and her young children, as these usually are, have a very hard time, whereas the husband, with the whole of his earnings, can employ a solicitor, and very often does, and the wife is very much at a disadvantage. In my local branch, we have, on several occasions, where in our opinion the case was absolutely first-class, paid a nominal sum for the wife to be represented, so that there should not be a miscarriage of justice.

7540. So you are anxious that legal aid should be extended?—Yes.

7541. (Lord Keith): May I ask a question? I am not quite clear how in connection with S.S.A.F.A.'s work you come into contact with deserted wives?—I have a dual personality, Sir, I run the Citizens' Advice Bureau and I also run the S.S.A.F.A. branch. Because I run the two, the Service people come back to me. I have worked in the city for about twenty years, so that cases which I knew as S.S.A.F.A. cases during the war have come back to me. When husband and wife have failed to settle down or—as in most cases, in fact almost all cases, I regret to say—the husband has deserted the wife, the wife automatically comes straight to me.

7542. So these are cases where the husband has left the Army or one of the other Services, and the wife, perhaps having made contact with you while her husband was in one of the Services, comes back to you to deal with her civil problems?—Yes, and in quite a number of cases, I have obtained from the husband's regimental fund money to pay the solicitor.

7543. But you are speaking here really more as an officer of the Citizens' Advice Bureau than as a representative of S.S.A.F.A.?—No, Sir, because S.S.A.F.A. looks after the welfare of the ex-Servicemen as well as the serving men. In fact we do far more work among the ex-Servicemen and their families than we do actually amongst the serving men.

7544. When you speak of the ex-Servicemen, do you mean the ex-Serviceman who was in the regular Army?—No—there are of course the regulars, the ones who served during the war and very often signed on for a further short period, three or five years.

7545. Do you cover National Servicemen?—I cover National Servicemen while they are serving, and for one year afterwards.

7546. Then these wives of whom you are speaking are not wives of National Servicemen?—Some of them are, but not very many.

7547. (Chairman): The only questions I want to ask arise on paragraph 15, under the heading, "Children". You say:—

"S.S.A.F.A. considers that the custody of the children of a marriage should never be decided until the court has seen and heard both parents and the children themselves. This is not always so at present."

I want to ask, first, does that suggestion refer to all cases, including cases where both parents agree that one of

them shall have the custody, or is it limited to cases where there is a contest over the custody of the children?—(Mr. Nisbet): Firstly, I should say that we would now wish to qualify that paragraph slightly. Where it says, "until the court has seen and heard both parents and the children themselves", we should like to insert "normally" before the words, "the children".

7548. I see. Is the suggestion, so modified, intended to apply only to cases where there is a contest between the parents about the custody of the children, or is it intended to apply to cases where the parents both agree that the child shall be in the custody of one of them, for instance, the mother? And in that case, do you still think it necessary for the court to see and hear both parents and possibly the children themselves, or not?—I think in that case that it would not be necessary for the court to see both parents and children.

7549. Coming to the children themselves, I have a little doubt about your suggestion as modified. Some people think that to see the children should be an exceptional rather than the normal thing, because it is rather apt to upset them and so bring them too much into the limelight, and it is better to see the parents in order to find out what sort of people they are, to hear what they say, and then only in the exceptional case to see the children. That is another point of view, and I want to know whether you are wedded to the idea that normally the children should be seen, and if so, why?—We quite appreciate the undesirability in many cases of bringing children too much into the limelight, but when we said that the court should see both parents and children, we did not intend that the children should be seen in open court by the judge. We would prefer that the judge saw the children in private.

7550. I quite appreciate that, but even so, I do not know whether you have tried seeing the children in private. Some people think that if you have seen the parents and heard them it is a very doubtful advantage to see the children, unless in the exceptional cases. However, you think that normally they should be seen, in private. Would you like to give any reasons for that?—The main reason is that we consider that the children are not sufficiently considered when awarding the custody, and we think that if this recommendation were accepted, more consideration would be given to them.

7551. The whole of this paragraph, as I understand it, relates to cases where there is a contest between the parents?—Yes.

7552. (Mr. Young): In paragraph 16, where you are dealing with the tenancy of the home, is it your suggestion that this should be awarded even in a case where the home is owned, not by the husband, but by some other party altogether?—There must be some tenancy agreement.

7553. Assuming a case where the house belongs to a stranger and the tenant is the husband, does your suggestion go the length of imposing a new tenant, so to speak, upon the stranger?—Yes, it does.

7554. The second thing I want to ask is whether you, Colonel Russell, were engaged in this work during the war?—(Lieut.-Colonel Russell): Yes.

7555. And you had to do with stoppage of pay?—Yes, Sir, I was the competent military officer.

7556. In relation to so-called reconciliations, was not the position this in your department, that at first, at the outbreak of war, a soldier was allowed to stop the allowance to his wife without any reference to a welfare officer at all?—That was before I had to do with it, and that, if I may say so, was a situation I remedied. The reconciliation procedure which was adopted in 1942, I think, was very largely of my devising, or at any rate that of my carrying through, against great opposition from the Treasury, because it involved the continuation of family allowance from public funds after the soldier had requested its discontinuance. The object of that was to allow for a period of six weeks, during which the welfare officers might have an opportunity of seeing whether the breach could be avoided. A further aim was to ensure that in the meantime the wife was not left without means, which would not only cause great hardship to her, possibly the children also, but was very likely to put an end to any possible reconciliation there might be, because she would

[9 November, 1952]

Mr. M. H. NIBBY, LIEUTENANT-COLONEL R. H. RUSSELL,
LIEUTENANT-COLONEL J. F. BATTER, O.B.E., M.C., and Mrs. M. E. N. HIGHAM
PAPER No. 94. MEMORANDUM SUBMITTED BY THE ASSOCIATION OF COUNTY COURT REGISTRARS

[Continued]

be so bitter and hurt that her money had been cut off, possibly without any justification at all.

7557. What I want to ascertain is this: in figures which are called reconciliation figures, would I be right in saying that these are cases where a soldier had been persuaded, or had decided, to resume the allowance?—I am not quite sure that I understand that question.

7558. We have been given a lot of figures about reconciliations in Service cases, and what I want to do is to test the validity of these figures as cases of reconciliation. These figures, I think—correct me if I am wrong—are really figures where the soldier has either been persuaded, or has decided, to resume the family allowance, is not that so?—I am not quite sure what the figures are which you have received, but I should think that is so.

7559. Was it not very often, in your experience, the case that when a soldier discovered that his own pay might be stopped to maintain his wife, and that he would lose the family allowance, he very quickly resumed it?—You mean that his pay might be stopped by the competent military officer?

7560. Yes.—But it was only stopped to the extent of the qualifying allotment which he was previously making.

7561. But did you not find that the soldier very often did not want even to pay that to his wife?—Yes, in many cases.

7562. And when he found it was going to be stopped out of his pay, that was a very potent factor in making him resume payments?—No, Sir, I would not say that. (Chairman): What were the reconciliation figures you had in mind, Mr. Young? (Mr. Young): The figures which were given, I think, by S.S.A.F.A., and also by the Citizens' Advice Bureau, and in fact reconciliation figures generally. So far as Service cases are concerned, I am not at all satisfied that they are really reconciliation figures. I thought that Colonel Russell was the man to ask. (Chairman): The reason I asked was because, looking at S.S.A.F.A.'s memorandum, I could not find any figures there.

7563. (Mr. Young): It is nothing to do with the memorandum, it is in connection with other figures.—Might I amplify my last reply to Mr. Young? Mr. Young asked me whether I thought that reconciliations had been caused in many cases by the fact that a soldier realised that he would not be any worse off if he were reconciled, than

if he were not. My experience was that many reconciliations were caused because the trouble had arisen through largely artificial circumstances, and very often through rumours, or even vindictiveness on the part of relations, who put ideas into the soldier's mind. When things were explained to him by a welfare officer, and the facts put correctly to him in a sympathetic and understanding way, the soldier was very often quite willing for the allowance and his qualifying allotment to be continued.

7564. (Chairman): In other words, you managed to remove the feelings which had prompted the man to stop the allowance?—Yes, my Lord.

7565. (Mr. Maddocks): I want to ask a question on paragraph 12, because some members of the Commission may think it is right as it stands. You say: "It is at present far too easy for a man to evade payment. He has only to change his employment and residence to be able to ignore the order for the rest of his life". That is not so, is it? If a man changes his residence and goes to live somewhere else, the woman has only to lay a complaint in her own court, and the complaint is sent to the district in which the man is living, a summons is served on him or a warrant granted against him. You can always get at him, can you not?—(Mrs. Higham): No, Sir, it is not always possible to do so. I have had any number of cases where the husband has cleared off, set up a new establishment, and it has been absolutely impossible to get hold of him. The National Assistance Board have advanced the woman 5s. to take proceedings in the court, but as the man cannot be found, ...

7566. You are referring to a case where the address is unknown?—They are nearly all unknown.

7567. When the address is unknown, why do you not apply for a warrant? The police will find him for you.—They are not always very helpful, I am afraid. Should not the National Assistance Board apply to the police to find him, because the woman is being supported by them? I do not know how the relieving officer found the man in the old days, but he always did. The Assistance Board will allow a case to go on for months. I have one in mind now. It is now a year since the court order was made, and the man has not paid a farthing.

(Chairman): Thank you very much for your memorandum, and for your assistance in coming here today.

(The witnesses withdrew.)

PAPER No. 94

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF COUNTY COURT REGISTRARS

I. PRELIMINARY

On the 1st January, 1951, the Association consisted of 126 members, of whom sixty-six were district registrars of the High Court exercising jurisdiction in divorce. As every district registrar is a member of the Association it can claim to be fairly representative.

Each member of the Association has been supplied with an abridged copy of the Commission's terms of reference and asked for his observations on the subject matter thereof. The substance of the replies is, so far as possible, incorporated herein.

The Association's activities and the offices of its members are confined to England and Wales. Consequently nothing is said on any matters pertaining to Scotland.

II. CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

Extension of grounds

1. On this subject there is a fairly widespread feeling among district registrars that the question of general changes in the law relating to divorce is a matter of policy which does not concern them as such. Nevertheless, the question of any extension of grounds for divorce has engaged the attention of members considerably and the case of a couple who have been separated for a good number of years, with or without proof of a matrimonial

offence, has attracted a good deal of notice. This is the only case put forward as a possible additional ground for divorce; otherwise it is felt that existing grounds are broad enough to afford relief in proper cases and that further extension would not be consistent with the dignity of the institution of marriage or the welfare of the body politic.

2. But there is a good amount of support for the view that where spouses have been living apart voluntarily and continually for, say, seven years, and there is no likelihood of reconciliation, then, subject to proper safeguards for the maintenance and the custody and care of children, the court should have the power, at the instance of either party, to dissolve the marriage; the power to be entirely discretionary and on such terms as the court thinks fit.

3. It is to be noted:—

(1) There should be a long minimum period, which must be unbroken.

(2) Whether the separation is under agreement, order of court or neither, is immaterial.

(3) There must be no likelihood of a resumption of cohabitation.

(4) There need be no matrimonial offence as the term is understood today.

4. It is not proposed to offer observations on the purely personal, domestic, religious and social aspects of such

a remedy, of which, no doubt, others will speak, but there are three outstanding legal advantages, namely:—

(1) It would afford relief in many cases where no matrimonial offence has been committed, or such commission is doubtful and proof cannot readily be obtained.

This class of case is fairly common and legal practitioners are frequently troubled by it. There are many cases where it is plain to the parties that cohabitation will never be resumed, yet neither has committed or is disposed to commit a matrimonial offence. There are other instances where it is doubtful whether the circumstances of the parties give rise to a legal remedy. And there are yet others—cases of suspicion—where, either on account of distance or concealment, proof is difficult to obtain.

(2) It would eliminate some, at any rate, of that class of case where an offence is deliberately committed to provide grounds for divorce.

This happens, fairly frequently it is believed, where, at any rate, one of the spouses is determined to bring the marriage to an end, generally to enable one or both to re-marry.

(3) It would help to avoid collusion.

In spite of legal safeguards, which are extensive, of course, it is felt that, though actual cases are seldom discovered, collusion is fairly common.

Miscellaneous suggestions

5. The following suggestions are put forward:—

(1) That actions for restitution of conjugal rights should be abolished as having ceased to serve any useful purpose.

(2) That husband and wife should be placed on terms of equality as regards liability for costs.

Under existing law there is full power to award costs against a wife but it is not the practice to do so unless she has sufficient means of her own to pay them. The suggestion as to putting both on an equal footing is prompted by current views as to sex equality.

(3) That the Inheritance (Family Provision) Act, 1938, should be amended so as to include for possible provision a former wife who had established, by court order or agreement, a right to maintenance. It is pointed out that it is often impracticable and/or undesirable to invoke the provisions of Section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as to securing to a wife a gross sum of money; impracticable because the form of the respondent's assets is unsuited to security, and undesirable, in that to fetter the respondent's use of them might result in loss of income. An example of such a case is that of a trader of moderate fortune, say £10, 15 or 20,000, whose capital is very largely employed in his business.

(4) Leave to present a petition for divorce within three years. In view of the decision in *Ambler v. Ambler* (1951) 1 A.E.R. 980, the law should be amended so as to enable a special commissioner to grant such leave. [See Question 7568.]

This is a technical defect which causes some inconvenience to proposed petitioners in that they must apply to a judge—usually in London—instead of to the special commissioner, locally.

III. CHANGES IN POWERS OF COURTS OF INFERIOR JURISDICTION

6. A good number of suggestions have been made on this subject. Broadly, they may be brought under three heads, as follows:—

(1) It is suggested that all jurisdiction of petty sessions in matters relating to husband and wife be transferred to the county court.

(2) That the county court be given concurrent jurisdiction with the High Court in divorce.

(3) That divorce jurisdiction be conferred on such county courts as may be prescribed subject to (a) special arrangements at Manchester and other large places for

trial by a High Court judge, and (b) the right of any respondent to have the case transferred to the High Court.

But it is submitted there is no need for any fundamental change here.

7. As regards (1), the idea of one court disposing of all powers affecting relations between husband and wife—in the nature of a matrimonial court—appears attractive. But existing jurisdiction should be left with petty sessions. There is no doubt that for the class of case with which they deal, the magistrates' courts have evolved an efficient procedure in relation to separation and maintenance orders. Such orders are cheap and quick to obtain and easy to enforce. It is doubtful whether this class of business would be transacted as efficiently if the powers were transferred to any other court. The machinery for enforcement and recovery seems very satisfactory. These considerations surely outweigh any advantages which might be gained by allocating all such powers and jurisdiction, in relation to divorce and kindred matters, to one court.

8. The suggestions in (2) and (3) are by no means new. Transfer of divorce to the county court was suggested to the Wedgwood Committee in 1943 and again to the Denning Committee in 1946. The proposal was rejected on each occasion. The following is an extract from the Report of the Wedgwood Committee, para. 28: "Before leaving this question we think it desirable to advert to two other possibilities which have come under our consideration relative to the trial of divorce cases in the provinces. The first was that the work of the Judges of Assize might be lightened by referring all undefended cases, possibly also all *Four Persons'* cases, to the County Court. We do not doubt that the County Court Judges, who already discharge many onerous duties, would handle with efficiency and a full sense of responsibility such matrimonial cases as came before them. Nevertheless we have rejected this alternative for the reason, which appears to us sufficient, that it does not pay adequate regard to the significance and the public importance attaching to matrimonial cases of every kind. These cases seem to us to call for treatment in the highest court available. [The Association's italics.] Moreover we think it undesirable to have different tribunals for defended and undefended cases, and it would be impossible to try defended cases in the County Court without completely dislocating the ordinary business of such Courts."

9. The Second Interim Report of the Denning Committee, paragraph 4, quoting as it does the Report of the Royal Commission of 1912 and re-affirming the attitude of that Commission on the point, is in similar vein.

10. The reasons for keeping divorce in the High Court apply with as much force now as then—perhaps more, if additional grounds are provided—and there is no reason for reversing the conclusions of these two Committees, both of them recent and, of course, both based upon adequate material before them at the time.

11. With a procedure considerably reformed on the recommendation of the Wedgwood and Denning Committees, existing arrangements, whereby long defended cases are tried at assizes and short defended and undefended taken by special commissioners, who are mainly county court judges, are adequate. The great majority of divorce cases are now being dealt with by special commissioners and this has been so for the last five years. Apart from one or two difficulties of an administrative nature, which call for smoothing out and which will be dealt with later, the form of the special commissioner, looked at in the light of five years' experience, seems quite satisfactory. Generally speaking, it brings justice expeditiously, cheaply and locally—often more so than was the case when all divorce was dealt with at assizes. And the system has the merit, too, of dissolving marriages "in the highest court available" by a judge or his equivalent.

12. There are one or two difficulties, amounting in one case to an anomaly, which call for cure by administrative action. For instance, in one town divorce litigants and their solicitors must travel forty-two miles to appear in London before a divorce commissioner, who, sometimes, is their own county court judge. But surely this could be remedied by extension of the list of divorce towns.

IV. CHANGES IN THE LAW RELATING TO THE PROPERTY OF HUSBAND AND WIFE

13. A married woman with separate means should be legally obliged to contribute, according to her capacity and in proportion with her husband, to the general expense of running the matrimonial home.

14. The material position of married women has altered very considerably since 1882, when the Married Women's Property Act was passed. In the seventy years that have elapsed since, ideas and social habits have undergone great change. No doubt the process has been stimulated very much by two wars. The result is that today great numbers of married women engage in trade or follow regular employment and have earnings in their own right. In many cases, especially of traders and workers in the small income group, their earnings approach or even surpass those of their husbands.

15. Under the common law, a husband is and always has been liable to maintain his wife according to his condition or estate in life. A wife is not, nor ever was, except in rare instances under the Poor Law, under obligation to maintain him. But then, until 1882 the wife's property vested in the husband on marriage; so that the husband's liability to maintain was only logical and there could have been no question, before 1882, of any obligation on the wife. The Act of 1882 conferred rights on married women as to owning property in their own right as if they were single persons, but imposed no obligations. There, again, that perhaps is not to be wondered at. Domestic habits, the activities of married women and the social scene generally were then so much different.

16. According to modern thought and ideas, however, the wife is an equal partner, in the fullest sense, in the matrimonial undertaking. This is her recognised and established position today and no view of her being in any sense inferior in the matrimonial relationships would be countenanced. If that be her standing, surely it is not unreasonable that she should contribute according to capacity and proportionately with her husband to the expense of running the matrimonial home.

17. The drawbacks of the present position, frequently revealed in the course of hearing applications under Section 17 of the Married Women's Property Act to decide, as between husband and wife, ownership of goods, are as follows:—

(1) The wife tends to regard her own capital and earnings as something apart and of no concern of the husband. She often rather resents questions being asked about it, her attitude being that it is "hers" and has no connection with the family fund consisting of "housekeeping" provided by the husband, except to such extent as she thinks fit to apply it. Contrast with this the position of the husband whose income is very largely charged with domestic obligations from the moment he receives it.

(2) The wife almost invariably reserves to herself the right to spend her money as she thinks fit, without reference at all to the husband. She is, in many homes, in charge of the entire domestic finances and sometimes spends the housekeeping money given to her by her husband entirely on "consumables" such as rent, rates, coal, electricity and food, whereas her own she applies to goods of a more permanent nature such as furniture. Then when they quarrel she claims the furniture.

(3) The wife's earnings are often the cause of friction. The commonest forms assumed are: (a) the husband considers the wife is not contributing as much as she should to ordinary household expenses and so cuts down the housekeeping he gives her; (b) the husband considers the domestic inconveniences resulting from his wife going out to work outweigh the material benefit received by himself and the family.

Presumption of advancement

18. For reasons of equality similar to those set out in the immediately preceding paragraphs, the presumption of advancement in favour of a wife should be abolished or at least considerably modified.

19. The presumption, logical enough when the property rights of the spouses were unequal, is now, it is submitted,

out of date and does not conform to modern ideas, property rights and social usage. It is difficult to see any more reason for raising a presumption in favour of a wife, where the assignment is by the husband, than it is in favour of the husband where the assignment is by the wife.

Section 17 of the Married Women's Property Act, 1882

20. It is suggested that the Section be amended to give express power:—

(1) to order a sale;

(2) to award a money judgment where such a course seems necessary to do justice between the parties, e.g., by way of equalisation.

21. Some registrars think that the terms of the Section do not, certainly, cover the orders the court would sometimes like to make. The difficulty arises, principally, over property found to belong to the parties jointly and/or missing goods. In the case of joint property, where physical division is either impossible or difficult to effect, the court often wishes either to order a sale or to award ownership to one, subject to payment by him to the other of a sum of money. Likewise with regard to missing goods, it is sometimes desired to award value as an alternative to ordering return, e.g., where goods have been destroyed or disposed of by one spouse and on enquiry are found to belong to the other.

22. Again, it is not certain that the terms of the Section, as they stand, are not wide enough to cover the cases in question. But there seems to be considerable doubt on the point and there is some feeling that existing case law on the Section is not an entirely adequate guide.

23. *Former spouses.* If it were the case that the Section confers a wider jurisdiction than the court would have in a common law action between former husband and wife (it is understood the Section was only enacted to provide a remedy denied to spouses because of marriage), then no doubt a good case exists for enlarging its provisions to include former spouses for a period of, say, six or twelve months after the termination of marriage.

V. CHANGES IN THE ADMINISTRATION OF THE LAW

24. It will be remembered that divorce practice was extensively and radically overhauled as a result of the recommendations of the Wedgwood and Denning Committees. Consequently, suggestions under this head are not numerous. They are:—

(1) Maintenance

It should be made compulsory to ask for maintenance either in the petition or on notice, *at the latest*, some reasonable time before the petition is heard. Under existing practice a petitioner may apply either in the petition (in which event the following has no application) or at any time up to two months after final decree without the leave of the court and thereafter, at any time, with such leave. As a consequence many applications are put forward for the first time after final decree (generally within two months) and come as a complete surprise to the husband who frequently says, when the proceedings have been undefended, that his attitude to them would have been different had he known there was to be a claim for maintenance.

It is unfortunately the case that a good deal of divorce is as much the wish of the respondent as the petitioner. It is felt that in many cases, were a defence raised, the conduct of the petitioner would be revealed as being little (if any) better than that of the respondent.

Nevertheless, because of equal anxiety to terminate the marriage, the proceedings are not defended. There is a tendency for husbands to allow themselves to become respondents in these circumstances. Then, probably after final decree, comes the first intimation of a claim for maintenance. Admittedly, under Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the award of maintenance to a wife is discretionary; nevertheless, the position of the husband, especially as to allegations of conduct, is inevitably weaker and that of the wife stronger by virtue of the pronouncement of the decree in her favour.

(3) *Decree absolute*

Provision should be made for the court despatching certificates of final decrees to petitioner and respondent without application or fee.

In district registries there are frequently enquiries, nearly always by respondents, of course, asking what has happened to the divorce.

To compensate for lack of fee, it is suggested that the fee on filing a petition be increased.

(3) *Bills of costs*

A copy of the bill of costs endorsed with date and place of taxation should be sent to the party who has

to pay the cost, notwithstanding that appearance has not been entered.

Such a practice would help to avoid annoyances and resentment when payment of costs is being enforced.

(4) *Orders dispensing with naming of a co-respondent*

A petitioner should be able to proceed without the necessity of obtaining an order dispensing with making an alleged adulterer a co-respondent.

This would put a husband petitioner on the same footing as a wife petitioner who alleges adultery with an unknown woman.

(Received 9th January, 1952.)

EXAMINATION OF WITNESS

(MR. J. H. LAWTON, representing the Association of County Court Registrars: called and examined.)

7574. (Chairman): We have before us, as representing the Association of County Court Registrars, Mr. J. H. Lawton, the President of the Association. Before I ask you any questions do you wish to add anything to your memorandum?—(Mr. Lawton): I have one or two remarks, my Lord. First, may I refer to paragraph 5 (4), under the heading, "Miscellaneous suggestions"? The decision in *Ambler v. Ambler* has been reversed since the memorandum was compiled, and that sub-paragraph should be deleted. Secondly, I would like to supplement what is said in paragraph 24 (1). In the form of memorandum of appearance, Form 5 in Appendix III to the Matrimonial Causes Rules, which has to be served with the copy petition, the respondent is asked whether he wishes to be heard on a number of matters, including maintenance. If maintenance is not asked for in the petition, the reference to maintenance in the memorandum of appearance has to be struck out by the petitioner's solicitors before service. The fact that the word "maintenance" is struck out on this form might give the respondent the impression that the wife does not intend to claim for maintenance at all.

7575. Your suggestion is that the word "maintenance" should not be struck out?—Exactly. I make that point supplementing the suggestion I have made that where maintenance is sought it should be asked for, at any rate, before the petition is heard.

7576. I suppose there are two possibilities, either that the form should be slightly altered, or else that maintenance should not be struck out?—Yes. The third point which I wish to make is not mentioned in the memorandum. It is an administrative matter, and it is a suggestion that the courts ought to be able to avail themselves of the services of a probation officer or his equivalent. I think that his services would be particularly useful in dealing with applications for custody.

7577. You mean the county court?—I mean the High Court. (Chairman): There is, of course, a court welfare officer attached to the High Court now.

7578. (Mr. Justice Pearce): Are you referring to cases that are tried, say, at Leeds?—Yes.

7579. Because, you know, there is such a service in London.—Yes.

7580. And you want some similar service available in divorce cases heard in the provinces?—I suppose that we are only used to our own system, and I had entirely forgotten that the service was available in London. But certainly it is not available in the provinces so far as I know, and I know that special commissioners frequently would welcome the services of such a person, particularly in dealing with applications for custody.

7581. Of course High Court judges on circuit do, in fact, use the local probation officer. I have done it myself, and I know other judges who have done it.—The probation officer whom the local magistrates use?

7582. Yes.—I did not know that. And certainly I have never heard of him being called upon by special commissioners and, of course, they deal with a tremendous number of these cases now.

7577. (Chairman): The suggestion is that special commissioners or, in fact, any person doing this judicial work out of London should have available the services of some such officer?—That is the additional suggestion which I would like to make.

7578. In paragraph 1, under the heading, "Extension of grounds", you say:—

"On this subject there is a fairly widespread feeling among district registrars that the question of general changes in the law relating to divorce is a matter of policy which does not concern them as such. Nevertheless, the question of any extension of grounds for divorce has engaged the attention of members considerably and the case of a couple who have been separated for a good number of years, with or without proof of a matrimonial offence, has attracted a good deal of notice."

Then you say, in a guarded manner:—

"This is the only case put forward as a possible additional ground for divorce; otherwise it is felt that existing grounds are broad enough to afford relief in proper cases and that further extension would not be consistent with the dignity of the institution of marriage or the welfare of the body politic."

Coming to the particular proposal which you say is a "possible additional ground", you put forward three "legal advantages" of the proposal, and you say, for reasons which I can appreciate:—

"It is not proposed to offer observations on the purely personal, domestic, religious and social aspects of such a remedy. . . ."

—No.

7579. As the objections to that proposal which have been put forward to the Commission all come under one of these four headings, I think I shall put no questions to you on that subject.—No, I understand that, my Lord.

7580. We note the three legal advantages. As regards section III of the memorandum, I have only one question, on paragraph 12. I wondered what the towns was from which divorce litigants and their solicitors must travel forty-two miles to appear in London.—That point was made by the registrar from Southend, my Lord. It may not have been Southend itself, but it was certainly one of his courts on that circuit.

7581. As regards section IV, which deals with changes in the law relating to the property of husband and wife, that is interesting, because we have heard so often what the husband should do for the wife. But you say:—

"A married woman with separate means should be legally obliged to contribute, according to her capacity and in proportion with her husband. . . ."

That is, I suppose, the proportion which her means bear to her husband's means?—Yes.

7582. Then, in paragraph 13, under the heading, "Presumption of advancement", you say:—

"For reasons of equality similar to those set out in the immediately preceding paragraphs, the presumption of advancement in favour of a wife should be abolished or at least considerably modified."

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In case that presumption is not familiar to all the members of the Commission I should say that it is this, that if a husband puts money or other property in the name of his wife, it is presumed that it is a gift and not a loan. That is the presumption which you had in mind?—Yes, my Lord.

7593. You suggest that that should be abolished or modified. Would it not be just as good, from your point of view, if the presumption applied to both spouses? If the wife put something into the name of her husband, it would be presumed that it was a gift, and if the husband put something into the name of his wife, it would be presumed that it was a gift.—Yes, I think it would, if the presumption worked both ways.

7594. May I suggest that that is better than your suggestion for this reason, that as far as my experience goes, generally, though not invariably, if one spouse puts property into the name of the other it is intended as a gift? Would you agree?—I do not find it so, my Lord. It is thought that estate duty and income tax can be evaded that way. I find that putting property into the wife's name or into joint names, for reasons of that kind, is fairly prevalent, and there is no intention of a gift present at all.

7595. Would it not serve such people right, if it was presumed that it was a gift unless they proved to the contrary?—That is one way of looking at it and, of course, they cannot be allowed to plead their own fraud. Nevertheless, in fact I find that a great many husbands put property in the wives' names and the joint names, for reasons of that kind.

7596. Your suggestion is, at any rate, that the presumption should be the same for husband and wife?—Yes, so long as it is the same both ways, I do not think it matters.

7597. (Mr. Justice Pearce): The point made in your memorandum about a petitioner having to travel forty-two miles is not one to which one need attach a great deal of weight, is it?—I do not think so. I think that surely can easily be remedied by adding to the list of divorce towns.

7598. You give an instance of a man having to travel forty-two miles. I suppose that could be easily done if he got up at eight o'clock, and he would be almost sure to be finished by lunch time. Is that not a fair description of the situation? The alternative to that would be to bring down a judge, counsel, solicitors, and have an assize. You have either to take the judge to the parties or bring the parties to the judge.—Not an assize surely?

7599. What are you envisaging, a special sitting?—I am envisaging the local county court judge sitting in Southend as a commissioner. The whole point, I gather, is that the parties come from Southend to London, to have their divorce heard before a divorce commissioner who is their own county court judge. On the face of it, there is no reason why the same commissioner should not deal with the divorces in Southend.

7590. (Chairman): This is one isolated case?—It is the only case I know of.

7591. (Mr. Justice Pearce): Is it necessary for us to consider this very seriously? If once in his life a man has to go forty-two miles to London, it is not an unbearable hardship, is it?—Once in the life of a good number of people, I suppose.

7592. I suggest that the existing arrangements make very reasonable provision for litigants, even though in odd cases it may be necessary for a petitioner to travel forty-two miles. Do you agree?—Would there be any undue difficulty in creating another divorce town so that the special commissioner could sit in Southend?

7593. No doubt if the people in Southend have a view that they want to put forward, they can put it forward to the appropriate department?—Yes.

7594. I want to be sure that the Commission understand the force of your point about maintenance, in paragraph 24 (1). It is that a wife petitioning for divorce may not have chosen to claim maintenance in her petition?—Yes.

7595. In that case, the form directing the husband's attention to the matters in issue, which he may wish to contest, will be silent on maintenance?—Yes.

7596. In that event, the case may go to trial and the decree be pronounced without the husband having his attention drawn to the question of maintenance?—Yes.

7597. The wife is then at liberty to start proceedings for maintenance and the husband may not have anticipated it?—Yes.

7598. I am not sure to what extent this is part of your objection to the present arrangements—but it has this defect, that, by law, serious matters which could have been raised by the husband as an answer to maintenance are not allowed to be raised by him if they would have constituted an answer to the wife's claim for divorce?—Yes.

7599. So that, without realising it, he may have thrown away a chance of destroying his wife's claim for maintenance because he did not want to raise it as an answer to her petition for divorce?—That is so.

7600. That is obviously a difficulty. One possible way of dealing with it would be to have maintenance proceedings fought out before the divorce?—Yes.

7601. (But that has grave disadvantages, has it not?)—It has, yes.

7602. It is going to cause delay in the hearing of the divorce petition.—And you do not know that the wife will get a decree.

7603. Is the only answer that you can see to the problem to make sure that the husband is aware that he may be faced with a claim for maintenance at a later stage?—That is my sole point.

7604. If that is done, you are content with the existing situation?—Yes, Sir.

7605. One point on your suggestion in paragraph 24 (4) that the naming of a co-respondent should be dispensed with. The result of that would be that in the ordinary husband's adultery petition, there would be no person who was capable of discharging an order for costs?—It would have that effect, yes.

7606. Now, the highest number of cases affected would be the legal aid cases?—Yes.

7607. It would remove the State's chance of recouping itself from the co-respondent in each case?—Yes.

7608. And that would be quite a serious defect in the proposal, would it not?—I do not know.

7609. Would you accept that it is a defect which would have to be seriously considered before one recommended the alteration?—I would accept that. You understand, of course, that I am doing this in a representative capacity, it was not my own suggestion.

7610. And the real aim is to secure uniformity as between men and women?—Yes.

7611. But, of course, there does tend to be this difference, that the co-respondent is usually somebody who is having a regular affair with the wife, and possibly living with her; that is to say, he is not just a casual passing man?—Yes, a party to the case.

7612. The cases of casual promiscuity by a man with a woman are in a wholly different class, and there would be no point in bringing in perhaps a prostitute as the woman named. Do you agree?—No, surely those cases are in the minority, are they not? In the ordinary way, there has been some association on several occasions between the man and a woman. (Mr. Justice Pearce): I note your view on that.

7613. (Mr. Mose): I have only one point, Mr. Lawton. Have you any comment on the cost of a divorce case at the present time? The Commission has been told that the costs are too high.—Costs in the Law Society's Divorce Department cases vary very little. In those cases where the costs are paid for by the parties themselves, there is considerable variation. In some instances, solicitors and counsel may not, I think, be adequately paid.

7614. But you would not support the view that generally the charges of solicitors and counsel are too much for the work they do in divorce cases?—Not in a general way, no.

7615. (Mrs. Jones-Roberts): Mr. Lawton, would you explain a little further paragraph 2 in section II, where you deal with the extension of grounds. In the first place, you say, "where spouses have been living apart voluntarily", and then you say "the court should have the power, at the instance of either party, to dissolve the marriage". Are you thereby excluding the case where one spouse leaves against the will of the other spouse? It is not quite clear to me what you have in mind.—I have not in mind the case that you have just mentioned. Leaving against the

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will of the other party would presumably give rise to desertion, which is a ground already, of course. I have in mind here cases where the parties separate by mutual consent or cases in which the position is not clear, where no one can be certain. Sometimes they part merely to let their tempers cool down. They agree that the wife shall go away for six weeks to think matters over. In instances like that, there may be difficulty in establishing desertion. I am assuming, of course, that they part in those circumstances and never resume cohabitation.

7616. Now would you in such a case favour one party having a divorce against the will of the other, or must it be by mutual consent? It seems to me that there is a slight contradiction here which I am not able to resolve.—Of course, I have made it clear that the power should be discretionary, entirely a matter for the court as to whether a decree should be granted. Certainly I say at the instance of either party.

7617. Have you considered that case where it is not a voluntary separation? The proposal has been put to us that where one spouse leaves the matrimonial home against the wish of the other spouse, then after a number of years that spouse should have the right to petition for divorce.—I think perhaps I ought to amplify my point to this extent. Certainly any matrimonial offence should be a discretionary bar to relief. If, say, the husband, in the circumstances you have mentioned, after a number of years petitioned for divorce, then the court should be able to refuse him a decree either by reason of his desertion or because of any other matrimonial offence he had committed.

7618. (Chairman): Assume that the husband has gone away against the wish of the wife, and the separation continues, and after some years he goes to the court and says, "Please grant me a divorce because the marriage has broken down". As I understand it, you consider that the judge should have a discretion to say, "I will not give you a divorce because it was your fault".—That is so, that is what I mean by saying that the power should be entirely discretionary.

7619. (Mrs. Jones-Rodgers): Supposing that the parties are living apart voluntarily, why do you stipulate such a long period of separation as seven years? Have you any special reason for that?—I was merely taking the period which had been suggested in the House of Commons. There is no particular significance in the seven years, but I think that it should be a long period.

7620. It has been suggested to us that where husband and wife have parted voluntarily, and both want a divorce, possibly eighteen months of living apart might be a sufficient period, but in similar circumstances you advocate seven years?—Yes, subject to what I have just said about seven, I do not think that I should personally raise any objection to five or something less than that. I think that it should be a long period.

7621. May we take it then that this is the view of county court registrars, that from their experience they have come to the conclusion that something on these lines would be an advantage?—They cannot see any real objection to something on these lines being made a ground.

7622. (Sheriff Walker): In paragraph 4, where you set out three legal advantages of this new form of divorce, you say:—

"In spite of legal safeguards, which are extensive, of course, it is felt that, though actual cases are seldom discovered, collusion is fairly common."

What is the basis on which you come to that conclusion, that collusion is fairly common? Is it a feeling rather than...—Yes, remarks made in the course of various interlocutory applications in divorce. Remarks—they only amount to hints—have been dropped fairly frequently. From experience of sitting in court, too, on the hearing of petitions, you fairly frequently get a suggestion that there may be collusion.

7623. Do you mean that it is a kind of rumour amongst practitioners that collusion is fairly common?—They are remarks generally made by the legal representatives, I think.

7624. What about officials of the court like the district registrars of the High Court, do they really believe that collusion is fairly common?—Yes, they generally believe that it is fairly common.

7625. Can you tell me in what kind of circumstances it is believed that collusion is fairly common?—Sometimes in maintenance proceedings you hear suggestions that there was a promise by the wife not to claim maintenance if the husband would let the divorce go through. As far as the court hearings are concerned, it seems so easy sometimes and there is such an entire lack of resistance that the proceedings seem to have been...

7626. Does that mean that where you have a husband petitioning for a divorce and his wife is not defending it, and you also know that some arrangement has been made for the wife's maintenance, you then put two and two together and say that the arrangement about maintenance has been made in consideration of the defence not being effected?—No, it is generally when the parties quarrel about maintenance that there is some reference to the proceedings not being defended on account of a promise relating to maintenance.

7627. Is that in the kind of case where there might be a defence, or is it in a case where there is no defence, no viable defence?—You never know the facts.

7628. What I am wanting to get at is really this. I am assuming that there is a rumour which goes round that there is collusion in divorce cases, but what I wanted to do if I could was to trace it down and see what it is based upon.—It is a bit hard to tell you, frankly. It is a bit difficult to convey the atmosphere at the time that these remarks are dropped, but certainly that is my feeling, and I find that it is shared by a great many others who have similar experience. It is generally from remarks dropped by legal representatives who feel that there may be collusion, and it is something that is rather intangible, if you understand.

7629. (Mr. Young): What is a registrar Mr. Lawton?—He keeps the register. That is how it originated, he was responsible for the court records.

7630. Like a clerk of the court?—Yes, that is the origin, but over a long period of time other functions have been conferred on him, and, of course, he has very limited judicial functions.

7631. That is what I wanted to ascertain. What kind of judicial function does he exercise? Do you ever decide maintenance?—I was going to say all of it, certainly almost all of it, yes.

7632. Do you actually decide to issue a decree for maintenance?—I make the order. You understand the difference between registrar of the county court and district registrar of the High Court?

7633. No. I want to know very shortly how far your functions are administrative and how far judicial.—Administratively the registrar is responsible for arranging the business of the court, of course, but limited judicial powers have been conferred on him. So far as divorce work is concerned, maintenance is one of them. Of course, in the busier centres now, such as Leeds, and especially with all the divorce we have had in the last few years, one spends ninety per cent. of one's time as district registrar of the High Court in dealing with interlocutory matters in divorce, such as maintenance.

7634. (Chairman): I observe that you are both registrar of the county court and district registrar of the High Court?—Yes.

7635. So that your judicial functions, I suppose, are exercised mostly as district registrar of the High Court?—Of course there are some cases in the county court, cases up to £100 are tried by the registrar, and then, of course, cases in the county court under the Married Women's Property Act may be referred by the county court judge to the registrar. In the Divorce Division, I think that the latter class of work comes direct to the registrar without reference.

7636. (Mr. Beloe): Mr. Lawton, you said, I think, that remarks were dropped here and there by litigants and counsel which made you feel that there was collusion?—Yes.

7637. Were they made in your hearing when you were sitting in your judicial capacity, or outside the court, or how?—No, certainly in divorce there are a great many of what we call interlocutory applications, which are necessary before the case can be tried, and all these interlocutory matters are dealt with by the district registrar.

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It is usually when you have the parties there on the hearing of one of those matters that things are said or attitudes are adopted which make one think that there may be an agreement.

7638. (Chairman): Does it come to more than this, Mr. Lawton, that on these occasions some cases go through with great speed and ease and everyone seems very agreeable, and you get the impression that this has been fixed up beforehand?—Not only on that account, something more than that.

7639. (Mr. Belov): There is no way of bringing that information before the judge before the actual petition?—I do not know, but certainly the judge has power at the hearing to refer the case to the Queen's Proctor.

7640. Have there been any such cases in your knowledge?—Yes, that is sometimes done where a hint is rather stronger.

7641. The existence of the Queen's Proctor is to some extent a preventive against it?—To some extent, yes. It is one of his functions.

7642. May I return to your suggestion about divorce after seven years' separation? I hope you will not misunderstand me in what I am going to ask you. How do you have experience which suggests to you that this would be a good thing?—Certainly in the busy centres you have people in and out of your room all day. I suppose that I have fifty people every day. You are dealing with people in matrimonial disputes nearly all your time. You are dealing—and this is where I think it becomes most apparent to men in my position—you are dealing with a lot of *ex parte* applications, such as applications for leave to dispense with the name of the co-respondent. They are dealt with on affidavit in the first instance, and if you are not satisfied you send for the solicitor and have a discussion with him about it. It is in those cases where technical difficulties often arise.

7643. Why would this particular ground for divorce help, because presumably most of the petitions are undefended and are granted?—Most of them are undefended, yes. But, you see, take the case of a husband in Kenya who has been there for years and who has been sending his wife maintenance. In that case it might be difficult to establish desertion. Nevertheless, after a period of years it is fairly apparent that they will not resume life together.

7644. That, of course, is rather a special case, is it not?—That kind of case is by no means uncommon.

7645. Men who are serving their country abroad?—No, not necessarily serving their country.

7646. Who are earning their living abroad and sending home some of their money?—Yes, who have gone abroad as a result of a quarrel, and without this actually being said, it may be clear that they have no intention of resuming cohabitation.

7647. Who would want a divorce in that case?—The wife. The husband may too, I do not know. But there are a great many cases in which one party resides in a distant country, especially since this last war when, from my experience, people seem to have gone all over the world. There seem to be a great many cases where one party has gone abroad—generally the husband—and the separation took place in such circumstances that it is fairly clear that the parties will never resume cohabitation. There is no correspondence, simply instructions to a bank to pay the wife so much a month and nothing more than that. You cannot get anything more than that. There are difficulties of making enquiries on the spot, it is very expensive indeed, difficulties of getting evidence of adultery.

7648. You mean that you might not be able to establish desertion, because the man is paying his wife?—You may not. Certainly I think there are a great many people living apart, and who have been living apart for a long time, who would not have any remedy at the law stands.

7649. Then you have not gained this impression in your capacity as county court registrar, but as a private individual?—You have misunderstood. I think I have had it gravely too. We all have a certain amount of private life, and I get a lot of individual approaches. But certainly, officially, as I told you, we have applications to serve petitions by advertisement where you cannot find the husband. You get the facts then relating to the

separation, and many times it becomes apparent that a matrimonial offence has not necessarily been committed.

7650. Nevertheless, I understand that the vast majority of cases coming before your court are undefended and are successful?—Even if they are undefended, a matrimonial offence has to be proved.

7651. I understand that the vast majority of those cases are nevertheless successful?—Yes, that is so.

7652. So that, somehow or other, the offence is proved in spite of the difficulties which you have mentioned?—Yes, in the great majority. Of course, some cases are not successful, and some cannot go forward. A good number are not put forward, as a result of legal advice.

7653. But how do they come before you?—I have mentioned one of these things, applications for substituted service, which are done on affidavit. There you get all the facts relating to the way the parties came to separate and what enquiries have been made to trace one of the spouses and that kind of thing, and many times disclosing in connection with those . . .

7654. How many of those would you personally get in a year?—I do not know, perhaps about two a week.

7655. How many of those do not eventually come before the court as petitions for divorce?—I have no means of knowing that. All day long I am having discussions with legal representatives and I know the thing is discussed frankly, perfectly frankly, and they point out their difficulties not only with regard to that particular application but with regard to the whole question.

7656. The proposed ground would be a legal convenience. That is really the point, is it not?—Yes, I think I only put it that way. It would have a legal advantage.

7657. May I ask you a question on another matter altogether, and again you must excuse my ignorance? Am I right in thinking that a county court judge has no duty to sit as a special commissioner of the High Court, that that is outside his duty?—That is quite wrong. They have nearly all been appointed special commissioners of the High Court for the purpose of hearing divorces.

7658. Is a county court judge separately remunerated for his work as special commissioner?—He was until recently, but the salary rates have now been revised to include remuneration for divorce work.

7659. Am I right in thinking that as divorce is a High Court matter the only people who have a right of audience are barristers?—Yes.

7660. Could you say how much less it would cost if the county court were made the court for divorce?—That would need a bit of thought, I could tell you that after some consideration. You see, in both courts there are scales of charges. In the county court, there are three scales, and in the High Court there are two, but presumably if divorce cases were to be heard in the county court, they would be on the highest of the three scales—which is not very different from the lower scale of the High Court.

7661. Are most of the legal aid cases on the lower scale of the High Court?—Yes, unless the judge otherwise orders, they are always on the lower scale of the High Court.

7662. Would it be your opinion that there would not be very much difference in cost, apart, of course, from the fact that a barrister might not have to be employed?—I do not think that there would be very much difference in cost.

7663. (Lady Bragg): Mr. Lawton, I do not quite understand how this memorandum was compiled. Have the members of the Association actually seen it? (Chairman): It is this right, Mr. Lawton? I understand that you drafted this memorandum, having first of all sent to each member of the Association an abridged copy of the Commission's terms of reference and having asked for observations; having got those observations you incorporated them in the document, but except in so far as suggestions have been incorporated, I gather that it is your own work and your own opinions?—Yes, my Lord. Certainly some of the suggestions are purely personal; in fact, it is a representative memorandum, a good number of the suggestions have been made by others.

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Mr. J. H. LAWTON

[Continued]

7664. It was drafted by you; some of the suggestions come from you personally and some of them come from other people?—That is the position.

7665. (Lady Bragg): Thank you. I want to ask a question on paragraph 13, where you say: "A married woman with separate means should be legally obliged to contribute . . . to the general expense of running the matrimonial home". I do not quite understand how you would actually implement that. I was wondering if you were thinking of comparatively wealthy people, because the sort of persons I am thinking of are a couple, where the wife does not in fact know how much her husband is earning, and goes out to get a little extra for herself.—I am not thinking of comparatively wealthy people, I am thinking mainly of salaried people and wage-earners.

7666. Would both parties have to declare their incomes in some way? I wondered how you would actually implement this, when you say, "legally obliged".—It would mean putting an express obligation on a wife who had means to contribute to running the matrimonial home.

7667. And would the husband have a legal remedy?—Yes, I think it would have to be accompanied by something like that.

7668. I foresee certain difficulties, and I wondered if you had thought about the method of enforcement?—It would mean putting the husband in the same position as the wife is in now. If the husband does not maintain the children, the wife can take certain proceedings.

7669. May I ask you this? When a registrar is going to make an order for maintenance, am I right in thinking that he sees, not the parties, but the two solicitors?—It is done on affidavit mainly, but of course solicitors or counsel attend, and frequently the parties attend for cross-examination. If they do not attend, and voluntarily offer themselves for cross-examination, then of course an order can be made for their attendance, to be cross-examined. Thus, frequently, and especially in the bigger cases, you not only have solicitors and counsel there—it is a very common thing these days for counsel to appear in these cases—not only do you have solicitors and counsel, but you have the parties themselves, husband and wife, and evidence is given as to their respective means.

7670. (Mrs. Jones-Roberts): I gather from what you said, Mr. Lawton, that, in your capacity as district registrar

of the High Court, it falls to you to make maintenance orders when a decree has been granted. We have had a good deal of evidence as to what happens after maintenance orders have been made in the courts of summary jurisdiction, and the difficulty in some cases of collecting the money. Would you tell us what happens when a man does not pay up under an order which you have made in your court?—There are a great many practical difficulties in enforcing it. It is nothing like as easy to enforce as is a magistrate's order. Usually it is done by judgment summons, either in the High Court, or in the county court. But in the magistrates' courts the process subsequent to the making of maintenance orders is dealt with mainly by policemen—as far as I know, the magistrates' courts have the whole police force of the country at their disposal to enforce these orders. Enforcement in the High Court is very expensive, it means coming to London, I think, to go before a judge of the Divorce Division. If you get a commitment order from him, you have then to pay the court tip-staff in London a considerable sum of money for going to the provinces to arrest the defaulting husband. The practical difficulties are so great that few people take it to the High Court. Sometimes they do go to the county court, and issue a judgment summons there, and that is much easier and less expensive. If the default was persisted in, the man would be arrested by county court bailiffs, who are on the spot, of course. But for enforcement—I think I make that point when I am dealing with the suggestion to transfer these matters from magistrates' courts—for enforcement there is no doubt about it, the magistrates' courts are much better.

7671. As things are, it is a very slow-moving and expensive process for the wife to set the enforcement machinery in motion in the High Court?—Yes, it is.

7672. (Chairman): And in the county court, too, did you not say?—Yes, but that is not so bad as the High Court, my Lord. Judgment summons in the High Court is a remedy which seems to be mainly theoretical and academic.

7673. But I gather you agreed that the procedure by judgment summons in the county court is more cumbersome than the procedure in the magistrate's court?—Yes, my Lord, far more. As a matter of practical remedy, there is no comparison.

(Chairman): Thank you, Mr. Lawton, for your Association's memorandum and for coming to help us today.

(The witness withdrew.)

(Adjourned to Thursday, 20th November, 1952, at 10.30 a.m.)

MINUTES OF EVIDENCE

TAKEN BEFORE THE

32

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

THIRTY-SECOND DAY

Thursday, 20th November, 1952

WITNESSES

MR. FRANK J. POWELL

MRS. JUANITA FRANCES

MISS ROXANE ARNOLD

MRS. LYDIA HORTON

DR. MARIE C. STOPES, D.Sc., Ph.D., F.L.S., F.G.S., F.R.S.Lit.

} representing the Six Point Group.



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MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

THIRTY-SECOND DAY

Thursday, 20th November, 1952

PRESENT

THE RT. HON. LORD MORTON OF HENRYTON, M.C. (Chairman)

MRS. MARGARET ALLEN
DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELCH, M.A.
MRS. E. M. BRACE
LADY BRAGG
SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.
MR. G. C. P. BROWN, M.A.
MR. H. L. O. FLECKER, C.B.E., M.A.
MRS. K. W. JONES-ROBERTS, O.B.E.

THE HONOURABLE LORD KEITH
MR. F. G. LAWRENCE, Q.C.
MR. D. MACE
MR. H. H. MADDOCKS, M.C.
THE HONOURABLE MR. JUSTICE PEARCE
DR. VIGLEY ROBERTSON, C.B.E., LL.D.
MR. THOMAS YOUNG, O.B.E.
MISS M. W. DENNERY, C.B.E. (Secretary)
MR. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 95

MEMORANDUM SUBMITTED BY MR. FRANK J. POWELL

Allegations of adultery in matrimonial proceedings in magistrates' courts

1. It is submitted that it is a serious defect in the procedure in matrimonial cases in magistrates' courts that a third party can be accused of adultery with one of the parties to the cause (the alleged adultery being the reason for the proceedings) without that third party having any right to be made a party to the cause or to be heard in his or her own defence. It has to be remembered that the court cannot impose a witness upon the parties and therefore cannot compel either the complainant or respondent to call such third party as a witness.

2. In the Divorce Court, as is well known, if a husband accuses his wife of adultery, the man accused is made a party to the cause and is, of course, the "co-respondent". Similarly, if a woman petitions for divorce from her husband on the ground of his adultery, the woman concerned is made a party. *None of this procedure exists in the magistrates' courts*; there is no such person as a "co-respondent" or a woman "intervener". This state of affairs is unjust to the persons accused, who may be entirely innocent of the allegation made. In any case, whether guilty or not, any person accused of the offence of adultery should have a strict legal right to be made a party to the cause and heard in his or her own defence. It must indeed be a great shock for a faithful and perhaps happily married person to learn (possibly for the first time) from his local newspaper that a few days before in the local court he was accused of adultery and that the accusation was held to be true! The existing rule that a party making an allegation of adultery shall, if possible, give particulars of the identity of the alleged adulterer and of the times and places of which it was alleged the adultery was committed, does not cure the injustice of the present system.

Unenforceability of orders made in magistrates' courts under the Summary Jurisdiction (Separation and Maintenance) Acts

3. Although a wife may apply for a maintenance order while she is residing with her husband, yet, if after obtaining the order she continues to reside with him the order is unenforceable and therefore worthless to her. Further, the order ceases to have effect if she continues to reside with him for three months after it is made. In practice, this rule of law works great hardship on many innocent wives and their children. This hardship arises from the security of tenure given by the Rent Acts to a tenant-husband and the shortage of dwelling houses.

4. Many women who are in need of a separation and/or maintenance order refrain from going to the court for relief because they know that if they obtain an order they

will have nowhere to reside except in the home of which the defaulting husband is the tenant and that if they so reside the order obtained will be worthless. The court has no power to order the husband to leave the house and to install the wife as tenant. So the wife seeks no relief at the hands of the court and endures, e.g., the husband's cruelty to herself and children as best she may.

5. Further, another reason why many women refrain from applying to the court for an order is the fear of losing the "home", i.e., the furniture, especially the beds and other necessary articles. Some women, thinking that the court has powers in relation both to the tenancy and the furniture, ask for the directions of the court in regard to these matters. The court is of course powerless in both directions and can only make suggestions. If the husband will not agree to leave the house or to hand over some of the furniture, the wife and children usually return to the matrimonial home and their last state is worse than it was before applying to the court.

6. It would be a useful and humanitarian legal reform for justices to have power, upon the making of an order under the Summary Jurisdiction (Separation and Maintenance) Acts, upon the application of either party, to apportion the contents of the matrimonial home (where the same is of modest dimensions) between the parties, having regard to their new status as defined in the order, in such shares as the justices thought just, having regard to all the circumstances of the case including the length of time the marriage had subsisted, the period during which the parties had lived together, the contribution, financial or otherwise, that each had made to the setting up of the matrimonial home (and whether out of housekeeping money or otherwise). And further, for the court to have power to order the husband to leave the matrimonial home notwithstanding that he was the tenant of the premises and to substitute the wife as tenant, if the landlord agreed.

7. Such an amendment of the law would put an end to a great deal of misery at present endured by many women and children. It is obviously easier for a man to find "a roof over his head" than for a wife and children to obtain accommodation, especially in these difficult days. It would also prevent some orders being rendered worthless by the wife being compelled, by lack of other accommodation, to continue to reside under the same roof as her husband. In any case, the law should be amended so that an order is enforceable whether or not the wife continues to reside under the same roof as her husband. The difficulties which I have mentioned have been aggravated by the second world war.

8. I believe the American courts have power to order an erring husband to leave the matrimonial home and I foresee no difficulty in justices making such orders.

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PAPER No. 95. MEMORANDUM SUBMITTED BY MR. FRANK J. POWELL.
MR. FRANK J. POWELL

9. I am aware of the debate in the House of Commons on these matters some twenty-five years ago and I make my observations notwithstanding that Parliament decided not to amend the law in the sense indicated by me.

Collection of maintenance arrears

10. The present law under which amounts payable under maintenance orders made in one court are enforceable in another, is not working satisfactorily. We need a new law to the effect that, such moneys are to be collected and payment enforced in one and the same court. At the present time the court enforcing the order cannot demand the right to be the collecting court as well; the result is great confusion in attempting to enforce orders made in another court. The chief point of confusion is as to the exact state of the account, which under the present system is not kept by the enforcing court.

11. With regard to the suggestion that consideration should be given to the question of the National Assistance Board paying to a wife the amount ordered by the court. On the whole, I am against the National Assistance Board being given this duty, as the way would be opened for fraudulent arrangements being made between husband and wife to the detriment of the public purse.

EXAMINATION OF WITNESS

(MR. FRANK J. POWELL: called and examined.)

7674. (Chairman): Mr. Powell, you are a Metropolitan Police Magistrate. How long have you held that office?—(Mr. Powell): Just over sixteen years.

7675. You are Chairman of the New Malden Citizens' Advice Bureau and a member of the House of Lords. Before I ask you questions on your memorandum, would you like to add anything to it?—I should like to make one or two remarks. First, in regard to paragraph 1, I submitted the memorandum over a year ago, and since then there has been a slight change in that at least one special matrimonial court has been set up in London. I gather that there may be others set up in the future, and I submit that that would make easier what I propose here. Secondly, I agree that if my proposal were accepted, it would be necessary to make some kind of rule as to substituted service on the co-respondent, which, I would suggest, should be by means of advertisement in the local papers.

7676. I suppose that there would be difficulty in many cases in catching the co-respondent?—In many cases, I imagine, it would be difficult to reach him.

7677. I do not quite understand why the setting up of a special matrimonial court makes your suggestion easier?—If a court is devoted entirely to matrimonial matters, I submit that that court would have more time to deal with these matters. Under the present set-up in the metropolitan courts and the justices' courts we deal with every subject under the sun.

May I turn to my recommendation in paragraph 6, in regard to the unenforceability of orders made in magistrates' courts? I do not get that forward, with respect, as a really important matter. There are the most appalling difficulties existing today which arise out of the Rent Acts, and the question of furniture. I would go as far as to say that in eighty or ninety per cent. of cases, when one gives a woman a separation order, she says to the court, "What about the home, and where am I and the children to live?" We ask, "Who is the tenant of the home?" She generally says, "My husband", and then one says to the husband, "What about your wife and children, where are they to live?" He says, "I am not going, I am staying where I am", and the result is that the wife is obliged to go back to the home with her husband, and under existing law while she is with her husband the order of the court is unenforceable, and there is an absolute deadlock. That arises in as many as eighty per cent. of the cases. I would like to see the magistrates given power to deal with such cases in this way. When the husband is the statutory tenant, if the landlord will agree—I agree that one must not ignore the rights of the landlord—but if the landlord will agree, one should have power to say that the wife is to be substituted as tenant, and to say that the husband must go, because it is easier for a man to find somewhere to live than for a woman with children.

Right of guilty party to obtain divorce after a long period of separation

12. There are many cases in which married couples have been separated for many years and the party who is in law the guilty party is living with another. Sometimes there have been children of that illicit union and the parties to the illicit union desire to marry but cannot do so because the "innocent" party refuses to initiate the necessary proceedings. In my court experience this refusal is actuated sometimes by religious conviction and sometimes by spite. I have come to the conclusion that it would be in the interests of public morality and just and equitable to innocent persons affected, e.g., any illegitimate children, that the guilty party should have the right to apply for a divorce after the lapse of a substantial period of time, say, seven years. Such a right should be exercised only on terms favourable to the innocent spouse and any children of the lawful marriage; and such terms should deal not only with the question of the maintenance of the innocent spouse and the children of the marriage but also with the question of the disposal of the general assets of the guilty party.

(Dated 10th September, 1951.)

Then the other point under this paragraph is the question of furniture. A woman will say as soon as the order is made, "What about the furniture, what happens to that?" They seem to think that the court has power to award them some part of the furniture—wood, of course, the court has no power to do. I have had a case where a woman has said, "He has even taken the baby's cot away to give to the other woman". When people have been married for a certain length of time it should be immaterial who paid for the furniture. One should have power to have regard to all the circumstances of the case, how long they have been married, the contribution each has made in making the home a real home, and the number of children. One should have power to say to the husband, "Though you bought that bed and the kitchen table and those pots and pans, I am going to make an order that you hand them to your wife".

7678. You may be glad to know that others have made a similar suggestion and have gone further, suggesting that where there are savings, which in the eyes of the law belong to the husband, the court should have power to make orders for maintenance out of these savings—I have not gone as far as that. I do not wish to have power to distribute the family savings, just tenancy and furniture. May I refer now to paragraph 10, which deals with collection of maintenance arrears? There are many cases in which the wife lives in one part of the country and the husband in another, and under the existing law the order of the court is enforced in the district where the husband lives. I do not think that I am exaggerating at all if I say that in a large number of cases there is an argument as to how much the husband owes. We will say to the man, "The Manchester justices say that you owe £50", and he will deny it, and every time there is an argument as to how much he owes. If the court which had the duty of enforcing the order against him was also the court to collect the money, there would be no argument as to what he owed, because the court keeps a record.

7679. Say a magistrate in Manchester makes an order against the man and the man goes to live in London, you say that the same court should collect the money...—As enforces the order. That would be the London court, the court where the man is has the duty of enforcing the order and sending him to prison if he does not pay.

7680. And it should be the collecting court?—Yes.

7681. How would it get information from Manchester?—We get information at the moment by correspondence. Usually it is several weeks out of date when we get it, and before it is sent to London the man may have paid the money. The man says, "I have paid it". We then ask, "Where is the receipt?" and he has not got one because the court did not send him one. It will be said that the London court can apply to the Manchester court

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[Continued]

to let the London court collect. That is true, but in my experience the other court will not agree to that, for a very simple reason. The clerk to the justices in the country gets a commission on the amount of money he collects in his court, and therefore it is against his interests to transfer the order. Personally, I have got tired of asking my clerk to write to the country courts and say, "Please transfer this order to London and say how much is owing". They write back and say, "My justices prefer that the money should be paid here". They do not say why, but I am told by those interested in these matters that there is a very simple explanation. They get a commission and they probably collect large sums of money. My own court collects £38,000 a year. If you are going to have a commission on £38,000 a year, it comes to a substantial sum of money, and it is asking rather a lot to expect the collecting court to say, "We will not collect this money any longer, we will let the London court do it".

7682. (Lord Keith): Does every clerk get a commission?—I understand that in some courts the clerk is paid a fixed salary and in that case he does not get a commission. In other courts, however, the clerk does not get a fixed salary, and then he receives a commission. It is therefore understandable that such courts do not want to transfer the orders.

Then, may I turn to the last paragraph of my memorandum, which deals with the right of the guilty party to obtain a divorce after a long period of separation? This is a proposition which for a good many years of my life I should have been horrified at putting forward, but really I feel driven to do it, and I do it on the ground of the happiness of the children. That is really the basis of this particular paragraph. What I am referring to there is the case where people separate, whether by order of the court or otherwise, and one party—the "guilty" party—lives with somebody else and they have illegitimate children. I do feel that under the present set-up illegitimate children are not given a fair chance in life. They have the stigma of being illegitimate and it is a miserable state of affairs for them. Therefore, where married people have been separated for a long time, say, seven years or some such period, I submit that the welfare and happiness and status of the illegitimate children should be considered, and steps should be taken to make them legitimate. I would respectfully suggest that the existing law, by which illegitimate children cannot be legitimated by subsequent marriage if the parents were not free to marry at the time the children were born, should be altered, and that such children should be legitimated by the subsequent marriage of their parents. I really put this forward in the belief that it would make for the happiness of children and also would reduce the number of illicit unions. I am told that there are 36,000 separation orders in force—I do not know if that is right or not—and many of the people concerned have illegitimate children. I submit that it would be in the public interest that where it is obvious that the marriage has broken down, and the marriage is a marriage only in law and name, and not in reality, it is better that such marriages should be ended and that the people concerned should be entitled to marry these they are actually living with and thus make their children legitimate. I am bound to say that I personally do not look on divorce as an evil thing, but often as a happy release from an intolerable state of affairs. When the marriage has broken down and the situation has become quite intolerable, then, unfortunately though it may be that people cannot agree and live together, one should recognise that fact, and even though it may swell the divorce statistics, it is in the public interest that those marriages should be ended.

There is one point which I have not mentioned in my memorandum, that is the question of imprisonment being a ground for divorce. I have had several appalling cases—and my Citizens' Advice Bureau, I know, supports me in this—where a man is constantly in and out of prison, and each time he is out of prison he puts his wife in the family way. These women complain bitterly of that state of affairs. I would submit that imprisonment should be a ground for divorce. It is difficult to say what kind of imprisonment and what conditions one should impose, but I would suggest for consideration, if a man is convicted three times of an indictable offence. There is a case in the courts, which

your Lordship will know, on the question of whether imprisonment justifies the making of a separation order. I did issue a summons on one occasion, intending to hold that if a man was persistently in prison, that would be ground for granting a separation order on the ground of desertion. When I came to decide the case I found that the matter had already been dealt with in the Divorce Court, and there it had been held that imprisonment could not be held to be desertion.

7683. (Chairman): It is not a voluntary absence?—Quite. I wanted to create a precedent for the Divorce Court to consider but I did not have the pleasure of doing that.

7684. Your suggestion would be "convicted of three indictable offences whatever the sentence may have been"?—I think so, yes. I merely put that forward as a suggestion. It might be that some better suggestion could be made.

7685. You will appreciate that however sympathetic one might be to the suggestion, it is a little difficult to frame the appropriate statutory provision. However, you have given us your suggestion and we are obliged to you. Is that all you wish to add?—Yes.

7686. I will start on your last paragraph, and I want to say at the outset, that I am not going into the moral, social and religious aspects of this paragraph, for two reasons. First, because we have had them discussed many times before us, and, secondly, I see that you and Mr. Davis, whom we shall see later, take diametrically opposite views on the subject, and I do not think that any useful purpose would be served by asking either of you to pursue your views on it. I would like to ask some questions on the financial aspects. In the last sentence, you say:—

"Such a right should be exercised only on terms favourable to the innocent spouse and any children of the lawful marriage; and such terms should deal not only with the question of the maintenance of the innocent spouse and the children of the marriage but also with the question of the disposal of the general assets of the guilty party."

I appreciate that you are thinking of the illegitimate children and are sorry for them, but one has to think very carefully of the wife (ex hypothesi innocent) who is being divorced against her will. I wondered how exactly you were going to provide for these "terms favourable to the innocent spouse and any children of the lawful marriage". In the first place, not many people can afford to keep an ex-wife and the present wife and two families, and it is suggested by other witnesses that this would really be a privilege for the wealthy. That is the first thing I would like you to deal with—When I was thinking this over last night I wrote against that particular sentence these words: "This is probably too idealistic and divorced from reality". In other words, having thought it over for twelve months, and bearing in mind, so far as my own court is concerned, that most of the husbands cannot afford to keep one wife and rely on national assistance, this proposal, I think, would only be applicable to people of substance.

7687. You see that, leaving out all religious, social and moral aspects, there is this practical objection, that it would be said that you are making this law for the rich and not for the poor, which is a very serious objection?—It is, indeed.

7688. May I come to another point? If your proposal were carried out, the natural impulse of the man would be, would it not, to look after the wife with whom he is living, of whom presumably he is fond, and the children of the second union, and to take every possible step to avoid paying up to the first wife?—They do that now.

7689. You would agree with that?—Certainly, my Lord.

7690. Then, if this proposal were adopted, I suppose that it would be logical to give the right, not only to men who have formed an illicit union, but also to any parties who had been separated for the specified term if one of them desired it, even if they had separated by mutual consent? Would not that be logical?—I think so. When one finds people coming to the court for twenty years for a few shillings a week, it gets positively indecent.

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[Continued]

7691. I quite see your point, but to quote your own word, your sympathy for the illegitimate children has led to rather an "idealistic" proposal. Is that right?—It may be, but I do feel that the position of illegitimate children has not received the consideration in the past from the law that it should receive. They cannot help their position, and when a marriage has broken down and one of the parties is living with somebody else with whom he or she is probably very happy, I must say that I consider it would be better that the lawful marriage should be ended and that he or she should marry the person with whom he or she is living—especially when one remembers that the so-called innocent party is probably not so innocent, in fact, as is implied by the word. It takes two to break up a marriage, and many a man has been held to be the guilty party when he only adopts that position to get out of an intolerable state of affairs.

7692. I will just say this, quite often "the innocent party" is perhaps a misdescription because there are faults on both sides, but quite often there are cases where a man or woman is merely more attracted by some other person and will go off and make a home with that other person. Is not that so?—That is so. I realise that whatever one says there is an argument the other way.

7693. I will leave that. But I should like to put this to you. We have before us, as you know, a memorandum by Mr. Davis, which you have read?—Yes, my Lord.

7694. I do not wish to foment strife between brethren at all but would you like to make any friendly comment on what Mr. Davis has said, under paragraph 1 of his memorandum, for example, to see if we can get out the right answer between you?—I would sooner your Lordship put specific questions to me, if that is convenient to you.

7695. Very well. First of all, Mr. Davis, as you see, thinks that it is not a serious defect or even perhaps any defect that the third party can be accused of adultery in his absence, and he says, for instance, in paragraph 3 of his memorandum:—

"In my experience on the bench (four-and-a-half years), I have had to deal with very few cases of alleged adultery amongst the numerous matrimonial cases which have come before me. In most cases where there is adultery there is also desertion, and the latter is usually the ground relied on. Seldom is a complaint founded on adultery alone and still more seldom is there a contest as to the truth of the allegation."

Then he goes on to say:—

"I am not aware of any case in which a 'faithful and perhaps happily married person' has learned 'possibly for the first time' from his local newspaper that a few days before in the local court he was accused of adultery and that the accusation was held to be true."

Would you like to make any comment on that?—I am the magistrate in the court who takes the matrimonial courts, he does not except on odd occasions. I have the figures here, there were sixty-three matrimonial courts last year in my court, I took forty-five, he took sixteen and another magistrate two.

7696. In your experience it is common for a person to be named as an alleged adulterer?—Yes, my Lord, constantly. I have got my clerk to look out the figures for our orders. We have 900 orders in force at Clerkenwell.

7697. Orders for what?—For maintenance, and we collected last year £38,326 9s. 10d. under these orders. Five per cent. of the orders were made on the ground of adultery, only five per cent., but although that is a very small percentage the allegations of adultery are made in practically every case. The reason why there is such a small percentage of orders made on the ground of adultery is that it is always so difficult to prove. People rarely have the necessary evidence which would justify the making of an order. Therefore, we take the line of least resistance, and where a woman says, "My husband has committed adultery and has deserted me and been cruel to me", a very common way of putting her case, we say, "Let us deal with the desertion or the cruelty or the maintenance, we will leave out the adultery", and

therefore we do not adjudge on the question of adultery, but these allegations are made in practically every case.

7698. Do you think that if the allegation is made, even if it is held not to be true, that involves hardship for the person named?—I should not like it said about one if it were not true. I had a case once where a man was sitting on top of a bus next to a woman. This was in Greenwich sixteen years ago, and the woman's husband ran up the stairs and accused this man of committing adultery with his wife. This man had never seen the woman in his life before but he had the misfortune to be named. I do not mean that he was a party, he was not, but he was referred to as the man with whom the wife had committed adultery. This rate man came and said he wanted to give evidence. I said to him, "See the solicitor for the respondent, perhaps he will call you to give evidence". The solicitor would not. The magistrate is not entitled to impose a witness on the parties or call a witness out of the blue, so the man could not give any evidence. That seemed to me to be grossly unfair. If he had been made a party to the case by having papers served on him he could have given evidence as of right. That is an illustration.

7699. A witness, whom I shall not name, has suggested this:—

"It must be borne in mind that the necessity of the magistrates' courts to persons of small means depends almost entirely on the simplicity of the procedure."

With that you would agree?—Absolutely.

7700. The same witness continues:—

"Any rule requiring service of proceedings on the co-respondent or on the woman named would lead to endless difficulty, delay and expense. A complete set of rules would have to be drawn up to cover cases where service could not be effected because the names and addresses are unknown, as is so often the case in magistrates' courts."

You would, I suppose, have to have a fresh set of rules to deal with the matter?—They would be very few indeed. I should make a rule that the notice should be published in the local papers for the next two weeks and that would be a service on the person in question. I do not see that you want any other rules about that.

7701. I have a helpful comment from Mr. Justice Pearce, which I will put to you. Would not that give the gentlemen or the lady named rather undesirable publicity?—I speak in deference to Mr. Justice Pearce—but is not that the rule in the Divorce Court? (Mr. Justice Pearce): I think, if I may, that I will leave it until my questions later.

7702. (Chairman): Then the witness in question went on:—

"Presumably affidavits would be required and power given to order substituted service and so on."

Would you agree?—No, not at all. I would never suggest that we should fasten on to magistrates' courts the High Court procedure. It is quite unnecessary.

7703. (Mr. Justice Pearce): I want to ask you about this question of citing a co-respondent. When adultery is alleged before you, it falls, does it not, into two classes of cases, one, when it is alleged as a ground for separation, and one, when it is alleged as a ground for rescinding an order that has been made in favour of the wife?—Yes.

7704. In neither of those classes of case is there any motive which would lead a wife who is not guilty of adultery to let it go unchallenged?—I agree with that.

7705. One may say that there is a strong motive to the contrary in all the cases which you deal with?—Yes.

7706. Can we divide the cases into two further classes, those in which adultery has been committed, and those in which adultery has not in fact been committed? Take the co-respondent in the case where adultery has been committed and take the case, since that is the one that chiefly prompts you, of the happily married man who is involved in it. Do you think that these further considerations come into it? If he is served as a co-respondent, he is put in the position that he must do something. Do you agree?—Yes.

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7707. I do not know if you have had any dealings with cases of this kind, but I can assure you that I am aware of more than one case where a man who has misbehaved himself, but is happily married, is in the unhappy position that, being served as a co-respondent, he realises that if he admits the adultery, it will break up his happiness with his wife. And also, have you not known of cases where it became apparently obvious, as the case proceeded, that the man was going to be held guilty of adultery, and that his marriage would be broken up in consequence?—Yes.

7708. Again, there have been cases where counsel on both sides, out of human sympathy, and wishing not to break up what was a happy marriage, with children, have even gone out of their way to see if the court could make some finding in accordance with the facts which would not necessitate a finding against the co-respondent. Would you agree that that does on occasion happen?—It does, certainly.

7709. That man, of course, is far better off if he never had a chance of intervening?—Yes.

7710. There is this additional defect so far as he is concerned, that the burden of costs is increased, and when he has made his ineffective stand to protect his innocence for the benefit of his wife, he will have to pay all the costs of the petitioner, of the wife respondent and himself. You agree with that?—Yes, my Lord, is the Divorce Court.

7711. No, I mean if this were applied in magistrates' courts. If he comes before you with a solicitor, and the wife has a solicitor and the husband has a solicitor, he will have to pay all these costs?—No. I will deal with that in a moment when your Lordship has finished.

7712. I put all those points to you because I would suggest that that man, namely, the man who has been guilty of adultery, is far worse off if the existing procedure is altered. Because, as it stands at present, he can always say to his wife, "I was not there and it was nothing to do with me, I cannot help what other people say". Perhaps you would deal with that point?—I think that those cases which your Lordship has mentioned are all special cases. But I submit to this Commission that it does not alter the general principle that when a man is accused whether of a criminal offence or of adultery, he has a right to be heard in his own defence, whether guilty or innocent. I am dealing only with the general principle, there are always exceptions, of course.

7713. I was not for the moment on that. I am not contesting that general principle. I am for the moment dealing with particular cases which will cover, I think you will find, substantially all the cases that are likely to arise, and then trying to see whether more hardship would not be caused by enforcing your general principle than is the case at present.—There is another matter, you mentioned the question of costs. It may be that those who move in such high places as the High Court do not appreciate that in our humble courts this question of costs does not arise as it does in the High Court.

7714. I was assuming costs of about £5 a side, is that unfair?—I do not know what the practice is in other courts. At the present time I rarely order any costs at all in matrimonial proceedings. My practice is that if one of the parties has a solicitor, I always give a solicitor to the other party and I pay for that out of the poor box. As you know, the Legal Aid Act does not yet apply to matrimonial proceedings, therefore one cannot allot legal aid to anybody in a matrimonial case. But we get the local solicitors to represent anybody whom we feel should have legal assistance, and we pay for it out of the poor box when those cases are decided. In not one case in fifty do I order any costs at all. That may not be the practice of my colleagues.

7715. May we take it, in short, that in each case the co-respondent who fought a case and prolonged it with no justification, and lied by saying he was innocent, would not be penalised by other people's costs, but would have to pay his own?—It depends on his means. The people we deal with are extremely poor people. They can hardly make their weekly wage packet go round. They have no money for these luxuries, costs and so forth.

7716. I do not want to stress too much the question of costs. But I suggest to you that it may well be that where a co-respondent has lied and prolonged the case in

cover by lying, he may find himself having to pay other costs than his own?—He might, it depends on his means. We have a rule that when one imposes costs, one must have regard to the means of the defendant, in so far as they are known to the court. I apply that in all cases.

7717. That deals with the guilty class, the man who has committed adultery, who, I have suggested to you, is better off if he can pass by on the other side and say, "It is quite unjust", when somebody accuses him of adultery. Now let us take the innocent class, where a different set of circumstances arises. We have agreed that in these cases the innocent wife will always have a strong motive for asserting her innocence and trying to prove it?—With one exception—I have known cases where the wife would be very glad to get rid of her husband and she admits the allegation though it is not true, because she is probably more fond of the co-respondent than of her husband. In that case she is willing to admit adultery.

7718. Willing to admit it, though not willing to commit it?—So that she can get rid of her husband.

7719. She is not being divorced?—She gets a separation. If brought before the court, she may feel that it would be a good thing to admit adultery even though she may not have been guilty of it.

7720. In that case she is acting with the consent of the co-respondent?—If she is fond of him. It is not a common case; indeed, it is very rare.

7721. May we come to the cases where the wife is not guilty and strenuously wishes to prove that fact? If the co-respondent has disappeared, then the situation is in no way altered by your proposed amendment, except that advertisements of the allegations of adultery will appear in the papers on one or two occasions. Is that right?—Yes.

7722. If he has not disappeared, he will be available. The wife, in all normal cases, I suggest, will get into touch with him. Do you agree?—I agree with that.

7723. And if he is innocent, and she is innocent, her solicitor will naturally call him to give evidence. Do you agree?—That is often done.

7724. And in point of fact he will, no doubt, if there is any difficulty about legal representation and he is able to do so, help her with the funds to establish her innocence and his at the same time?—Yes, but they usually have no funds.

7725. In all those, which I suggest are normal cases, no hardship occurs in present circumstances at all?—In your Lordship suggesting that the Divorce Court rules should be altered and that the same considerations should apply to the Divorce Court?

7726. I am not, because what we have to bear in mind is this: you put forward your general principle, with which I wholly agree, but one has to remember that the reason why we all regard magistrates' courts with such admiration is because they can deal so quickly and so cheaply and so efficiently with the work. Do you agree?—Yes, my Lord, certainly.

7727. I do not think that for this purpose a comparison with the Divorce Court is really helpful, because I want to see whether, in pursuance of a general principle, we must impose on the magistrates' courts something which, it seems from our present consideration, will do very little good to anybody?—I am trying to uphold the general principle that anybody accused should have the right to defend himself whether he is guilty or whether he is not.

7728. We have agreed that in a normal case any innocent man will get the right to defend, as circumstances are, unless he has disappeared, because the woman will always go to him and he will always be called as a witness?—Yes.

7729. Let us deal with that special case, which you have mentioned, where a man wished to protest his innocence and nobody wished to call him. Was it not perfectly possible for him to make a statement, audible to the Press, to the effect that he was perfectly innocent and had nothing to do with it?—I think that if he did that, and the magistrates acted on what he said, the Divorce Court would quash his decision, and say that he acted on a statement which was not sworn to in the witness box, and should not have been listened to. (Mr. Justice Pearce): He need not act on it.

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7730. One final question. There is one further difficulty which we suffer from in the Divorce Court, and which would arise equally in magistrates' courts if your procedure were adopted, namely, the cases, which are not infrequent, where there is evidence as against the wife, but not as against the co-respondent?—Yes.

7731. And it would then better him in no wise that he was a party, but it might have this unfortunate result, that he would be out of pocket over his costs?—As against that, I think that it is very unfortunate that a man, whose name is coupled with the wife, against whom a decision of adultery is made, should not be made a party to the case; although it has no legal effect, the man in the street regards the charge as proved against him.

7732. May I ask you this about your suggestion of divorce for imprisonment? I imagine that you meant a man who was imprisoned for three indelible offences. You said convicted?—I meant imprisoned.

7733. (Mr. Maddocks): In all your years of experience on the metropolitan bench, have you ever come across any case, except the one you have told us about of the man on the bus at Greenwich, where any complaint has been made to you or come to your ears that a man's name has been wrongly used in a charge of adultery?—I have, not many, but some.

7734. Do you mean that somebody has come to the court afterwards and said, "What about this, what can I do about it?"—I have been told my name was mentioned, and they have complained about it.

7735. You have had that?—I have had that.

7736. Let us assume that the address of the party, with whom the adultery is alleged, is known. If a summons has to be served on that person, it is going to delay matters?—I agree.

7737. And if that person cannot be found and an application has to be made to the court for leave to effect substituted service, that is going to take much longer?—Yes.

7738. If substituted service is going to be of any use at all, it would be necessary to adopt the same practice as is adopted in other courts, and insert an advertisement in the local newspaper?—Yes.

7739. That would cost money?—Yes, I do not think that it would cost a lot, but it would cost a certain amount.

7740. The majority of magistrates' courts in this country have no poor box at all?—That is so.

7741. Who is to pay for the substituted service?—What is wanted is something analogous to the provision in the Costs in Criminal Cases Act, under which the expenses of those persons who have to come to court can be paid.

7742. That would involve yet another statute?—It would, indeed.

7743. I was surprised about the figures in regard to adultery cases in your court. Is it not your experience that in 99 times out of a 100 in a magistrates' court, where there is an allegation of adultery, the parties concerned admit it?—No, I would not say as much as that.

7744. I think that I am right in saying that you are the most experienced metropolitan magistrate at the moment?—I have heard it said.

7745. Would you agree to this extent, that in the vast majority of cases where there is an allegation of adultery, that adultery is admitted in the magistrates' courts?—Yes, I should think that in most cases it is.

7746. For the benefit of the Commission I should like you to explain the arrangements for collection of maintenance arrears which you deal with in paragraph 16 of your memorandum. Is this the position, if a woman gets an order in Manchester and the husband then settles in London, and he does not pay, the woman goes to the Manchester court to apply for a summons for arrears, which is a summons on complaint?—Yes.

7747. The Manchester court then sends the order to a court in London for it to collect?—Yes.

7748. The London court either summons the husband, or gets him there on a warrant, and finds out why he has not paid?—Yes.

7749. The court tells him what he has to pay and then, under the present procedure, he has to send that money to Manchester?—Yes.

7750. The London court therefore has no record of his payments?—Exactly, yes.

7751. And it is that, is it not, which causes the difficulty, because you may get a man arrested by means of a warrant, and he comes and says, "Why am I here, I have paid", and you have no means of knowing?—He may be lying or he may be speaking the truth. He may have been wrongfully arrested.

7752. And if he is speaking the truth, he is suffering a grievous wrong because he has been arrested and has been in custody and brought to court and all the time he has paid?—And he is probably thrown out of work into the bargain.

7753. Supposing your proposal were accepted, how is the money to be got to the woman?—We should have to send it in cash case to the court at Manchester.

7754. It would be necessary to get permission to use public lands for stamps, etc.?—There would be the cost of postage, that is all. But we have an item for postage costs at present, because in my court a lot of the money is sent by post to women who live too far away to call for it.

7755. (Chairman): Will you clarify one point? Even if your suggestion was adopted, and I see the force of it, the first time a man comes before you, you do not know how much he owes?—We do. The Manchester court, taking that court as an example, informs us that Mrs. X has complained to them that her husband is not paying the order. It tells us the amount alleged to be due, and we issue a summons, or a warrant for the man's arrest, and make him come and answer the complaint. The trouble is that by the time the man is found, several weeks may have elapsed, and in the meantime he may have made up his arrears. We do not know that, and we arrest him for arrears which in fact do not exist.

7756. Whereas if your system were adopted, directly Manchester sent the particulars to you, you would become the collecting court and would know that he had not paid anything since the information had been sent to you?—They would transfer the case to us in toto and we should start the operation of bringing the man before the court.

7757. In transferring it to you, would they not inform you that this man is under an order to pay so much; he is alleged not to have paid the following instalments?—Yes. Thereafter, we should have no communications with them; from that moment we should carry on ourselves in collecting and enforcing.

7758. (Lord Keith): What would happen in these circumstances? Suppose that after the Manchester court has transferred the case to London, and before the man can be found, he has sent his money to the Manchester court. Would the Manchester court just refuse to take it?—We should have to have an arrangement about that. They could send it back to him or send it to us. It happens sometimes that when people are ordered to pay money into court, they send it direct. They should not do it, but they do.

7759. (Chairman): Surely the sensible thing would be for Manchester to hand the money to the woman and let you know?—Yes.

7760. (Mr. Maddocks): The trouble is that the country courts do not supply the information with any degree of regularity?—That is so.

7761. (Mr. Mace): I want to go back to this question of notice to the third party. If a husband desires to set aside a magistrates' order against him on the ground of his wife's adultery, there is a Divisional Court ruling that it is necessary for him to give particulars of the adultery in writing to his wife before the hearing of the summons?—Yes.

7762. Do you see my objection to a rule being made that not only shall he give that notice in writing to his wife, but he shall also give it to the alleged adulterer, if he knows the name and address?—I think that is an excellent compromise, if I may say so. Instead of having to give notice of substituted service, to give notice at his last known address, when the summons is served, informing him of the allegation against him—I think that that would be an excellent compromise.

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7763. I am not suggesting that I agree necessarily with this, I am putting it to you as a hypothesis to see how far we get. Assume that notice sent by registered post is proved at the hearing as having been sent, and the man does not appear and the court has no reasonable grounds for supposing that the registered letter was delivered, the magistrate in his discretion could go on with the case in the man's absence?—Yes.

7764. Assume that no notice has been given, because the man's name was not known or his address was not known, some reason was given to the court for notice not having been given, do you think that the magistrate could use that information as part of the facts upon which he would decide whether or not the allegation was true?—I do not think that he should take the responsibility of finding a man with adultery on these facts. I had not thought of it before, but what you are suggesting I would respectfully put forward as a very useful compromise between those who oppose what I suggest and those who are in favour of it. When a man comes before a magistrate and says, "I want my order ended because my wife has committed adultery", if one could then direct him to put upon the back of the summons the particulars of the person with whom she is supposed to have committed adultery, and direct that a similar notice should be served on the alleged adulterer, I think that that would do away with the necessity of substituted service. That would give a man notice, at his last known address, of the accusations made against him, and he could come to the court and have his say.

7765. Assume that the registered letter comes back marked "not known"—You would be in the same position as when a summons is served. As you know, before a court can hear a summons, proof of service must be given, and there are rules about proof of service which say that summonses can be deemed to have been served if left at the man's last known place of abode. I think that it would be an excellent idea if we sent a letter to the man's last known abode, saying, "You are accused of adultery with so and so, the case is being heard on such and such a date, this is to give you an opportunity of coming to the court if you wish". One of the parties would have to call him then. It would meet my point that a man accused of an offence should be given an opportunity of being heard.

7766. Whether or not he can be heard is a procedure which is already provided for in magistrates' courts under Section 83 of the Food and Drugs Act, 1938. I do not know if you know that Section?—I am familiar with it in regard to food and drug cases, but I cannot think that it is quite applicable to matrimonial matters.

7767. It is only applicable as to the machinery as to how a court would hear a third party brought into a case?—Yes.

7768. That machinery is already laid down in such cases?—I agree that it lays down the principle that third parties can be brought in. The analogy is not perfect, because, in those cases, when a man has manufactured an article, his address is usually known and you can find him all right, but it is different with adultery.

7769. I am only using that Section to show that magistrates' courts already have a procedure for hearing a third party to proceedings?—I entirely agree.

7770. Turning now to the difficulty about collecting the maintenance moneys, would you agree that if there are to be new rules, the rules should provide that the collecting and the enforcing should be done where the man is?—Absolutely.

7771. For this reason, that the court in that locality knows the difficulties of local trade in the locality better than the far-distant court?—Yes, I entirely agree.

7772. I should like to put a question on one point which is not in your memorandum. Are you or are you not in agreement with the retention of the non-cohabitation clause in separation orders?—When I used to go to the Divorce Court many years ago, the judges used to tell me that one should try to persuade magistrates to strike out the non-cohabitation clause, because it bars a subsequent divorce on the ground of desertion. Therefore I think that the non-cohabitation clause should be struck out.

7773. (Chairman): You think that the non-cohabitation clause should always be struck out?—Except in cases of cruelty.

7774. (Mr. Mace): Would you put it this way, it should not be granted unless specially asked for by a wife, or where the magistrate comes to the conclusion that it is an appropriate case in which to insert it?—Under the Summary Jurisdiction (Married Women) Act, one can either leave the non-cohabitation clause in the order or strike it out. I can only say that it entirely depends on the facts of the case. If I want to be sure that the husband and wife are keeping separate and apart, I leave it in, but if I think that the wife later on may want to get a divorce on the ground of desertion, I strike it out, because I understand that if you leave in a non-cohabitation clause, it opens the path for a subsequent suit for desertion.

7775. I am thinking of the woman who comes before a court on a desertion summons unrepresented, and proves desertion, and then finds afterwards that the non-cohabitation clause has been left in by the court though it was not asked for—it has probably been left there without either the justices or the clerk of the court noticing it.

7776. That is so?—It is often done, I am afraid.

7777. That is something which I thought might require a remedy. Would you agree that the non-cohabitation clause should not be included unless it was asked for by the parties?—It should not be included unless it is the intention of the court to put it in. The court forms are printed, and it is the easiest thing in the world for the clerk or the justices to forget to strike that clause out. When I used to practise at the Bar, I have been in the Divorce Court when the judge has said, "There is a non-cohabitation clause here, how can you say that there has been desertion?", and everybody has agreed that it was probably left in by accident. Certainly, the matter should receive special attention.

7778. Arising from that, on an application by a wife to strike out the clause, perhaps some six years after the order was first made, would you hold that there would have to be some new evidence required on the part of the wife, in order that the order might be varied?—I have actually acceded to such an application.

7779. And on what evidence?—I would only say that I should listen to the reason and decide according to what I thought the justice of the case required.

7780. That is a present-day difficulty?—It is undoubtedly a very real one.

(Chairman): In regard to the cost of substituted service by advertisement, it might be useful to the Commission to have on record that there are figures given in *Lacey on Divorce*, Fourteenth Edition, page 623.

7781. (Mrs. Jones-Roberts): You say, in paragraph 6, that it would be useful for justices to have power to apportion the contents of the matrimonial home, if there has been a breakdown and a separation or maintenance order has been made. Have you thought how that could be effected?—My idea would be that when an order is made, the wife would say, "There are myself and the children, we have no furniture except what is in the home", and the court would ask the husband to hand over to her the kitchen table, chairs and pots and pans, a bed for herself and cot for the children, whatever it is. In a rough and ready way, having heard what the husband had to say, the court would decide it in the interests of common humanity. The magistrate would say, "I think it desirable in this case that you should hand over these articles of furniture to your wife and children and I make an order that you do hand them over".

7782. Supposing the husband contests that very hotly, and says that the wife is taking too much for her share, how would you follow it up?—You would have to use your discretion and say what you thought justice required.

7783. Would you have any officer go there and investigate?—You could do that, and the probation officer to have a general look round, in the same way as one sends the probation officer round to the house when the parties

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are disputing the custody of the children. I always send the probation officer to where the child is and to the place to which it is desired that the child should go, and get his report on the conditions in each case.

7784. You would allow an appeal by one party or the other?—I think that they should have a right of appeal.

7785. What troubles me is the mechanics of it. In theory, it sounds reasonable, but I can see difficulties in carrying it out. I wondered if you had given it close attention?—All these things are difficult, but difficulties are made to be overcome. I cannot see any insuperable difficulty in sitting in court, hearing what both parties have to say, and deciding what the interests in the particular matter require. I may decide that justice requires that the husband should hand over the kitchen table, chairs and pots and pans for the use of the wife and children, although the husband paid for them originally. Marriage is a joint venture, and in looking after the home, I maintain that the wife contributes as valuable a part as the husband does in earning the wages.

7786. Could you envisage a difficulty so great that the furniture would have to be sold up and the money divided?—My idea is that the wife must have the minimum articles to run a home with, and if they are in existence I see no difficulty in handing them over, unless they are subject to a hire-purchase agreement, as they often are. In that case, what I suggest would not be any use, unless you could make arrangements with the person hiring out the goods. Where the table and the bed are paid for, I see no difficulty whatever in saying to the husband, "You must hand these over to your wife".

7787. I turn now to paragraph 12, where you suggest that the guilty party should have the right to obtain divorce after a long period of separation. Can you tell us what your experience has been on this type of problem? Have you come across many cases as a magistrate, and possibly in your capacity as Chairman of the New Malden Citizens' Advice Bureau?—Not a tremendous number, but I can mention one or two cases. I have in mind particularly the case of an officer in the first world war, terribly wounded and rendered practically helpless. He came back from the war, but he and his wife did not hit it off; she apparently had no use for him. He is a terrible sight, paralysed and so on. His mother provided him with a nurse. They became devoted to each other. She became his mistress. For years his lawful wife pursued him in court for maintenance under an order of the court—it was positively indecent. This nurse-mistress was looking after him devotedly, his wife was nothing to him. He could not afford to pay this allowance and the prospect was that he would have to go on in this wretched situation for the rest of his natural life. I constantly asked his wife to divorce him because he was living with this woman, but she said, "No, I am not going to hand him over to this woman". Every time they came to court there was a scene between the two women just because of spite. I think that the marriage should be ended so that this man and his nurse could get married and be done with this wretched state of affairs. The wife was pursuing him for the money. Eventually I put an end to the order by saying he could not afford to pay any more.

7788. I am wondering when you say that there is religious conviction or spite which would make a wife unready to come forward, do you not think that economic might play some part in it?—But the economic fear is now removed from the sort of people I deal with, by that blessed thing known as national assistance. With national assistance in the background, many of the wives prefer to draw it to having an order of the court, because it is a regular source of income. They do not have to go down to the court every week and chase their husbands and get something less than the order, so they are delighted to receive national assistance and be rid of their husbands. I am afraid that is causing a certain amount of fraud between husbands and wives. For instance, I had a case a fortnight ago which opened my eyes to a lot I had not realised before. A letter was produced in which it was quite clear that the husband and wife had made this arrangement. The husband told the wife, "Go and draw national assistance. I am not going to pay you the £3 a week that the magistrate says I have to pay. I will give you £1 a week on the

quiet. You can draw the rest from national assistance. But do not tell them what I do give you". The wife agreed to that.

7789. I wonder if you can tell us whether there are cases which come before you as a magistrate where a man does not pay up under a maintenance order because he has another family?—We have 900 orders in my court. Most of the husbands pay very well. About fifty will not pay, unless you screw it out of them by threats of sending to prison and so on. They are the "regulars". I know their history. They are familiar faces at the court. They come every Saturday afternoon when I deal with arrears cases. They will not pay unless they are made to pay.

7790. What is the number of cases in which the reason that they do not pay is because they have another family?—A man is earning, say, £5 15s. a week. That is often the wage of a working class man. He has a wife and children and is living with another woman with several children. It is absolutely impossible for him to pay more than a few shillings to his wife. He has the woman he is living with and his children by her. He cannot possibly meet his obligations. I often say to such men, "You go and live with another woman and produce a lot more children, yet you cannot keep the children you have by your wife, and you come and ask me to reduce the order because you cannot pay it". But you cannot get away from it, the man cannot keep two homes.

7791. (Lord Keith): You spoke of 900 cases, out of which you say there are fifty recalcitrant people. What Mrs. Jones-Roberts wants to know is what proportion of those recalcitrant cases are due to the men living with other women?—I should think that out of the fifty, about thirty per cent. [See Note on page 814.]

7792. (Chairman): That is, fifteen cases out of the fifty?—Yes.

7793. Arising out of your last answer, take the case of a man who is living with another woman and has children by her, and cannot pay more than a few shillings to the wife. If your suggestion for divorce was carried through, and if you passed a further Act that the children should be legitimated, it would be very nice for the children, but the wife would be deprived of any legal remedy she has?—In that case, I think she would be delighted, because she would get national assistance, which is regular, instead of an allowance from her husband which is uncertain. This national assistance is a vital factor in matrimonial relations, just as in a criminal case the criminal has nothing to lose but everything to gain when he goes inside, and the wife gets national assistance, so it is with these matrimonial cases.

7794. (Lord Keith): You quoted the proportion as thirty per cent. of your fifty cases. Of the balance of the 900, can you say in how many of those cases the men are living with other women?—I cannot pretend to answer that because one does not see them.

7795. There will be some, I take it?—I am quite certain that there are a large number, but I could not pretend to say what the percentage is. One does not see the people who pay, only those who do not pay. [See Note on page 814.]

7796. (Mrs. Jones-Roberts): One final point, in regard to these fifteen cases which you know well from your personal experience, your feeling is that the balance of suffering lies with the second family, they are the people who suffer more, the unmarried wife and the illegitimate children? You have to balance that against the deserted wife who has difficulty in collecting money, and you would say from your experience that it is the second family who suffers more?—I would not say that my sympathies are more with the illicit than with the licit union. Both families suffer most, because the husband is no longer living with them but with the new woman and the illegitimate children, therefore he gives them prior consideration. I think that probably the lawful wife and children suffer most because they are neglected all the time by the husband, but I still think that it is in the interests of public morality that the unlawful union should be regularised because the first wife will then, as she is doing now, draw national assistance for the children, where they are young. She would be in the same position financially, because she gets national assistance. She gets it now because the husband cannot

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[Continued]

keep two families, she will get it if the marriage is put an end to, but the illegitimate children will be legitimated and there will be a lawful union instead of an unlawful one.

7797. (Dr. Robertson): One further question regarding this constant difficulty in enforcing maintenance orders. We have been told on several occasions that there is particular difficulty in tracing husbands in Scotland. Has that been your experience?—Yes, but there is a new rule by which summonses issued in England can be served in Scotland.

7798. But there is still a difficulty?—Yes.

7799. Can you suggest any remedy or explanation? What is the chief obstacle, in your opinion?—I am afraid I cannot answer that. All I can say is that the summons in an English court can be served in Scotland, and why the Scottish police cannot find the person concerned, to serve the summons, is a question I cannot answer.

7800. (Lord Keith): It is the legal difficulty. We do not use the police, we use solicitors.—I do not know if this is right, is it a question of expense? If you use solicitors perhaps they do not get paid enough, and they are not so energetic as they would be if they were paid more for serving the summons.

7801. (Dr. Robertson): In any case you agree that the difficulty exists?—Yes.

7802. (Lady Bragg): I understood you to say that the clerks to magistrates' courts get a commission and that is why they would be likely to object to the transfer of the collection of maintenance payments?—Yes.

7803. Is that generally known and accepted?—That is what I am told by those who claim to know. I do not know whether I have said something I should not, but that is what I am assured by clerks to the justices, that that is the reason.

7804. Whole-time ones?—Yes. As I understand it, some justices' clerks are paid a fixed salary, and the amount of the salary is fixed having regard to what their commission would be on the amounts collected. Others have no fixed salary, they are paid a commission, therefore the more they collect the more their remuneration is. That is what I am told on good authority.

7805. Perhaps I ought not to press that if it is only a rumour. I turn now to paragraph 2, where you say:—

"It must indeed be a great shock for a faithful and perhaps happily married person to learn (possibly for the first time) from his local newspaper that a few days before in the local court he was accused of adultery...."

To continue with your Greenwich bus story, did the aggrieved party see a notice of that kind in a local newspaper?—No, he was sitting on a bus on that occasion when the irate husband ran up the stairs.

7806. Do you have the Press in your matrimonial courts?—Yes, sometimes. They are entitled to report certain limited particulars, the names and addresses of the parties, the allegations made and a summary of the decision of the court.

7807. That information being given to them outside by the clerk? In my experience, I have never seen the Press in matrimonial courts.—They do not come a lot to my court. I have seen in other local papers the reports of matrimonial proceedings there.

7808. Then, with regard to paragraph 5, in a case where the husband pays the rent and the council house is in his name, if he has an order made against him, would you agree that the tenancy is made over to the wife and that the local authority insists that the husband should leave?—It is my experience that local authorities are most co-operative. I often have communications with them and say to them, "Can you arrange for this tenancy to be transferred?" I have been discussing this matter with them within the last few days. Their attitude is, "We will change over the tenancy as soon as you make an order." I am not sure that they are entitled to do that, but nevertheless that is their attitude. I have handled cases where women have come to me, they have no legal ground upon which I can issue a summons, but I have sent the probation officer round to the local authority

landlord and made an arrangement for the tenancy to be changed. Under the Housing of the Working Classes Act, a good many of these tenancies are not subject to the Rent Restrictions Acts, therefore it is easier to make the change compulsorily. In the case of private landlords it is much more difficult, but in the case of local authorities they are more co-operative in changing over the tenancies because, where the Rent Acts do not apply—and they do not apply to many of the local authority tenancies—the change can be made by giving a week's notice to quit.

7809. You do not mention this in your memorandum, but I should like to ask whether you ever make an interim order for the purposes of reconciliation?—Yes, I do that sometimes.

7810. Do you find it is a help?—Yes.

7811. It does not prejudice matters at all?—No.

7812. How do you proceed? Do you say, "See the probation officer," or "Go to the marriage guidance people"?—The reconciliation machinery in my court—I think it is the same in most courts—is most effective before the case is heard. The parties come to the court, interview the probation officer, and he often brings about a reconciliation before the matter is mentioned to the magistrate at all. Sometimes when that has not been done, it will appear when the application for a summons is made that this is a case where reconciliation might be effected, and one puts the matter back for the probation officer to deal with. Then there is the third stage, when a case has come into court. Very often when a case is called in my own court, I start by finding out if there is any chance of the parties being reconciled, and if I see any hope from their manner, then usually I say, "Mrs. So-and-so, are you willing to give your husband a chance?", and she will say, "It is up to him".

7813. Do you say that at the beginning when the actual hearing commences and the parties are standing there with their solicitors?—Yes, sometimes lawyers are there.

7814. You see them without solicitors?—No, I never see anyone in my room, only in open court. The only people I see in my room are little children when it is a question of custody. I see them without their mothers and fathers glaring at them and talk to them like a father.

7815. Would you agree that the ordinary person does not understand what a separation order is at all? A woman goes to court and asks for a separation order when what she really means is a maintenance order?—Absolutely.

7816. Do you think that something ought to be done to make the public understand what a separation order is?—That is up to the justices. When you have people who are completely ignorant and cannot read the oath, you talk to them and explain matters to them. That is a matter for each justice to decide. The more informally there is in a court, the more chance there is of irregularity and of the case being upset in the Divorce Court, but we do try to be as informal as possible and yet be regular.

7817. (Lord Keith): There are one or two points of information I would like, and possibly something of explanation which I might be able to give. In the last paragraph of your memorandum, you have the suggestion that there might be a question of the disposal of the general assets of the guilty party. That, of course, is a separate question from the questions that arise under paragraph 6, which deals with the matter of maintenance?—Yes, my Lord.

7818. Now it is an idea that is not unfamiliar to us in Scotland, in fact that is the principle that we carry out at the present time, that is to say, when a divorce takes place, and the guilty husband has assets, the wife is entitled to a share of them, and that is, as I understand it, what might be introduced here?—That is what I am suggesting. I cannot pretend that I know of the Scottish practice.

7819. It has been suggested as a reform or improvement of the law of Scotland that, instead of the wife having a settled right to a share of the guilty party's assets, the court should have an option to award her a lump sum payment out of the assets, which need not necessarily be

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any fixed proportion, or alternatively, an annual payment where it may be that there are no assets which it is worth taking anything out of. Would that idea commend itself to you?—It would, my Lord, certainly.

7820. And as long as the wife gets something from the guilty party, it is left to the court to decide what in the whole circumstances would be right to give?—A sort of general discretion.

7821. Either in the shape of a capital payment or of an annuity?—Yes.

7822. Might I come now to paragraph 3 of your memorandum? Here I am really looking for information. You have said that where the parties are living together the wife can get an order for maintenance. It is a curious idea to me, and I am not clear how it arises in England?—Some people are so peculiar in their habits. A husband will say to his wife, "You do not know how to run a house, I am going to do the shopping and I am going to buy the food", and he will give the wife nothing at all, he will say that is necessary. She will come to the court and say, "I cannot live in these conditions, he does not buy the proper food or enough food, I want money so that I can run the house properly".

7823. Is that a common case?—It often happens. Or a man will say, "My wife goes to work, she earns money, why should I give her any money, she is as well off as I am, she can keep herself". All sorts of considerations like that arise.

7824. Do you consider, in such a case, where the husband is providing an insufficient amount to maintain his wife and family in the house that she should have an order?—Yes, my Lord. The most usual complaint is that he gives her an allowance which is not enough. I had a case a fortnight ago where a man paid his wife £4 a week. She maintained that it was not enough, she could not manage on it. That was the issue there. It is a question of the amount.

7825. In that case can you say to the husband, "I am going to award to your wife maintenance of £5 a week"?—One can. It is a question of fact in each case. Where the husband is maintaining the wife and she says that it is not sufficient, whether it is sufficient or not is entirely a question of fact in each case.

7826. Supposing the wife gets a maintenance order of £5, and assuming that all the time she and the husband are living together in the same house, is it then up to her to maintain the house and the family and her husband out of that £5?—It all depends on the circumstances of the case. One takes the joint income and has to try to fix what would be a reasonable way for people of that income to live, and then decide whether the husband is paying a proper maintenance allowance or not.

7827. Supposing you decide that he is not and award a maintenance allowance against him of £4, is the wife then supposed to maintain the house out of that £4?—It would entirely depend on what he did. If he pays the gas bill, the coal bill, the electric light bill, I should take all that into consideration and say to the husband, "If I make an order for £4, what is it you are saying your wife should do, how do you say she should use it"? If he says, "I will pay the rent", then I should reduce the amount of maintenance. But the point I am trying to make in this paragraph is this: that, at present, if I make an order, in a case such as your Lordship envisages, then if the wife goes back and lives with her husband, as I understand the law that order is unenforceable.

7828. I am assuming that the wife is living with him at the time of the order.—The order is unenforceable while they are living together. In a large number of my orders, they live together and the husband pays because he does not know what the law is. On a summons for arrears I do not enquire too closely whether they live together, and until I am aware of the fact that there are reasons why he need not pay, I do not say anything.

7829. You did say something just now which was new to me. You said that the order is unenforceable while they are living together?—Yes.

7830. Therefore though you make an order for £4, if the husband and wife are living together, the wife gets nothing?—That is unfortunately so if the husband knows the law, but we turn a blind eye to the law.

7831. (Chairman): You make the order and the husband pays under it, and he does not know that it is unenforceable?—Supposing the man fell into arrears and he was sent to prison for not paying it, the magistrate might be liable to an action for false imprisonment. It would be said, in law the order is unenforceable.

7832. I see the point, but though the order is unenforceable, it is nevertheless an order, and there is no reason why the man should not comply with it, and often he does so in blissful ignorance that if he did not, you could not do anything about it?—Yes. That is a reason why the law should be clarified on the subject.

7833. (Lord Keith): It is mysterious to me and I cannot understand how it works. If you are satisfied, I suppose that is all right. I have only one further point, on the question of an intimation to the person who is alleged to have committed adultery. As I understand it, you would be quite satisfied if intimation were made to that party by registered post?—Yes, my Lord.

7834. That would be if the party's name and address are known?—Yes.

7835. If the party's name and address are not known or if the registered letter comes back marked "Unknown", then would you be satisfied simply to dispense with any further intimation?—Yes, my Lord, I would.

7836. And proceed with the case and decide it in the absence of this unknown or undiscovered party?—Yes.

7837. That is all you want?—That is all I want, though I have asked for more in my memorandum, but having heard what has been said it would completely satisfy me.

7838. I do not know if it would be of assistance to you and the Commission to know that that is precisely what is done in Scotland, at any rate in the Supreme Court?—I did not know that.

7839. (Chairman): I am very glad Lord Keith has raised that point. I understand then that you are not pressing for a system of substituted service?—No, my Lord. It had not previously occurred to me, but having heard the views expressed this morning, I would welcome this alternative proposal as an easier way of dealing with the matter than that which I have suggested in my memorandum. (Lord Keith): We never have intimation in a case of that kind by public advertisement. Therefore in one sense the only person who ever knows about the intimation is the party who receives it, and therefore no one else need know about it unless that party chooses to come in and defend the case.

(Chairman): Thank you very much for your memorandum and for your help this morning.

(The witness withdrew.)

NOTE.—Mr. Powell subsequently stated that on consideration he was satisfied, with regard to the 900 orders in force at his court, that about two-thirds of the men concerned were living with other women. Further, the same proportion would be applicable to the fifty "recalcitrant" cases within the 900.

PAPER No. 96

MEMORANDUM SUBMITTED BY THE SIX POINT GROUP

Introduction

1. The Six Point Group has welcomed with the greatest enthusiasm the appointment of the Royal Commission on Marriage and Divorce. It is our profound hope that it will make recommendations for changes in the law regarding marriage and divorce which will adjust the institution of marriage to present-day conditions and thereby give it renewed strength as the basis of family life.

2. The Six Point Group feels that it has a duty to present its views to the Royal Commission since it is one of the oldest feminist organisations in the country and since it holds the single tenet that there should be equality between the sexes. We consider it a function of the law to establish and maintain this equality both in relation to legal rights and economic status. The Group will make its recommendations within this framework.

PART I

Economic status

3. Over the years, the social trend in British communities has been that women should share equally with their menfolk in the opportunities and responsibilities, and in the rewards and sacrifices, of the society in which they live. It is our hope that the findings of the Royal Commission will be in agreement with this trend.

4. The Six Point Group recalls that until comparatively recently a married woman was not recognised before the law as a person. Among other disabilities she had no property rights, she had no vote, she was not recognised as the parent of her child, she could not easily divorce her husband. In fact a married woman was regarded as a chattel.

5. The changes in the status of married women have been brought about by the persistent demands of liberal-minded men and women who are conscious of the injustices and cruelties inflicted on married women.

6. At the present time a married woman has emerged from the status of a chattel to that of an independent person with certain limited, legal, civil and human rights but with no economic independence or rights in respect of rewards for her work as wife and mother. The acceptance by the Parliaments of the countries of the United Nations of the principle that every individual should have equal rights irrespective of class, colour, religion or sex supports the claims for the recognition and implementation of the principle of the economic independence of the married woman.

7. In order to preserve the marriage tie and the family as the social unit, the partners to a marriage should at all times be able to stand before the law, their community and each other as equals in the joint undertaking of marriage. The actual contributions each partner makes to a marriage will vary with each couple, but the principle of equality will, in our opinion, invest the partners with a deeper sense of responsibility and with a deeper sense of security against the indignities and injustices which now lurk in the background as remote possibilities even at the start of the most auspicious unions.

8. It is the opinion of the Six Point Group that foremost among the causes of personal conflicts, broken homes and the subsequent injury to children, is the inferior economic status of the wife and mother.

9. Consider the relative status of the man and the woman in the normal home where the man is the bread winner and the woman is the housewife and mother. Both may work equally hard with the common aim of building up a home and bringing up the children and in our opinion their contributions are equally important to society. Nevertheless, the woman is treated in law as a dependant; she has no financial rights deriving from her work in the service of the home and of the children, her rights to bare shelter and maintenance are based on the legal theory of dependence. Her economic status is servile and degrading. She would often be better off as a paid housekeeper.

10. Nor are the wife's economic rights improved if she helps her husband as his business. She continues in this capacity as an unpaid worker with no rights to the income of the business by reason of her work.

11. In these quite usual situations it is the husband and father who wields the authority over the family and in consequence the children develop an attitude that the wife and mother is of secondary value and importance. Since this Group regards the contributions of the wife and mother to the home and family as of the highest value and considers the home and family the joint effort of both spouses, the Six Point Group makes the following recommendations:—

(a) The matrimonial home and its contents shall, subject to the qualifications mentioned below, be deemed to be the joint property of the spouses, even though there may have been unequal contribution to its cost. (The matrimonial home shall include the house, if any, lease of dwelling and personal chattels as defined in the Administration of Estates Act, Section 55.)

(b) All accretions in wealth derived from earnings, interest, rents, or profits of either spouse while living together shall, subject to qualifications mentioned below, be deemed to be their joint property. Property owned before marriage shall be excluded and also gifts from third parties and inheritances as it might be contrary to the wishes of donor or testator to benefit both. (Benefits under intestacies should also logically be excluded.)

(c) If the marriage is ended by a decree of divorce or a decree of nullity, the property shall, except in the cases mentioned below, be divided or accounted for on the lines indicated above subject to any arrangements the court may make in respect of children, and with due regard to the paramount importance of the continuance of the matrimonial home for the use of the children. In such division the matrimonial offences of either party shall not as such affect their property rights.

(d) On a decree of nullity on grounds now requiring proceedings to be brought within twelve months of marriage, or on a decree of divorce on grounds for which permission to bring proceedings within three years of marriage would now be allowed, none of the foregoing provisions for joint ownership shall apply.

(e) Any claims under the above provisions shall be disallowed or modified at the discretion of the court where there has been fraud or unconscionable conduct as between the parties, irrespective of whether such conduct is a ground for dissolution.

(f) The spouses shall have the right at the time of marriage to contract out of the above provisions for joint ownership.

12. If marriage is to be viewed substantially as an equal partnership with implication of equal financial responsibility, it would in no way be a deterrent to serious intentions of marriage and it would invest it with a material responsibility commensurate with its spiritual and social significance.

13. The provision for the legal right of a spouse to a share of the joint income would not affect marital relationships where they are satisfactory, but would tend to prevent unsatisfactory relationships from developing. In every case it promises that each spouse is an adult and not a ward of the other. We believe such equality will stabilise the marriage relationship.

PART II

Domicile

14. The theory in law that the husband and wife constitute one entity is not compatible with modern thought. We have already witnessed the modification of this idea but an instance where it still operates is the case of domicile.

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PAPER No. 96. MEMORANDUM SUBMITTED BY THE SIX POINT GROUP
MRS. JUANITA FRANCES, MISS ROXANE ARNOLD AND MRS. L. HORTON

15. The Group considers the present rule that the domicile of a married woman is that of her husband, can operate unfairly and harshly. Her capacity and right to dispose of property during her lifetime and by will are affected by the law of her legal domicile which may not be her *de facto* domicile. A wife in this country may not even know to which system of law she is subject in such matters, and if she does know, she then has all the trouble and expense of finding out the rules of that foreign system.

16. The Group makes the following recommendation:—

That the domicile of a married woman shall be determined in the same way as that of a man or *feme sole*.

PART III

Damages

17. The Six Point Group regards the present law relating to damages in cases where adultery is grounds for divorce as incompatible with principles of equality and out-of-date in its concepts. The law at present provides that a husband-petitioner may claim damages from a man who has committed adultery with his wife but a wife cannot claim damages from a woman who has committed adultery with her husband. The Six Point Group

is of the opinion that both an erring spouse and the man or woman with whom adultery is committed are equally responsible morally and should both bear any consequent financial responsibilities.

18. The Six Point Group therefore makes the following recommendations:—

(a) That the right to claim damages be abolished in its present form.

(b) That both the husband and wife petitioners shall have the right to join as co-respondents a man or a woman who has committed adultery with his or her spouse, and that such co-respondents be jointly and severally liable with the respondent for maintenance of the petitioner and the children of the marriage.

(c) That there shall be a right of contribution between the respondent and co-respondent.

(d) That the court shall have power in cases of default in maintenance payments to order their deduction at the source.

19. In connection with maintenance generally we would point out that a consequence of the adoption of our proposals for joint ownership would tend to reduce, in number and quantity, awards and orders for maintenance.

(Dated 15th January, 1952.)

EXAMINATION OF WITNESSES

(MRS. JUANITA FRANCES, MISS ROXANE ARNOLD and MRS. L. HORTON, representing the Six Point Group; called and examined.)

7840. (Chairman): We have been Mrs. Frances and Miss Arnold, who is the Vice-Chairman of the Group. Miss Arnold kindly attended before a committee set up by this Commission to give evidence on points dealing with international law.—(Mrs. Arnold): Yes.

7841. We also have before us Mrs. Horton. May I ask what positions Mrs. Frances and Mrs. Horton hold in the Group?—(Mrs. Horton): We are members of the Executive Committee.

7842. To whom shall I address my questions?—Perhaps to me.

7843. We have all read and studied your memorandum and there is no need to repeat anything that is in it, but would you like to add anything to it before answering any questions?—We should like to if we may. You have realised that the Six Point Group believes that the most serious threat to a happy and stable marriage is the present inferior economic position of the wife and mother. We want to stress that as strongly as we can. We believe the surest way to preserve the family as a social unit is to establish the legal and financial equality of both the partners to the marriage. Briefly, we recommend that the husband and wife should agree on what they consider a reasonable amount for the household expenses—and that would include all personal expenses that are incurred either by man or wife in the course of their profession or business—and the remainder of the income of either man or wife, whether their earnings or profits or interest or rent, should be deemed to be their joint property. There would, of course, have to be certain qualifications such as we have set out in our memorandum. In other words, what we are working for is equal partnership in marriage, and we mean full equality, because if the wife is providing the income then the husband would be entitled to his share. We do not believe that a change in property rights of this nature would raise any more serious difficulties than any other form of partnership. On the contrary, we believe that it would enormously reduce friction in the home and that perpetual irritation about money matters, which is so often the cause of much more serious trouble. Mrs. Frances can give instances that have come to our knowledge of homes that have been wrecked by the man's refusal to provide properly for the maintenance of his wife and family. But even in homes where the man is willing to provide food and clothing the position of the wife can often be galling in the extreme. If we take the case of a young woman who has been earning her own living before marriage, she has been used to having her own money in her pocket and

then she marries and finds she has nothing whatsoever to call her own; that whatever money she needs she has to ask her husband for, even for a postage stamp or for a bus fare. Social scientists tell us that in this country it is rare for a husband to make any allowance for pocket-money to his wife and that can be extremely galling. It is humiliating to her and if she has children it cannot fail to humiliate her in their eyes. It is not only humiliating, it is unjust. We believe that the contributions to marriage made by man and wife are of equal value and it is time that was given legal recognition. We believe if that were established it would be accepted just as the Married Women's Property Act has been accepted in spite of the most strenuous opposition to it when first mooted. The National Society for the Prevention of Cruelty to Children tell us that in thousands of cases every year the mere threat of prosecution will make a man who has not been providing enough for his wife and children change his habits. We believe that if equal partnership were recognised in law, there would very soon be no need even for the threat of prosecution in a great number of these unfortunate cases. We would like to point out that we are not asking for anything that is new or untested, because in our experience there are many homes today where the equality we are recommending is actually being practised. We are asking that legal value should be given to a moral code, a code that is already successfully adopted by many self-respecting men and women. Despite these cases, however, the fact remains that the position of the married woman, the economic position of the married woman, today is very little better than a *seaf*. In law she is a dependant and her right to bare shelter and maintenance is based on the legal law of dependants. The Six Point Group feels that this state of affairs should be ended as soon as possible, that it is degrading—and it is degrading to the man as well as to the woman, just as slavery was degrading to the slave owner as well as to the slave. We want to see marriage put on a sound foundation and a foundation adapted to the conditions of the present time. We believe equal partnership is the easiest way of achieving that end. I would like Miss Arnold to say something about the legal side of the proposals we have made. (Miss Arnold): At this stage I would just point out to the Commission that the equal partnership that we advocate is confined to the fortune that is built up or to the earnings that are brought into the family during the continuance of the marriage.

7844. That is well before our minds, that is most clearly set out in your memorandum. Is that all?—I think the other questions may be questions of mechanics upon which

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[Continued]

no doubt the Commission may wish to raise questions, but that is the essential feature of the legal proposals which we make.

7845. I want to ask you, first, what is the constitution and membership of the Six Point Group?—The membership is something between 150 and 200.

7846. Have you an annual subscription?—We have an annual subscription of 7s. 6d., that is the minimum subscription. Many of our members, I am pleased to say, subscribe more.

7847. How do you run the Group, have you a president and a council?—We have a Committee which is elected annually. The Committee elects its officers. The present Chairman is Miss Monica Whately. We have quite a long list of Vice-Presidents and our present President is Lady Fethick-Lawrence.

7848. (Lord Keith): Is the society confined to women?—The society is not confined to women. We are only a small society but we have several distinguished men whom I could name if you like.

7849. (Chairman): About how many men members have you?—I should say we have ten or so.

7850. Turning to your memorandum, I have a question on paragraph 10. You say:—

"Nor are the wife's economic rights improved if she helps her husband in his business. She continues in this capacity as an unpaid worker with no rights to the income of the business by reason of her work."

I should have thought that any wife who helps her husband in the business would make her own arrangements with her husband and say, "Now if I help in the business you must pay me a salary such as you would pay to somebody else with the same qualifications". Is there anything wrong in that?—There is certainly nothing wrong in that, but there, I think, you have really put your finger on the root of the whole trouble. When young people marry, whether they have a joint business or not, they do not enquire into the state of the law, and paragraph 10 relates particularly to the small, what is called the one-man, business, where two people who are not learned in the law set up in a small business of their own. The woman helps and she never realises that she is not entitled to the life fortune that the couple together build up.

7851. Forgive me, that is dealing with the profits of the business?—Yes.

7852. This paragraph contemplates, as I understand it, that the husband has a business and the wife is a helper in it. I am coming to your proposals for joint ownership shortly, but surely any woman of sense would say, "Well, it is your business, if I help you in it you must pay me a salary". If she has not got the sense to do that, do you think that the law should do it for her?—Yes, I do think the law should do it for her. Indeed, I imagine the whole purpose of this Commission, is to help people who enter into marriage thinking, quite wrongly, that the law is going to meet their needs. The law does not meet their needs and I think we should help them.

7853. I follow that as regards joint ownership. Please do not think I am dealing with that at all. I am dealing with the other matter, when the wife, knowing that it is her husband's business, helps him in it and does not request a salary, perhaps because they are fond of each other. I wondered whether it was wise for the law to step in and create a legal salary if the wife does not ask for it, and perhaps does not think of asking for it? (Mr. Justice Pearce): As a matter of fact, in the ordinary small business, is not the wife always entered as having a salary because of the income tax relief it brings? Is it not so that in almost every case she will be described as earning £3 a week?—(Mrs. Horton): We do know of many cases where she does not take anything whether it is entered or not. (Mr. Justice Pearce): It only reinforces what my Lord says. She has a right to be paid the £2 or £3 salary which is entered in the books of the business, if she likes to stick up for her rights which exist already.

7854. (Chairman): Coming to your recommendations, in paragraph 11 (a), you say:—

"The matrimonial home and its contents shall, subject to the qualifications mentioned below, be deemed to be the joint property of the spouses, even though there may have been unequal contribution to its cost."

I think I follow that entirely. When you say "deemed to be", you mean it shall be deemed to be so in equity, whoever has the legal right?—(Miss Arnold): Yes.

7855. Secondly, you say:—

"All accretions in wealth derived from earnings, interest, rents, or profits of either spouse while living together shall, subject to qualifications mentioned below, be deemed to be their joint property."

You exclude property owned before marriage and gifts from third parties and so on. One thing that troubles me is that this might raise certain difficulties as to the business profits. Suppose that the husband is running a business and every profit he makes month by month belongs to them equally. How could he control the business, if he had to consult his wife as joint owner of these particular profits on each occasion? I am dealing with a case where the man is running the business entirely. How would you deal with that?—I think on the same lines as suggested for paragraph 11 (a), that is, he would be answerable to his wife in equity but would be left free legally to carry on his business.

7856. He would deal with the profits and plough them back into the business if he thought fit, but if he kept anything back his wife would take half?—Yes. (Mrs. Horton): Would it not be carried on in the same way as any other business partnership?

7857. (Chairman): I took it the husband was running the whole of the business?—There are often sleeping partners.

(At this stage the Commission adjourned for a short period.)

7858. (Chairman): Coming to the recommendation in paragraph 18 (b), you say:—

"That both the husband and wife petitioners shall have the right to join as co-respondents a man or a woman who has committed adultery with his or her spouse, . . ."

So far, I think a great many people would agree with you. Then you go on:—

" . . . and that such co-respondents be jointly and severally liable with the respondent for maintenance of the petitioner and the children of the marriage."

That might possibly give rise to difficulties. In the case of a wealthy co-respondent it might possibly be doing rough justice, but I am not quite sure that, applied generally, it would work well. I wondered whether it was not better, if both the husband and the wife have the right to join the adulterous co-respondent, to adjust that matter by the amount of damages awarded against the co-respondent. Would not that be a simpler way, and would it not perhaps meet the situation? You contemplate, apparently, that throughout the life of the petitioner and, I suppose, the infancy of the children of the marriage, the co-respondent and the respondent are to be jointly and severally liable? Is not that going perhaps too far?—(Miss Arnold): I think maybe it is, re-reading it now in the light of what you say. The main object was to bring the woman named and the co-respondent into line, in so far as responsibility for breaking up the marriage and consequent financial loss to the children is concerned.

7859. I quite follow that; that would be met by damages?—(Mrs. Horton): That would be met, yes, we agree.

7860. You point out in your last paragraph the consequences of your proposal for joint ownership, that it would tend to reduce the number and quantity of awards for maintenance. The basis for that observation is, of course, that there would be an absolute right to one-half of the joint property?—(Miss Arnold): Yes.

7861. (Lord Keith): Might I just ask something about this joint property proposal? Is your proposal that the joint property rights should be exercised during the subsistence of the marriage?—Yes.

7862. May there not be great practical difficulties in working that out while the marriage subsists?—I do not think in fact that there will be such great practical difficulties. The fact that one has a legal sanction to the right of the wife to a half-share in the income will be sufficient for the thing to be given practical effect. I cannot help recalling what the witness said this morning

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PAPER No. 97

MEMORANDUM SUBMITTED BY DR. MARIE C. STOPES, D.Sc., Ph.D., F.L.S., F.G.S., F.R.S.Lit.

I. BIOLOGICAL CONSIDERATIONS OF DIVORCE AND NULLITY

1. In any, and pre-eminently in legal, considerations of divorce and nullity, a fundamental principle should be incorporated and logically followed. This does not appear yet to have been done. A recognition of biological facts should dominate legal niceties.

2. In the *British Medical Journal* (June 3rd, 1950) it is stated that, "In passing the Matrimonial Causes Act, 1937, often referred to as Herbert's Act, the legislature made some far-reaching reforms in the law of nullity".

3. I disagree profoundly. The use of nullity in the 1937 Act increased confusion, and multiplied grave injustices to unfortunate individuals by increasing the non-biological attitude to nullity.

4. Marriage may be "natural", "legal" or complete, i.e., social marriage. Based on biological fact, I suggest the following definitions as a guide. All three types of marriage are considered as an intended continuing state:—

(a) *Natural marriage*: that is, the voluntary biological action between the two sexes in which the erect male organ penetrates the feminine vagina. Such natural marriage does not lead to a complete social marriage unless it also conforms with the legal basis of marriage.

(b) *Legal marriage*. This may take place under the current law of the land, either in a registry office or some recognised religious place of worship. Thereafter the parties are legally married and subject to the social laws governing married persons. Such legal marriage does not lead to a complete social marriage unless it proceeds to the act of natural marriage. Though legally binding in social matters it is voidable, after the legal marriage has taken place, if the act of natural marriage (consummation) has not taken place.

(c) Complete social marriage involves both factors (natural and legal) of marriage.

5. Only after complete social marriage can divorce be instituted.

6. If after legal marriage there is an attempt to consummate and enter natural marriage, and some physical defect is either party prevents the rupturing of the hymen and/or the complete penetration by the male organ, then no natural marriage can take place, and complete social marriage has not taken place. If the wife after a sufficient number of attempts at consummation remains *virgo intacta* she has long been recognised as having redress in the legal courts where she can sue as *virgo intacta* for the nullity of the marriage. Thereafter no touch of any moral sort is attached to the pair, who suffered a physical disability which precluded natural marriage. This is a true nullity of marriage.

7. Willful refusal on the part of one or the other leaves the same biological condition but with a different moral atmosphere after the nullity suit is obtained.

8. As a biologist I claim that the only fundamental way of getting the marriage laws of this country straight and honest is to confine the use of the word "nullity" to nullity with non-penetration, and the continuance of the state of virginity of the bride of the non-consummated marriage. (The consideration of non-consummation of a marriage in which the bride was not *virgo intacta* raises other problems which should be considered under the same heading as willful non-consummation, though individual cases may cause some difficulty.)

9. "Divorce" is the only right word to use for any marriage which has involved a natural marriage, that is, has been consummated physically. The clinical pressure which was brought to bear on legislators, leading to the confused use of the term "nullity" in the Herbert Act, is entirely deplorable. All the quibbling involved in such phrases as "defective intention" and the fantastic Roman Catholic attitude which culminates in the practice that persons who have been married for twenty years and more and

have grown-up children can obtain a nullity on the ground of "defective consent", are legally and biologically utterly pernicious. All such modulated arguments of that type should not be tolerated.

10. While greatly respecting his views on many aspects of our problem, I do not agree with the noble Judge, Lord Merriman when he said in the House of Lords (Official Report, March 16, 1949, Vol. 161, No. 50, Col. 416), "logically, everything that happens after marriage as divorce is distinct from nullity, and willful refusal, quite plainly, is something which ought to have been made a ground for divorce". He is in this sentence perpetrating a biological confusion. Willful refusal, leaving the bride *virgo*, does not involve a natural marriage; it is clearly a marriage which is non-consummated and to which, therefore, "nullity" is the term which should be applied.

11. I agree with Lord Merriman most heartily that in the House of Commons Bill "the argument of convenience prevailed". Much confusion in the House of Commons, House of Lords and elsewhere has arisen from not basing arguments on the biological facts.

12. Where natural marriage has taken place and legal marriage was not properly performed and freedom from the marriage is granted, it is confusing to use the word "nullity" and for such dissolved marriages the word "void" should be used.

13. Legal terminology should be made to conform to biological facts, which are essential in all questions of the dissolution of marriage. It is wrong that legal terminology should be twisted either for theological manoeuvring or legal niceties, when either are at variance with biological fact.

14. *Adultery*. I understand that another organisation is demanding that adultery should be re-defined so as to include lechism and/or an act of gross indecency. This would only create further facilities of description. Adultery should be clearly defined in accordance with biological fact. I understand that this same organisation is bringing forward recommendations bearing on "children in nullity cases"; if biological facts are taken into consideration there can never be children in nullity cases (see para. 9 above). So-called nullity cases to which they appear to refer are marriages which are void for legal reasons. The word "void", and not "nullity", should be used for all such conditions.

15. *Three-year probationary period*. Under the present law married couples cannot bring a divorce action until three years after the date of their marriage. While this may prevent hasty divorces afterwards to be regretted, yet there are circumstances in which such a period provokes real hardship on the innocent party. The three-year probationary period should not be compulsory. It should be left to the discretion of the judge trying the case to impose a probationary period if he considers it might lead to reconciliation.

II. AGE OF MARRIAGE

16. The present age of marriage is too high and ignores the biological tendency to natural marriage. The tendency of social workers to consider the raising of the age of marriage as a reform is deplorable, and based on a foolish over-riding of biological conditions. I have discovered that, biologically, British women are of three main types in regard to sex potency: (a) those who are fully mature and ready for coitus, orgasm and childbearing at the age of fifteen or sixteen; (b) the larger number, the "average" type, only ready for marriage about eighteen to twenty-one; and (c) those who can be married but are not sexually mature and physiologically developed enough for orgasm till about the age of twenty-seven to thirty. Many of our grandmothers were happy brides at the age of sixteen, even fifteen. When a woman is biologically capable of bearing a child she should be legally capable of marrying. The legal age of marriage for girls should

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be fifteen. In addition, legal marriage should be made possible in the exceptional circumstances when a girl under fifteen has become pregnant and the man desires to marry her.

17. A case illustrating the cruelty involved in our present law may be noted. The girl Freda brought an action for adultery against her husband; his defence was that the marriage was invalid because she was under sixteen at the time of the marriage. The judge held that there was no marriage. A few days after the time when she reached the age of sixteen the couple went through another ceremony of marriage. This time, however, the banns had not been re-published and a fresh entry had not been made in the register. The judge then dismissed Freda's petition on the grounds that there was no valid marriage, even after the second marriage. The result being that the man married another woman and claimed not to have committed adultery. This is a fantastic travesty of justice.

III. LEGAL SEPARATION

18. On the whole "legal separations" tend to work mischief rather than good. If our legislators are not convinced of the desirability of doing away with legal separations entirely, I hope recommendations will be made to all solicitors that "legal separations" should be asked for as seldom as is possible. Either divorce or a reconciliation is greatly to be preferred.

IV. COLLUSION

19. As any man experienced enough to be a judge must be aware, secret collusion takes place in the great majority of divorce cases, yet if detected it is a bar to divorce, which is absurd.

20. Divorce by agreement, where the parties treat each other as rational and friendly human beings, should be made legal, and solicitors encouraged to make it the form of choice.

21. I understand that another organisation is giving evidence that "refusal of sexual intercourse" should be treated as desertion for the purpose of divorce. This suggestion should be viewed with great caution. Such refusal is not to be confused with willful refusal of a non-consummated marriage, but is refusal of sexual intercourse

after some or many years of marriage have taken place. Consideration of refusal of intercourse then requires very intimate biological knowledge. Among cases personally known to me the sex capacity of apparently perfectly normal middle class men varies within the range of a capacity only to have one sex union every two years, and a capacity and need to have sex union three times a day, 365 days every year. If refusal of sexual intercourse after some years of marriage is made grounds for divorce by desertion, grave injustice is likely to be done.

V. AFFILIATION ORDER FOR MAINTENANCE

22. Financial damages against the adulterous co-respondent, and financial damages in "enticement" cases should be abolished. If a child has resulted from the adultery the co-respondent should be legally liable to contribute to the upkeep of the resulting child.

VI. ROMAN CATHOLIC INFLUENCE IN A PROTESTANT COUNTRY

23. Our legislators, and I hope the Commission, will remember that we are a Protestant country and that interference with our Protestant laws is not the function of the Roman Catholics. If the Commission will refer to the *Catholic Herald*, September 21, 1951, they will see, and I hope be warned by, a huge headline, "Mothers Tackle the Royal Commission—Pope's Delegate Calls for Action". The apostolic delegate urged 18,000 people of the Union of Catholic Mothers to bring pressure to bear on the Royal Commission on Marriage and Divorce. Such pressure should be ignored. The confusions of the Roman Catholic canon law and Roman Catholic thought in general, on all sex subjects, already too much penetrate our Protestant Anglican Church.

VII. INTERNATIONAL AGREEMENT ON DIVORCE REGULATIONS

24. Though it may be at present premature, I hope the Commission will make some effort through the United Nations, or some other organisation, to arrive at an internationally agreed standard for divorce, and to clarify the confusions and distances which arise under present conditions.

(Received 18th December, 1951.)

EXAMINATION OF WITNESS

(DR. MARIE C. STOPES, D.Sc., Ph.D., F.L.S., F.G.S., F.R.S.Lit.; called and examined.)

7890. (Chairman): Dr. Marie Stopes, I see you are a Doctor of Science, a Doctor of Philosophy, and in your memorandum you set out your other degrees, all of which I follow except "F.L.S." I dare say I ought to know what it is.—(Dr. Marie Stopes): I am a Fellow of the Linnean Society, that is a biological society.

7891. We have read your memorandum very carefully and we have taken note of all that you say. Of course, we do not wish you to go over it again orally, but is there anything which you would like to put before the Commission which is not in your memorandum?—If I might be allowed, my Lord, I should like to emphasise the extreme importance I attach to founding the law of divorce on a biological basis. Until 1937, until the Herbert Act, as I understand it, the only ground for nullity was that a woman was *virgo intacta* after marriage. Therefore I have set out the three kinds of marriage which exist, and I hope very much that you will come, at the end of your deliberations, to the view which I hold as being extremely important, that there should be a preamble to a new law of divorce making it quite clear which kinds of marriage there are and their relation to possible divorce or nullity. If I may instance one or two cases, there is acute injury both to individual adults and to children as a result of the most unfortunate middle created by the Herbert Act, and which is not made better by the 1950 Act. If you depart from the biological standard that these three kinds of marriage exist, and the clarity of definition goes, you get the kind of thing happening that occurs when a false description of nullity is given and you get a woman with children getting a

nullity suit which means that the children are made illegitimate, which is fantastic. If you confine yourself to biological integrity in saying that the only nullity that exists—that word is a very ancient one and is well known—must be that of a *virgo intacta*, then you preserve clarity, and the other things come under divorce. I strongly disagree with Lord Merriman, with all due deference to Lord Merriman's position; I had some correspondence with Lord Merriman, with reference to his speeches in the House of Lords debate on artificial insemination, where he made a number of quite unbiological statements. I think it is very deplorable that in 1937 we should have departed from the good old English idea that the *virgo intacta* got nullity and nobody else. I sincerely hope there will not be further tinkering with the 1937 and 1950 laws, but a new, straightforward, biologically-based divorce law. That is the main thing I do very much want to stress.

Then, I should have added to paragraph 4 of my memorandum, after the words, "social marriage", the words, "which combines them both". A complete marriage combines both natural marriage and legal marriage; those two words ought to be added.

Then, in paragraph 12, I suggest the use of the word "void". On thinking that over, I do not think that the word "void" is adequate, because very often it is combined with nullity; people talk about a marriage being null and void. Therefore we want a new word—for you to devise—in order to represent what I have there described as "void".

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[Continued]

7892. Is there anything else you wish to add?—Might I just ask a question, my Lord? I did not know when I sent in my memorandum whether this Commission was dealing with the question of artificial insemination?

7893. My own view is this: that we are not concerned to express an opinion as to whether artificial insemination is or is not a good thing. That is not within our terms of reference, but we could, I think, recommend, if we thought fit, that A.I.D. without the consent of the husband, ought to be a ground for divorce. Do you follow what I mean?—Yes, I did not know that when I drew up my memorandum. There are in the debate in the House of Lords, which of course you have, many statements of Lord Morrison that . . .

7894. I do not think you need trouble to go through all those statements. It seems to me that the only problem we may have to consider is—should it be a ground of divorce if there is artificial insemination by a donor without the consent of the husband?—The Archbishop of Canterbury and Lord Brabazon, and others, said that it should be considered as adultery; that is a very serious attitude to take, and they say clearly that the children of A.I.D. must be illegitimate, forgetting entirely the common law of England. The common law of England is that if a man marries a woman pregnant by a man other than himself and the child is born in wedlock, he is registered as the father. The common law of England covers these so-called doubtful questions.

7895. Turning to your memorandum, the first fourteen paragraphs, which you have been enlarging upon to some extent today, deal with the appropriate use of terms, and you point out that in many ways quite inappropriate terms are used today and you stress the fact that there are three types of marriage, natural marriage, legal marriage and complete social marriage. I have not any questions on those paragraphs because I entirely follow what you say and they will be carefully considered. Then, in paragraph 15, you say:—

"Under the present law married couples cannot bring a divorce action until three years after the date of their marriage."

Then you say that that sometimes causes hardship, and you suggest that it should be left to the discretion of the judge trying the case to impose a probationary period if he considers it might lead to reconciliation. As you are aware, I am sure, there is a proviso to Section 2 of the Matrimonial Causes Act, 1950, which is as follows:—

"Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent . . ."

Are you suggesting that the judge should have a wider discretion than that, or had you temporarily overlooked the fact that he has that discretion?—I think he ought to have a wider discretion, my Lord, because I think to require exceptional hardship or exceptional depravity to be shown makes it too difficult. It is very doubtful indeed whether the three years' bar ought to exist at all. One man, whom I know personally, knew that he had made an appalling mistake and that his marriage was utterly intolerable, after the first night of marriage, but his position was not one of "exceptional hardship" in the legal sense.

7896. We have had several suggestions that the three-year period should be abolished.—That is what I would suggest.

7897. But my question was directed to the width of the discretion. You think it should be unlimited, just leaving it to the judge to say whether divorce should or should not be granted in the circumstances?—I think that would be much better.

7898. Coming to the heading, "Collusion", I have no questions on paragraphs 19 and 20, and I do not wish to discuss, under the latter paragraph, any of the social, moral or religious questions involved in divorce by agreement, because we have discussed them many times. I only want to get clear what you suggest. Would you impose any restrictions on divorce by agreement, or would

you leave it to the parties to get a divorce if they both wished it just by applying, say, to a registrar?—I think applying to a registrar is too simple. I think it ought to be made a serious and very grave action on both sides. The ground should be mutual agreement, but I also think that marriage ought to be made more difficult.

7899. May we for the moment keep to divorce by mutual agreement? What safeguards, if any, do you suggest, or have you not worked out the safeguards?—Only the safeguard of a proper court action, not just going to a registrar, but making a serious business of it.

7900. If divorce by mutual consent is introduced, the parties would only have to go to a person, either a judge or a registrar, and say, "We both want to be divorced", and if it is a true divorce by consent, that would be an end of the matter? There could be no judicial function?—I think that some kind of ceremony could be made to surround it, my Lord.

7901. And you did say that marriage should be made more difficult?—Yes, I do think so.

7902. As you have mentioned it, would you tell us what practical suggestions you would make on that? If you have not thought it out, do not trouble.—I had not thought them out from the point of view of answering today, I did not know it was going to arise.

7903. It would not have arisen but for your own observation. Would you come to the section headed "Affiliation order for maintenance". There you say:—

"Financial damages against the adulterous co-respondent and financial damages in 'enticement' cases should be abolished. If a child has resulted from the adultery the co-respondent should be legally liable to contribute to the upkeep of the resulting child."

I can completely follow the second sentence, but in a case where the marriage has been broken up by an adulterous co-respondent why should not a husband or a wife have some damages, not necessarily for his own benefit or her own benefit, but for the benefit of the children of the marriage? Is not the fact that damages can be claimed some deterrent to those who are going about making to take one spouse away from another?—My own view is that nobody can take a spouse from another if the two spouses are properly related to each other.

7904. That may be, but one knows of cases.—It is not the adulterer who is primarily to blame necessarily.

7905. I did not say "necessarily", but there are cases surely where the husband and wife are living together quite happily and somebody comes along who makes love to one spouse and attracts him or her and breaks up the home. Why do you say there should not be any damages in such a case as that?—You are talking of financial damages?

7906. Certainly, that is what I am speaking of, why should not he or she pay?—It seems to me to degrade it still further, as it were to have a payment for the loss of a slave or servant.

7907. (Lord Keith): With regard to the different kinds of marriage that you set out in your first paragraphs, I am not quite clear about this case. What would be the position where there had been no normal sexual intercourse at all, but there had been artificial insemination by the husband, and as a result a child was born? That is a case that has actually arisen, and a decree of nullity was granted. What category of marriage would you put that under?—After the birth the woman was not *virgo intacta*, so she could not get a nullity.

7908. That was why I asked the question. There would not be natural marriage, in your interpretation of the term, as I understand it, because there would not be a voluntary biological union between the two parties at all. I was just wondering whether that was an exceptional case for which you would have to find another category?—It is a very difficult case, and artificial insemination introduces difficulties, but you could not claim that the wife was a virgin after the birth of the child. I think she ought not to have got a nullity, I think that in that case she ought to have got a divorce.

7909. That is the way you would treat it?—Certainly.

7910. Would you look for a moment at paragraph 21, where you refer to the refusal of sexual intercourse as a ground for divorce? You have some remarks to make

20 November, 1952]

DR. MARK C. STOKES, D.Sc., PILD., F.L.S., F.G.S., F.R.S.Lit.

[Continued]

about the caution that should be exercised in the case of refusal of sexual intercourse. I quite appreciate your reasons for caution, but what I was going to ask you was this: would the expression, "wilful refusal of sexual intercourse", not overcome all your difficulties there?—How do you interpret the word "wilful"?

7911. There could not be wilful refusal of sexual intercourse if either the man or the woman were incapable of sexual intercourse either temporarily or permanently.—That would not be wilful.

7912. And therefore would not be the answer to your difficulties in this paragraph be met by the introduction of the word "wilful" before "refusal of sexual intercourse", so that it would be "wilful refusal of sexual intercourse"?—Wilful refusal would be implying a ground for divorce, would it not?

7913. It might be a ground for divorce.—Yes, I think the introduction of the word "wilful" alters the position.

7914. And that would meet your views?—I think so, my Lord, yes.

7915. The only other matter—although it may not be within our terms of reference, I think you understand that—is the question of the age of marriage. You said that you wanted to make marriage more difficult. Of course, one of the ways of making marriage more difficult, or a little more difficult, is to raise the age of consent, is it not?—I do not think that it makes it more difficult, except for those who are below the age. It increases the sex disorders of the community, in my opinion, and I have brought with me a cutting of this poor wretched child Freda. . . .

7916. I do not want to go into that case, you have told us about it.—I consider that where a girl is fully sexed at fifteen, and there is a very considerable percentage of girls fully ready for marriage at fifteen, she should be able to be married. I would not encourage them to marry, but it should be possible.

7917. I quite see that from the biological angle, but one looks at other matters, namely, the economic side, and the moral and intellectual development of the individual. I agree that it may give rise to hardships, but is there not something to be said for postponing the age of marriage from these aspects, other than the biological aspect?—I think those aspects should encourage young people not to marry before twenty-one, but, on the other hand, the present prohibition on marriage of girls of fifteen—you have only to read the daily papers, to see how constantly these girls on street corners are enticing boys and getting into appalling trouble. If those girls could be properly married when they are quite ready for it, at fifteen, I think you would do away with a lot of difficulty.

7918. (Chairman): There is one question arising out of an answer to Lord Keith. Is the case where there was artificial insemination with the husband's seed and a child resulted, you said that that should not have been a case

for nullity but for divorce, but what would be the ground of divorce?—I cannot see what the woman was thinking about when she brought that case.

7919. Then your answer would be that it is not a case for divorce or nullity?—She would have to find some grounds for divorce, it could not be nullity.

7920. (Mr. Young): You wish to reduce the age at which a person can marry to fifteen?—Yes.

7921. Would you also reduce the age of consent in criminal matters to fifteen?—I think so, yes.

7922. (Dr. Selby): Dr. Stokes, have you any views about a medical certificate before marriage? You have a very great experience of the difficulties and problems that arise after marriage; do you think it would be a good thing to require a medical certificate before marriage, and is it practicable?—I think it is a good thing to encourage people to have a medical examination before marriage, but I would not at all approve of it being made compulsory. I have known a case in which the mere suggestion, on the part of the girl's parent, that the man should have an examination, deeply affronted the man and broke up the marriage, because it is a kind of insult to either of them, they feel it like that. I think that a thorough medical examination should be encouraged by the parents of both parties, but I would not have it made compulsory.

7923. Could I just ask you to consider again this question of the age of consent? You talked of the difficulties which give rise to the evils of young girls getting into trouble, but have you considered that evils might follow from girls who were so irresponsible becoming parents? We have to think of the fitness for parenthood or we may be having more evils following this than we would cure?—I do not think that the majority of English women are ready for marriage at fifteen. I only know from experience that, say, one-third or a quarter are, often their sex feelings are very intense. Our own grandmothers often married at fifteen and sixteen and had very satisfactory families. I think there is that kind of girl about, therefore she ought to be able to marry at fifteen though she should not be encouraged to marry. I think on balance the evils are greater today than they would be if she were allowed to marry.

7924. (Chairman): But if you say a girl who is sufficiently mature can marry at fifteen, how are you going to pass a law about that? Either you make marriage allowable at fifteen or you specify some other age, unless you are going to examine each girl who proposes to marry to see whether she is physically fit for marriage?—What I am suggesting is that it should be legal for her to be able to marry at fifteen, but it should not be socially encouraged.

7925. For any girl to marry at fifteen?—For any girl to marry at fifteen.

(Chairman): Thank you for your memorandum and for your help in coming here today, Dr. Stokes.

(The witness withdrew.)

(Adjourned to Friday, 21st November, 1952, at 10.30 a.m.)

MINUTES OF EVIDENCE

TAKEN BEFORE THE

33

ROYAL COMMISSION
ON

MARRIAGE AND DIVORCE

THIRTY-THIRD DAY

Friday, 21st November, 1952

WITNESSES

MR. D. SUTTON	}	representing the London Magistrates' Clerks' Association
MR. D. E. HUGHES, LL.B.		
MR. S. FRENCH, M.A. ...		
MRS. M. LEPROY, M.A., J.P.	}	representing the National Council of Women of Great Britain
MRS. M. F. BLIGH, B.Sc.		
MRS. C. JOLLIFFE, B.Sc. ...		
MISS GLADYS SANDIS, F.R.C.S.	}	representing the National Baby Welfare Council
DR. D. H. GIFFEN, M.D., D.P.H.		



LONDON: HER MAJESTY'S STATIONERY OFFICE

1953

THREE SHILLINGS NET

MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

THIRTY-THIRD DAY

Friday, 21st November, 1952

PRESENT

THE RT. HON. LORD MORTON OF HENRYTON, M.C. (Chairman)

MRS. MARGARET ALLEN
DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELCH, M.A.
LADY BRADG
MR. G. C. P. BROWN, M.A.
THE HONOURABLE LORD KEITH
MR. D. MACR

MR. H. H. MADDOCKS, M.C.
THE HONOURABLE MR. JUSTICE PEARCE
DR. VIOLET ROBERTSON, C.B.E., LL.D.
MR. THOMAS YOUNG, O.B.E.
MISS M. W. DENNIS, C.B.E. (Secretary)
MR. D. R. L. HOLLOWAY (Assistant Secretary)

PAPER No. 98

MEMORANDUM SUBMITTED BY THE LONDON MAGISTRATES' CLERKS' ASSOCIATION

1. Membership of the London Magistrates' Clerks' Association is confined to Chief Clerks and Deputy Chief Clerks of the twelve metropolitan magistrates' courts. In the year ending 31st March, 1952, these courts made 1,211 orders under the Summary Jurisdiction (Separation and Maintenance) Acts, and 680 orders under the Guardianship of Infants Acts. There are in force over 10,000 orders under the Married Women Acts and over 2,000 under the Guardianship of Infants Acts. During the last twelve months the sum received at the courts on periodical payments of maintenance, and subsequently paid out, totalled £575,533.

2. The Association has ample material in the experience of its members on which to base evidence as to the primary causes of matrimonial difficulties and breakdowns, but it proposes to confine its evidence in the main to the effect of the existing law as administered in courts of summary jurisdiction and to suggestions for its improvement, since these are matters on which members of the Association feel themselves particularly well qualified to speak.

The Association does, however, wish to express emphatically its opinion that far fewer marriages would come to an untimely end if every couple were able to commence married life together in a home of their own, however humble, free from the surveillance and interference of relatives.

Jurisdiction

3. The Association wishes to point out that there is one respect in which the law administered in courts of summary jurisdiction actually encourages the break-up of families.

The Summary Jurisdiction (Separation and Maintenance) Act, 1925, Section 1 (4), provides that "No order . . . shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband".

We consider that this provision presses unduly hardly upon a wife at the present time since she cannot enforce her order so long as she continues to reside with her husband; moreover, if such residence continues for three months from the date of the order, she forfeits her rights under it. The decided cases show how very difficult it is for a wife, no matter what efforts she makes to live "apart", to continue to live under the same roof as her husband without it being held against her that she is "residing" with him, within the terms of that Section.

The Association considers that no useful purpose is served by this sub-section and that it should be repealed. At the same time it should be made clear that an order made on the ground of a husband's wilful neglect to maintain his wife and/or children cannot be enforced if cohabitation continues after the order is made.

4. Much matrimonial discord is due to disagreements about money. The experience of the members of the Association is that of recent years few families lack an income adequate for their needs if it is properly managed, but a great many husbands create unnecessary difficulties by failing to allocate a reasonable proportion of their income to household expenses and some wives are bad managers. Quarrels over money, when exacerbated by temperamental differences, nostalgic recollections of single blessedness, and the varied rubs inherent in married life can easily develop into one or other of the parties "getting away from it all" by deserting the other, by seeking solace in the company of another man or woman, or by giving vent to temper in violence.

Every reduction in the number of such quarrels is likely therefore to reduce the number of broken marriages with which the courts have to deal.

5. It is unquestionably beyond the competence of the law to compel a woman to be an economical housewife but it should be able to deal with a husband's failure to provide his family with adequate maintenance without requiring his wife to leave him.

At present it is not, because of Section 1 (4) quoted above. The effect of this Section is to discourage some wives from seeking the help of a court because they do not wish to live apart from their husbands and to encourage others, who might otherwise have continued trying "to make a go of it", to break up the matrimonial home so that they can reap the benefit of a maintenance order. Not that the making of an order is always followed by the separation of the parties; it sometimes happens that the court finds that an order it has made, perhaps after a long hearing, is completely ineffective because the parties continue to reside together—and "residing together" covers living under the same roof although leading separate lives (*Evans v. Evans* (1948) 1 K.B. 175).

6. The Association advocates, therefore, an amendment of the law which would empower courts of summary jurisdiction which have found a husband guilty of wilful neglect to provide reasonable maintenance for his wife and/or children to make a confirmable maintenance order, fixing the weekly sum to be paid by the husband to his wife for housekeeping purposes (including the rent, if she pays it)

so long as they continue to live together and she to look after him. Such an order will not be put through court save in exceptional circumstances and it will in no circumstances be enforceable at court, but the wife will be entitled to have the order confirmed if at any time within twelve months after it is made she satisfies the court that her husband has failed without reasonable cause to comply fully with the order for at least two weeks (either consecutively or intermittently). When a confirmable order has been confirmed, it will be fully enforceable unless cohabitation continues. When confirming the order the court will make any adjustment in the amount necessary because cohabitation will presumably cease.

The Association believes that the making of a confirmable order would have a salutary effect on many husbands careless of their financial responsibilities, and would be of great benefit to wives struggling to keep the home together.

The Divorce Court and the magistrates' court

7. The relationship between the Divorce Court and the magistrates' court is based on the similarity of the law administered in each, but it is possible to draw a true distinction between the work of the two courts, namely, in their respective functions. The pronouncement of a decree of divorce changes the status of the parties, but no order under the Summary Jurisdiction (Separation and Maintenance) Acts does this. A wife still retains her married status even though there may be a non-cohabitation clause in the order which she obtains at the magistrates' court, though for certain matters such as property, liabilities and contracts she is to be regarded as a *ferre sole*.

8. Although the Divorce Court and courts of summary jurisdiction do tread ground that is to a certain extent common to both, it is in our view very doubtful whether the lower courts could properly participate further than they do at present in the processes leading to a decree. The Matrimonial Causes Act, 1950, Section 7 (2), provides that an order obtained under the Separation and Maintenance Acts can be accepted in the Divorce Court as proof of the ground on which it was granted. We entirely agree with the Final Report of the Denning Committee that the seriousness and sanctity of marriage should be emphasised at the outset and that everything possible should be done to preserve the marriage tie. It follows that divorce proceedings themselves should take place in an atmosphere commensurately serious and formal and that there should be no relaxation of the formalities attending a decree.

9. While we believe that up to the grant of a decree the separation of functions of the two courts must necessarily be preserved and that they should work as entirely independent tribunals, there are two points which we would put forward for consideration by the Commission.

10. It is understood that recovery of maintenance granted in the High Court is at present a matter of delay and difficulty as contrasted with the relative simplicity with which maintenance orders made in courts of summary jurisdiction can be enforced. It is therefore suggested that when the High Court grants maintenance there should be power to register the order in a magistrates' court, there to be enforced and varied as if made under the Summary Jurisdiction (Separation and Maintenance) Acts. We deal later in this memorandum with the enforcement procedure, and suggest some improvements, but in practice the system works well, costs little or nothing to the complainant and is of great advantage to the public.

11. We are of opinion that there should be power for a court of summary jurisdiction to make an enforceable interim order for maintenance pending divorce proceedings. In this respect we respectfully concur in the views of the Denning Committee set out in paragraph 45 of the Final Report.

Appeal

12. Although by Rule 71 (6) of the Matrimonial Causes Rules, 1950, reproducing Rule 68 (6) of the 1947 Rules, it is stated that on appeal to the Divisional Court against an order made, or against the refusal of an order, "The Divisional Court may draw all inferences of fact which might have been drawn in the court below and may give any judgment and make any order which ought to have been made", it appears that in practice the Divisional Court will not upset the finding of the justices when there

is evidence to support that finding. The leading case on this subject, *Wor (or Thomas) v. Thomas* (1947) 1 A.E.R. 512, a House of Lords decision, was considered and applied in *Clark v. Clark* (1950) W.N. 489, where Singleton, L.J., said that questions of fact were to be determined by the justices and that if there were evidence that justified them in making an order, or in finding as they did find, the appellate court had no right to interfere. *Simpson v. Simpson* (1951) 1 A.E.R. 955, and *Pew v. Pew* (30th January, 1951, unreported) are other cases in point.

13. In many matrimonial proceedings before courts of summary jurisdiction the evidence of the husband and the wife is unsupported by the evidence of any witness and the court has to decide if either can be believed or whether the husband's or the wife's version of certain incidents should be preferred and accepted. These decisions are findings of fact and the Association is of the opinion that if there were an appeal on questions of fact the appellate court would be in a fair proportion of the decisions appealed against come to a contrary decision to that given by the court of summary jurisdiction.

14. In the opinion of the Association there should be a right of appeal to an appellate tribunal on questions of fact, coupled with an appeal to the Divorce Division of the High Court on questions of law on the same basis as an appeal by way of case stated in criminal matters. It would be part of the proposed procedure that the appeal on the facts could be heard within a short time of the decision appealed against. The Association suggests that the appellate tribunal on questions of fact should consist of a legally qualified chairman and two justices, one being a man and the other a woman, and that it should be independent of quarter sessions. Such an appellate tribunal would, of course, be given jurisdiction to hear appeals against the amount of any order as originally made or on variation and also on the refusal of a court of summary jurisdiction to vary an order.

15. Proceedings before the appellate tribunal would be by way of re-hearing with power to hear any witnesses who may not have been called in the court below.

16. Decisions in all appeals should be notified to the clerk of the magistrates' court concerned. This is not done at present.

The duration of maintenance orders

17. A maintenance order lasts until one of the parties dies unless it is revoked by a court for some reason recognised by the present law. It may continue after a divorce.

As the law stands a husband is obliged to maintain his wife throughout her life unless she is proved to have been guilty of conduct regarded by the law as forfeiting her right to that maintenance. This means in effect that many a woman becomes entitled through the misfortune of an unsuccessful marriage to a life-long pension from a man who may become a complete stranger to her. The result may be to arouse feelings of bitterness in the husband and to sap the independence of the wife and to give her opportunities to become spiteful and oppressive. It may also discourage her from building a new life free from old associations and habits.

18. The Association considers it most undesirable that on the one hand a husband should have no prospect in his lifetime of being relieved of the burden of an order and on the other that a wife should be encouraged always to remain her husband's dependant. We therefore consider that the court should be given discretionary power to limit the duration of an order having regard to the length of time the parties have been married, their circumstances and their ages and the ages of any dependent children. There should also be an amendment of the law to make it clear that the power to revoke a maintenance order provided by the Criminal Justice Administration Act, 1914, Section 30 (3), includes power to revoke such an order at any time upon the court being satisfied (1) that the husband has fully complied with his obligations under the order, and (2) that the wife is either able to support herself or is unable to do so only by reason of her neglect or inaction. It should be a sufficient answer to an application for the revocation of an order on this ground for the wife to show that she has living with her a child under the age of sixteen or in receipt of full-time education or training.

The division of the home

19. The Summary Jurisdiction (Separation and Maintenance) Acts contain no provision enabling the magistrates' court to deal with a problem which often arises on the making of an order, namely, how the household furniture and other domestic chattels should be divided between the parties. The parties themselves are hardly likely to approach such a question in the frame of mind which will lead to a mutually satisfactory solution, yet when as frequently happens they apply to the court for a ruling as to the division of the matrimonial home, no binding order can be made. Sometimes the matter can be disposed of informally by the probation officer or other social worker, or the husband and wife can be referred to their remedy in the county court under the Married Women's Property Act, 1882, Section 17.

20. In the opinion of the Association it ought to be possible for the court, on the application of one of the parties, to assist in the making of an equitable arrangement for sharing the domestic chattels. Possibly a procedure on the general lines of an arbitration out of court before the chief clerk of the court or the clerk to the justices, with provision for an appeal to the court, would meet the case. Whatever procedure may be devised we consider that there ought to be available to the parties, their major differences having been adjudicated upon, some convenient means of settling, authoritatively, the minor problem of their belongings.

The tenancy

21. Who is to remain in the matrimonial home after an order has been made? Husbands are usually the tenants, but it is easier for the husband to find other accommodation than for the wife and children, who may suffer considerable hardship if they have to leave. We refrain from expressing an opinion whether courts of summary jurisdiction should be empowered to decide questions of tenancy in these circumstances, as such a jurisdiction seems more appropriate to the county court; but our concern is that some court should be able to exercise a discretion to make a fair order in the interests of the family, especially the children.

Guardianship of Infants Acts, 1886 and 1925

22. Although there is power under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, to make an interim order for a period not exceeding three months, no corresponding power is given under the Guardianship of Infants Acts.

In many applications under the Guardianship of Infants Acts the husband, although opposing his wife's application for the custody of a child of the marriage and giving good reason for his opposition, cannot himself accept custody either because of lack of suitable accommodation or because of the absence of a suitable relative or foster-parent to assist in the care of the child. In other cases the court forms an adverse opinion of both parents.

23. The Association is of the opinion that courts of summary jurisdiction should be empowered to make interim orders under the Guardianship of Infants Acts granting the custody of an infant to a parent for a period not exceeding six months and that it should be a condition of such an order that the parent to whom custody is provisionally granted should receive visits from a female probation officer during the currency of the order. No final order should be made following an interim order unless sworn evidence is received from the probation officer regarding the welfare of the infant during the currency of the interim order.

24. The Association is also of the opinion that, where there is a dispute between the parents, no order under the Guardianship of Infants Acts should be made without a home visit or visits by a female probation officer on each parent and evidence on oath by that probation officer regarding the conditions found by her and the result of her inquiries.

Children over sixteen

25. At present an order under the Summary Jurisdiction (Separation and Maintenance) Acts, giving the custody of a child under sixteen to the mother and awarding a sum in respect of its maintenance may be continued up to the age of twenty-one if the child is engaged in a course of

education or training. Under the Guardianship of Infants Acts, a magistrates' court may not make an order in respect of a child over sixteen unless the child is physically or mentally incapable of self-support and no original order may be made in respect of a child over sixteen under the Separation and Maintenance Acts.

We see no reason why the court should not have power to make an original order (under either the Separation and Maintenance Acts or the Guardianship of Infants Acts) in respect of a child over sixteen whose circumstances are such that an existing order under the Separation and Maintenance Acts could be continued.

The Legal Aid and Advice Act, 1949

26. The Association would like to see the provisions of the Legal Aid and Advice Act, 1949, applied to domestic proceedings before justices, subject to the following comments. A great many matrimonial cases are simple in both fact and law and the courts can look after the interests of both parties without prejudice to either, but there are other cases which have complicated facts or difficult legal points in which the assistance of counsel or solicitors is most welcome. The Association would deprecate, however, the granting of legal aid in all matrimonial cases. It is an unfortunate fact that enthusiastic advocates, particularly if, as often happens, they are young, inexperienced and eager to show their flair for cross-examination and the taking of nice points, will sometimes turn a dispute, which left to the court might have been settled amicably, into a hotly contested trial bound to inflame the antipathies of the parties. The practice at some of the metropolitan magistrates' courts whereby solicitors experienced in work of this kind undertake, for extremely moderate and even nominal fees defrayed from the poor box, cases where the magistrates think it is desirable there should be legal representation, works extremely well. It would be a pity if the advantages this practice has were not retained by allowing magistrates to certify for legal aid.

Legal aid and conciliation

27. In its Final Report (para. 28 (4)) the Denning Committee attaches the highest importance to the reconciliation of estranged parties to marriages, and comments: "It [reconciliation] is indeed so important that the State itself should do all it can to assist reconciliation". We have found on occasion that the possibilities and prospects of reconciliation in cases in which the parties are legally represented are in some danger of being obscured by the legal issues involved.

28. The questions of legal aid and conciliation should in our view be considered in relation to each other. Much depends on the stage at which the parties first instruct their solicitors: often a case comes into court only after protracted correspondence during which the services of a probation officer or other experienced conciliator may or may not have been sought. The chances of reconciliation in such cases may have receded considerably before the matter comes on for hearing. It is never too late to attempt conciliation, even after an order has been made. Many parties are reconciled during the hearing of a case. We believe that the prospects of reconciliation are brightest when the parties see the probation officer for the first time and before a summons is applied for. If, however, the case is one which must come into court a summons is sought and in the metropolitan magistrates' courts legal aid granted in necessitous cases from poor box funds. Sometimes both parties are helped in this way. The solicitor accepting the case receives a detailed report from the probation officer and is thus fully aware of the efforts already made to restore matrimonial harmony and of the prospects there still are of bringing this about.

Interim orders

29. The power of the court to make an interim order, once it has found the ground of complaint proved, is not clear. In view of the importance of encouraging reconciliation, even after the ground of complaint has been found proved, we think that the court should have clear power to make an interim order.

Re-hearing the case

30. Where a complaint for an order is dealt with in the absence of the husband, on proof that the summons has been served, and an order is made, it sometimes happens

that the husband appears later and claims that he misunderstood the date, or time of hearing, or states that the summons did not reach him before the hearing.

We are of opinion that the court should be given specific power, on application by the husband and on such terms as the court thinks fit, to set aside its order in such circumstances and to start the case afresh.

Additional power to grant a warrant

31. Applications for orders under the Summary Jurisdiction (Separation and Maintenance) Acts are made by way of complaint to a magistrate for the issue of a summons against the husband. On proof of service of the summons the court may proceed to hear the case in the absence of the husband or it may issue a warrant to bring him before the court. Occasionally it may be in the interests of the wife and children that the husband should be brought before the court without the delay, however short, that must occur when a summons is issued, and we suggest that the court should have a discretionary power to issue a warrant in the first instance. This provision would, for example, meet the case of a husband going away and leaving no information about his whereabouts.

Enforcement of maintenance orders

32. The basic machinery for the enforcement of arrears under maintenance orders, whether made under the Summary Jurisdiction (Separation and Maintenance) Acts or the Guardianship of Infants Acts, is some eighty years old, but continues to work well in practice because of the sanction of imprisonment in default of payment and because there is a summary remedy for securing the defendant's appearance in court. When opportunity offers, we suggest that the Bastardy Laws Amendment Act, 1872, Section 4 (the enforcement section), should be repealed and re-enacted, suitably modified, in a comprehensive enforcement section to include the enforcement provisions of the Emergency Laws (Miscellaneous Provisions) Act, 1947, and as part of a consolidating enactment embracing the entire field of the jurisdiction of justices in matrimonial cases.

Remand in custody

33. There is at present no power to remand in custody when the defendant is brought before the court for non-payment of arrears. In our view the court should be given such power to enable it to deal effectively with the case of the persistent defaulter who is difficult to trace. It may happen that a man of this sort is brought before the court at a moment's notice on a warrant issued months previously, and at a time when the attendance of the complainant cannot then be arranged. For one reason or another the court may not be in possession of all the information it needs to decide whether his failure to pay is due to his wilful refusal or culpable neglect. To release the defendant during the adjournment would inevitably mean that the police would have to start looking for him all over again; on the other hand there must, to comply with the provisions of the Money Payments (Justices Procedure) Act, 1935, Section 8, be a sufficient means enquiry in the defendant's presence. We think, therefore, that there is ample justification for a discretionary power to remand in custody for a limited period.

Suspended commitments

34. Opinions vary as to the merits of suspending the operation of a commitment warrant for non-payment of arrears under a maintenance order. We are, however, unanimous in our view that there is authority for the practice, but would suggest that there should be an addition to the Summary Jurisdiction Rules, 1915, on the following lines:—

"No commitment warrant the issue of which has been suspended conditional upon the periodical payment of money shall be issued upon failure to comply with the condition until at least three days have elapsed after a notice to the defendant that the warrant will be issued at the expiration of three days unless he has either written or attended the court personally to explain the reason for non-compliance."

Such a provision would meet an objection that is sometimes made to the practice of suspending commitment warrants that no account is taken of an adverse change in the defendant's circumstances after the date of adjudication.

The Emergency Laws (Miscellaneous Provisions) Act, 1947

35. When the complainant, the defendant and the official account of receipts and payments are before the court there are good prospects of doing justice between the parties: husband and wife can air any grievance, call evidence and cross-examine each other. Disputes about payments are decided by the account. It is when one of the three is missing that arrears proceedings unquestionably lose some of their effectiveness and tend to be a source of irritation and dissatisfaction to the parties. The Emergency Laws (Miscellaneous Provisions) Act, 1947, which was designed to minimise these disadvantages, has proved helpful, but in the view of the Association the machinery is now in need of overhaul.

36. Where the husband moves out of the jurisdiction of the court by which the order was made (court A), a sworn complaint for arrears can be sent to his local court (court B). Under present legislation court A continues to keep the account and is under a statutory duty to notify court B of payments made by the defendant. Thus court B sees only the defendant and in dealing with the case must rely upon information received from court A. It is our experience that many courts, after sending a complaint for arrears, fail entirely to keep the enforcing court informed of the position of the account and of payments made. Regularly defendants in these cases appear before the court when no information has come from court A. Thus the defendant must come again, and time and labour expended in reminding court A of its obligation under the Act. In the opinion of the Association the remedy lies in the adoption of a procedure whereby the act of sending an arrears complaint to another court for enforcement operates to transfer the account to that court, so that future payments are to be made to that court. Thus the enforcing court would have before it the defendant and the account, instead of the defendant alone, which would enable it to adjudicate without information from court A. The additional work at court B of posting moneys to the complainant would be much less than that caused by the need of frequent communications between courts.

37. At present, complaints for the enforcement of arrears can be sent only by the court which made the basic order (the "original court" in terms of the Act). This is an unnecessary restriction and we are of the opinion that any court which for the time being is keeping the account should be empowered to transmit a complaint for arrears to the defendant's local court (court C), wherever that may be; in other words, court C could begin where court B left off. We realise that to make the account follow the defendant may be thought to be unfair to the complainant, who would have to pay postage to the court which sends her money; but so long as the defendant pays regularly there is no need to invoke the Act. The account would not be transferred merely because the defendant changes his address, but only when his payments lag or cease altogether. It then becomes a question of giving the enforcing court adequate material on which to act, and this is to the complainant's advantage.

Variation, revival and discharge

38. Our comments under this head also concern the Emergency Laws (Miscellaneous Provisions) Act, 1947, by which a complaint to vary, revive or discharge a maintenance order can be heard at a court other than that which made the order (the "original" court). Under the Act the applicant may begin the proceedings by making a written complaint to the court having jurisdiction in the place where he or she is living. The complaint is then sent to the "original" court, which must decide whether the case will be heard there or at the applicant's or defendant's local court. While it is true that the "original" court has the notes of evidence and records relating to the making of the order, we do not think that reference to that court should be necessary when neither party resides within its jurisdiction. Moreover, a considerable time may have elapsed since the order was made. The court through which the payments are made has, at least, the advantage of being in touch, through its collecting officer, with both parties as payer and payee and in that way has in its possession material which

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may be of advantage in deciding at which court the variation, etc., should be heard. Subject to our remarks in the next paragraph, we therefore consider that the decision as to the venue should rest with the court which keeps the account.

39. We see no reason why the court which decides where the case is to be heard should not have power to name any court of summary jurisdiction if inconvenience and expense to the parties can thereby be reduced.

Evidence by deposition

40. The Association is of opinion that in hearing cases of variation, revival or discharge of maintenance orders, the court should be able to admit, as evidence, the deposition of an absent party or witness. *Ex parte* hearings cannot be avoided, but are undesirable, and there should be provision for an absent party or witness to go to his or her local court to give evidence by deposition, that is, on oath

before a magistrate. The deposition, duly certified by the magistrate, would then be sent to the court by which the case is being heard, there to be admissible as evidence.

Similar provisions are contained in the Maintenance Orders (Facilities for Enforcement) Act, 1920, by which depositions taken in the Dominions and Colonies are admissible as evidence in courts of summary jurisdiction in this country.

Conclusion

The Association would be pleased to furnish any further information the Royal Commission may require in amplification of the foregoing and to assist the Commission in any way possible. If desired, the Association would be prepared to nominate representatives to attend before the Royal Commission to give evidence.

(Received 3rd June, 1952.)

EXAMINATION OF WITNESSES

(MR. D. SUTTON, MR. D. E. HUGHES, LL.B. AND MR. S. FRENCH, M.A., representing the London Magistrates' Clerks' Association; called and examined.)

7926. (Chairman): We have been representing the London Magistrates' Clerks' Association, Mr. D. Sutton, who is the Chief Clerk of Lambeth Magistrates' Court; Mr. D. E. Hughes, Chief Clerk of Old Street Magistrates' Court; and Mr. S. French, Chief Clerk of the West London Magistrates' Court. Before we ask questions on your memorandum, do you wish to add anything to it?—(Mr. French): We have one addition, my Lord. It has been compiled by my friend and colleague, Mr. Sutton, and he would like either to read it or, if you would prefer, to add it to our memorandum.

7927. Perhaps it had better be read, if it is not very long, because we may wish to ask questions on it.—(Mr. Sutton): My Lord, I should like to add a few words on the question of appeal. I personally have been convinced for some years that the present facilities for appeal are quite inadequate. I know that my colleagues share this conviction. A comparison of the number of appeals with the number of maintenance and separation orders made given adequate support to this conviction. In my own court I find there is an appeal in less than one per cent. of the domestic proceedings brought before the court, and I, personally, have never known of an appeal brought against the amount of an order as originally made, or as varied.

This does not mean that all the parties to the proceedings not appealed against are satisfied with the court's adjudication—very often they are most dissatisfied. Quite a number express a wish to appeal but, when the procedure to be followed is explained to them, my observation shows that they are immediately discouraged and frustrated.

I have known of many cases in which the opinion of counsel has been obtained on the question of an appeal, with the inevitable answer that it would be hopeless to appeal, as the note of evidence shows that there was some evidence on which the court could have based its findings. Very often in these cases there is a body of evidence on which a contrary decision could have been based.

Then there is the class of case in which an order is made against a man, followed immediately by his flat refusal to comply with the order. Very often he persists in the refusal, with the inevitable result that he is committed to prison in respect of the arrears. How much better would it be if the court could explain at once to the man that there existed a quick, easy and cheap way of appeal against the decision of the court, and that the court would welcome such an appeal by any aggrieved party.

The Association is convinced that there should be a quick method of appeal against the amount of any order. A badly assessed order is followed by a trail of trouble. If it is too high the man may only comply in part and stand the risk of being committed to prison for the arrears. Alternatively, he may throw up his job and leave the neighbourhood, hoping to escape his obligations

entirely. If the amount of the order is too low, the woman is encouraged to throw up her job and force a variation of the order.

I think that I can best emphasise the present unsatisfactory position by quoting the words of Mr. G. K. Rose (the presiding magistrate in my own court) when giving judgment a short time ago on a complaint for an order on the ground of persistent cruelty. He said: "Any bench could sincerely decide this case either way", and he went on to dismiss the case, after a very long and careful hearing.

Surely there should be a quick and easy method of appeal on the facts in a case such as this.

It has been pointed out to us that it would be costly to provide a separate appellate court, both from the building and staffing points of view.

The Association agrees that the work could well be carried out by a specially constituted court at quarter sessions on the basis indicated in our memorandum.

7928. Thank you. That emphasises and elaborates paragraphs 12 to 16 of your memorandum, and I am interested to see that you are impressed with the difficulty of forming a separate appellate tribunal. That was one of the first questions I was going to ask you, whether an appeal by way of re-hearing to quarter sessions, which has been suggested by other witnesses, would not meet the case?—My own view about that is that it would be better if it could be kept independent of quarter sessions. Quarter sessions mainly deal with criminal matters, and these are civil matters, but I do agree that having regard to the expense involved, it would not be practicable at the present time to have a separate appellate court.

7929. Assuming that it is not practicable at the present time, I suppose that the next best thing would be a complete re-hearing at quarter sessions, with power for that court to hear any witness who might not have been called in the court below?—I agree, my Lord.

7930. (Lord Keith): I just want to be enlightened: what would the substantial difference be between an appellate tribunal, consisting of a legally qualified chairman and two justices, to hear these appeals, as you suggest in your memorandum, and a quarter sessions hearing? I recognise that you would have a different name for the tribunal, and there might be an advantage in that way, but what would be the practical difference between the tribunal, as you propose to constitute it, and, let me say, three justices sitting in quarter session?—It would in itself be a re-hearing of the whole matter, and to that extent it would be a safeguard if there was any bias in the original tribunal.

7931. That I understand. I thought that quarter sessions did re-hear cases on appeal?—On appeal in criminal matters it is a complete re-hearing, where it is an appeal against conviction.

7932. You mean that at the present time there is no appeal in respect of maintenance orders to quarter sessions?—No.

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[Continued]

7933. I see. Then what you are really suggesting is that there should be an appeal in respect of maintenance orders to quarter sessions, very much of the same kind as there is at the present time in criminal matters, is that right?—It would be practically equivalent.

7934. I am rather ignorant of your procedure, but I think I understand it now.—The great advantage, if I may say so, is the fact that it can be done so simply. The husband or wife could lodge a notice of appeal with the court below, and then it is only a question of fixing the date at quarter sessions and leaving it to be arranged. There is no delay, there is no expense, and of course the husband or wife could prosecute the appeal in person.

7935. (Chairman): And the great advantage suggested is that it would be a re-hearing, instead of the present position, where the Divisional Court does not in practice, as I understand it, upset the finding of the justices, where there is any evidence to support that finding?—That is how we understand it, my Lord, and we do come across that difficulty. I have had numerous cases in which the opinion of counsel, I know, has been obtained, and it has been said that it is hopeless to appeal, simply because there is evidence on the note that would justify the finding.

7936. (Mr. Mace): While we are on that point, could I put this question? In appeals in cities where there is a recorder, the appeal is to the recorder alone; would your Association suggest that the appeal in these matters should be to a recorder alone, or would they suggest that he should sit with two lay justices?—(Mr. French): I think that one should be consistent at all levels, and a domestic court is constituted either of three lay justices or, in London at the moment, at any rate West London, a legally qualified chairman and two lay justices. Surely at the next level we should maintain that principle and not leave it to one qualified man.

7937. (Chairman): Now, if we may go back to the beginning of your memorandum, coming to your concrete suggestions, you refer to Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and you say that that presses unduly hardly upon a wife at the present time, since she cannot enforce her order so long as she continues to reside with her husband. Then you say:—

"The Association considers that no useful purpose is served by this sub-section and that it should be repealed."

You go on:—

"At the same time it should be made clear that an order made on the ground of a husband's wilful neglect to maintain his wife and/or children cannot be enforced if cohabitation continues after the order is made."

There, as I understand it, you draw a distinction between the case where the wife is residing under the same roof as her husband and the case in which they are cohabiting as man and wife.—That is so, yes.

7938. What you really want is this—not so much a repeal of the sub-section, as an amendment so as to make it apply only to cases where the husband and wife are cohabiting?—I think, my Lord, that we should like in effect to have the word "cohabit" substituted for the word "reside".

7939. Very well, then, I will pass on from that. You make a very interesting suggestion in paragraph 6:—

"The Association advocates, therefore, an amendment of the law which would empower courts of summary jurisdiction which have found a husband guilty of wilful neglect to provide reasonable maintenance for his wife and/or children to make a confirmable maintenance order, fixing the weekly sum to be paid by the husband to his wife for housekeeping purposes (including the rent, if she pays it) so long as they continue to live together and she to look after him."

Then the wife can have that order confirmed if, at any time within twelve months after it is made, she satisfies the court that her husband has failed without reasonable cause to comply fully with the order for at least two weeks, either consecutively or intermittently. Many witnesses have suggested that a husband should be bound to allow his wife a certain proportion of the net surplus of his income, but I think that yours is a new suggestion.

It does, however, have the advantage that the court fixes the amount in the circumstances of each case?—Yes, that is so, and whereas, I believe, some witnesses before the Commission have suggested that there should be a fixed proportion in all cases, this proposal only relates to those cases where a husband has committed the matrimonial offence of wilfully neglecting to provide reasonable maintenance.

7940. Yes, I follow. Towards the end of that paragraph you say: "When a confirmable order has been confirmed, it will be fully enforceable unless cohabitation continues". That puzzled me a little, because I thought that you were postulating throughout a case in which the parties were cohabiting but the wife was not getting enough for housekeeping. If you make the confirmed order cease to be enforceable if cohabitation continues, are you not defeating the object of the provision?—No. We feel that the court must not interfere with husband and wife unless it is absolutely necessary, and it can only be absolutely necessary when a husband has committed a matrimonial offence. A very common one and an easy one for a husband to commit, almost without realising that he is doing so, is wilfully to neglect to provide his wife with maintenance. Thus, if we can encourage him not to behave in that way, without doing anything to break up the family, we shall have done a good deal to maintain the bond of marriage. But if, having been given a conditional discharge for twelve months—the condition of the discharge being that he should fulfil his obligations as a husband and a father—at the end of that time, or at any time during the year when it appears that he does not intend to fulfil that obligation, the wife can then come back to the court. In that case, we say: "The court has done its best to keep husband and wife together. Now the ordinary course of law must follow. The law is clear that if husband and wife continue to cohabit, no order can be enforced, and at the end of three months it shall cease to be of effect. If you want this order confirmed, you must take the consequences of that, and if you want us to enforce it, you and your husband will have to part".

7941. The order, if confirmed, does result in the breaking up of the matrimonial relationship?—Yes.

7942. (Lord Keith): That means, Mr. French, that the wife will have to leave her husband?—She will, or he will have to leave her.

7943. That is right, but then if she wants the order and the husband has no intention of leaving her, she will have to leave him?—If she wants the order confirmed. But if we had the amendment which we were discussing earlier, altering "reside" to "cohabit", she might still be able to live in a separate establishment under the same roof.

7944. (Chairman): Yes. I was surprised to see that you say in paragraph 16 that, at present, decisions in appeals are not notified to the clerk of the magistrates' court concerned. Is that never done?—(Mr. Hughes): Never done, as far as we know. Of course, appeals from orders are such a rarity that one loses all track of what happens.

7945. (Mr. Justice Pearce): You are only referring, are you not, to unsuccessful appeals, because obviously the result of successful appeals must be notified in order that the court order may be altered accordingly?—(Mr. Sutton): It is never notified direct to the court. The information comes to us through the appellant's solicitor, usually, who produces an order to us.

7946. (Mr. Maddocks): The position is, my Lord, that there is no official notification to the court. If the Divisional Court allows an appeal and sends the case back for a re-hearing, the appellant's solicitor comes and tells us about it. We never get any notification from the Divorce Registry, or anything of that kind, nothing official.—(Mr. Hughes): If I could add one word to that, it was only comparatively recently that the Lord Chief Justice gave directions for the results of cases stated to be notified to magistrates' courts. Until recently they were not notified officially from the Divisional Court, but that is now done. (Chairman): You may be interested to know that until recently a judge in the High Court was not notified of the result of the appeal from his decision—is he now? (Mr. Justice Pearce): Yes.

7947. (Chairman): Then we come to the question of "The division of the home". In paragraph 20, you say:—

"In the opinion of the Association it ought to be possible for the court, on the application of one of the parties, to assist in the making of an equitable arrangement for sharing the domestic chattels. Possibly a procedure on the general lines of an arbitration out of court before the chief clerk of the court or the clerk to the justices, with provision for an appeal to the court, would meet the case."

I was not quite sure that the arrangement would work on the application of one of the parties. Would it not need both to consent, or are you contemplating that even if one objects it should still be done?—I think that if one of the parties wants guidance as to what shall happen to the furniture, for instance, then the court should be empowered to hear that party and to call upon the other party to listen to what the first party says. Very frequently, at the end of cases, when an order is made, a wife says, "Can I have the wireless?", and matters of that sort, and the procedure we envisage is that this should be gone into immediately on the conclusion of a case, when an order is made, and that both parties, of course, should be present and parties to that enquiry.

7948. Yes, and I think you contemplate that it will not be an enquiry into the legal ownership, as to who paid for it or anything of that kind, but simply an enquiry as to how it would be equitable to divide the furniture, in the circumstances of the case?—Yes, I think so, and it would be without prejudice to an application to the county court, under Section 17 of the Married Women's Property Act. What is wanted is some early and quick decision about what is to happen to the furniture while the parties are re-settling themselves, if they are going to part.

7949. (Mr. Justice Pearce): I do not know how much you have had to do with investigations under Section 17 of the Married Women's Property Act, but of course the question is purely one of ownership, following back receipts and payment and instalments, and so. I should have thought, from my practical experience of these matters, that the two simply do not fit together; you will either have to deal on the basis of what is equitable under all the circumstances or on the basis of making an investigation into who has the legal entitlement?—(Mr. Sutton): I think, personally, that the court of summary jurisdiction should be able to make a binding order in that matter. We are usually faced with an application the moment the order is made, and we have at the present time to tell them, "We have no authority to make an order of any kind", and that they must apply to the county court. I think that the court of summary jurisdiction should be able to make a binding order of some kind. What very often happens, when a separation order is made, is that the husband disposes at once of the whole of the home, and the wife is left practically without any furniture of any kind, and it is against that that we have to guard. (Lord Keith): Yes, but what I think was asked is: if this new power were introduced, would it not be better to repeal Section 17?

7950. (Mr. Justice Pearce): No, if I may intervene, one must have Section 17, because there are many cases where it is appropriate as between husband and wife to find who is the legal owner of articles, but I wanted to put to the witnesses that their suggestion would have a much better hope of success, if the magistrate's court made a final order which would over-ride any question of who was the owner, and have nothing to do with Section 17.—(Mr. French): What I had in mind, my Lord, when we were discussing this as a committee, was that the magistrate's court would be able to deal itself with a situation where a wife says, "I am leaving (or have left) my husband, with the children. We have only got one single bed to sleep on; there is my husband with two double beds, and he will not let me have them". The court might then say, "We can settle that at once, and you shall have a fair proportion of the furniture", and that would be an end of the matter.

7951. (Chairman): I think we follow that. But do you mean that forever thereafter the furniture so allotted to the wife would be the wife's property, or do you mean that for a limited period she should have the use of it?—

I should say for ever. After all, the husband endowed her with all his worldly goods, and he should not mind parting with some of them.

7952. I quite follow. I think that the formula now is: "and all my worldly goods I with thee share", is it not, which is perhaps even more appropriate? Passing on to tenancy, you point out, in paragraph 21, that husbands are usually the tenants, and it is easier for the husband to find other accommodation than for the wife and children, after an order has been made. You say:—

"We refrain from expressing an opinion whether courts of summary jurisdiction should be empowered to decide questions of tenancy in these circumstances, as such a jurisdiction seems more appropriate to the county court; but our concern is that some court should be able to exercise a discretion to make a fair order in the interests of the family, especially the children."

Deciding questions of tenancy is one thing, as a rule it is perfectly plain who is the tenant because there is a tenancy agreement of some kind. But I thought that you had in mind here some order, irrespective of ownership, to enable the wife to stay on and prevent the husband from turning her out. Is that not the sort of thing?—Yes, that is the sort of thing. (Mr. Sutton): I should like to say in that connection that practically all the tenancies in these cases are controlled tenancies, as far as our courts are concerned, and very often at low rentals.

7953. Yes. Then would you explain the letter part of paragraph 25:—

"We see no reason why the court should not have power to make an original order (under either the Separation and Maintenance Acts or the Guardianship of Infants Acts) in respect of a child over sixteen whose circumstances are such that an existing order under the Separation and Maintenance Acts could be continued."

What have you exactly in mind there?—(Mr. Hughes): It is now possible to extend a child order, when the child has passed the age of sixteen, if that child is undergoing a course of educational training. Why, therefore, should there not be power to make an order for a child of seventeen to begin with? At present no order can be made if the child is over sixteen. We say that if a woman has a child of seventeen undergoing training at school, college or elsewhere, then she should be able to come to court and ask for maintenance, and not be barred by the age limit of sixteen.

7954. In paragraphs 27 and 28, where you deal with legal aid and conciliation, there is a very interesting discussion of the subject, but I do not find any suggestion—have you any definite suggestion to make?—There is no concrete suggestion from the Association as such, because we feel that conciliation is more a matter for the probation officers and conciliators. We do, of course, see the attempts which are made to effect reconciliation at three levels: firstly, there is the conciliation which is possible before the case ever comes into court; secondly, conciliation between the time of the issue of a summons and the hearing of the case; and thirdly, and what I think is quite important, conciliation after an order is made. I think that those three separate opportunities of conciliation ought to be kept well in mind, and that all courts should have on their staffs probation officers ready at all times to see parties, and to try to patch things up at any of those stages. But beyond that, we make no definite suggestion about conciliation.

7955. Then, in paragraph 29, you say: "The power of the court to make an interim order, once it has found the ground of complaint proved, is not clear". To what Section were you referring there?—I think it is a decided case. (Mr. French): There is a decided case on that, my Lord, but I cannot just think of it. [Fulker v. Fulker (1936) 3 A.E.R. 636.]

7956. I see, thank you. Then, in paragraph 30, you suggest that the court should be given specific power, on application by the husband and on such terms as the court thinks fit, to set aside its order in such circumstances and to start the case afresh.—(Mr. Hughes): If I may mention it, there is one precedent for it in summary jurisdiction, namely, in the Employers and Workmen Rules which are made under the Employers and Workmen Act.

Disputes between employers and workmen can be heard in courts of summary jurisdiction, and if the case is decided *ex parte*, under the Rules the court has power to set aside its decision and grant a new hearing on such terms as the court thinks fit. In other words, it may be by payment into court, or something of that sort.

7957. And is that made on some such ground as you mention there, that the party claims that he misunderstood the date, or time of hearing?—It would cover that contingency, yes.

7958. (Mr. Justice Pearce): What you are really asking for is this, is it not, that when it appears necessary that the case should be re-heard, because somebody has misunderstood the position and not been there, instead of coming to the High Court, as the parties have to now in order to get the matter set aside and started again, they should come back to you?—(Mr. French): Exactly.

7959. It is merely handing over to you the jurisdiction to set the matter right, which at present can only be exercised by coming to the High Court?—That is so, yes.

7960. (Chairman): Thank you very much. Then, in paragraph 31, you say:—

“On proof of service of the summons the court may proceed to hear the case in the absence of the husband or it may issue a warrant to bring him before the court.”

And you suggest, for reasons which are given there, that the court should have a discretionary power to issue a warrant in the first instance, that is to say, without proof of service of the summons?—Yes. There are occasions when a husband has disappeared and we have no idea where he is, but possibly if his name were circulated to the police they would be able to find him, and we should then be able to have him before the court and an order made if it were necessary. (Mr. Hughes): We intend that the procedure should be without summons in the beginning, but proceeding by warrant straight away.

7961. (Lord Keith): Then the wife would simply apply to the court?—She would simply apply to the court, and if she did not know her husband's address then the magistrate should issue a warrant. (Mr. French): It would have to be sworn information, of course, as for all warrants.

7962. (Chairman): Yes. I have no questions on paragraphs 32 or 33, but there is one word in paragraph 34 which puzzled me:—

“Opinions vary as to the merits of suspending the operation of a commitment warrant for non-payment of arrears under a maintenance order. We are, however, unanimous in our view that there is authority for the practice . . .”

I thought perhaps you meant there that you are unanimous in your view that there is good reason for it?—Not quite. It has been suggested that magistrates' courts have no power to make suspended commitment orders but we feel that there is statutory authority for this practice.

7963. Then, I have only one other question, on paragraph 40, where you say:—

“The Association is of opinion that in hearing cases of variation, revival or discharge of maintenance orders, the court should be able to admit, as evidence, the deposition of an absent party or witness.”

Did you intend that to apply to people who are in the country and could be traced?—Yes. We had in mind the many cases we get under the Emergency Laws (Miscellaneous Provisions) Act, where a complaint to vary an order made, shall we say, in West London, has been made by a woman living in Birkenhead. The original court, which is the West London Court, has to decide where her application should be heard. It may be that the husband is living in the West London district, and it would be easy for him to come to the original court. It has then to be decided whether the wife who is making the application will have to come down to London, or whether the husband will have to go to Birkenhead unless he chooses to write a letter. It would be much better if the woman's application could be heard in Birkenhead, and the court there could have a deposition taken from the husband at West London Court, which could be read and considered by the justices at Birkenhead.

7964. I quite see the convenience of it, but there would be an opportunity of cross-examining the husband on the deposition?—Then I would suggest following the procedure under the Maintenance Orders (Facilities for Enforcement) Act, that the court at Birkenhead could send back the deposition together with the evidence that they had taken of the wife, so that the West London Court could further examine the defendant in the light of the evidence of the wife.

7965. The magistrate could in effect cross-examine him?—Yes. (Mr. Mace): On that point, surely there could be procedure such as taking evidence on commission, where an agent could be appointed to the cross-examination? (Chairman): Yes, that might be so.

7966. (Mr. Justice Pearce): May I deal first with the question of enforcing maintenance orders? Let us assume that the present procedure does not work very well. I would like your views on the value of the various suggestions that have been put before us. One is your suggestion, which, in substance, is to hand over the enforcement of maintenance orders made in the High Court to the magistrates' courts. Another is that the summary procedure should be adopted in the High Court. Yet another is that the enforcement of orders should be retained in the High Court if they are over a certain amount of money, or are in respect of a certain class of case, for instance, that of the small businessman whose affairs might have to be investigated in detail. Do you think that it is better to hand over the enforcement of all the orders to the magistrates' courts?—I think, personally, that the magistrates' courts would be able to deal quite adequately with any sort of order, however much it was and whatever the type of person involved.

7967. It has been suggested by some witnesses that it is undesirable to have the large orders enforced in the magistrates' courts, because although they are so obviously good at enforcing the small orders, they may not be so good at dealing with the large orders, the £1,500 a year or the £2,000 a year order?—(Mr. Hughes): We think that the same principles would apply whether the man were earning £8 a week or £1,000 a year. The magistrate could have an enquiry into means. (Mr. Sutton): May I say on that, we do admit evidence of earnings by certificate? We have full power to issue a distress warrant, and I can see no reason why we should not enforce an order to any amount so long as the order is registered with us as the application of one of the parties.

7968. (Lord Keith): Am I right in understanding that your proposal is that when an order has been made in the High Court, if a party wishes it to be enforced in the magistrates' court, she will register it there?—Yes, that is the procedure I should like to see adopted. (Lord Keith): If the party does not want the order to be enforced in the magistrates' court, of course that party would not register it there. I wondered if that met the point Mr. Justice Pearce was putting about the possible difficulty of the enforcement of large orders in the magistrates' court.

7969. (Mr. Justice Pearce): It does not really, because I suggest that if you are going to leave it to the parties to register the order, you are much more likely to have confusion and difficulty. You see, a large number of orders are made annually. If registration were automatic, that could be both efficient and reasonably easy. If you are going to leave it to the parties to make application, then there may be arguments and delays, and you will lose a good deal of the efficiency of the procedure, will you not? For instance, a wife may not ask her solicitor to take proceedings to register the order until the arrears have piled up.—(Mr. French): Could it not be made mandatory that on the application of either party the order should be registered and enforced?

7970. I wonder whether you are wise to leave it to either party instead of having a clear-cut machinery whereby, automatically, the enforcement of orders for maintenance, whether a wife is competent or incompetent at looking after herself, comes under the jurisdiction of the magistrates' courts?—(Mr. Sutton): That could be contemplated when the order was originally made. And if it were not done, then if the wife found that the order was not being complied with, could she not immediately make an application to the court of summary jurisdiction?

1971. (Chairman): Why have applications? If you are going to have this plan at all, why should not you have a rule or an Act providing that, whatever court makes the order, it shall be registered and transferred to the magistrates' courts for the purpose of collection and enforcement?—(Mr. French): I must say that this is what I had in mind when we were discussing this, but I think that a certain amount of modesty made us feel that we should not suggest that the High Court should register every order for enforcement through summary courts. But, of course, if the High Court thought it a proper thing to do, I am sure we could deal with the matter adequately, and I should like to point out that many of the people who come before the West London Court, at any rate, are earning £1,000 a year and often much more.

1972. (Mr. Justice Pearce): I rather suspected that it was difference which made you put it that way, but I suggest that if the scheme is to work in the right way, it should be automatic, because once you leave it to wives to enforce their rights there are a large number of them who are not very good at it—Yes. (Lord Keith): I am a little at sea on this procedure. In what magistrates' court is the order to be registered? (Mr. Justice Pearce): Where the man is. (Lord Keith): Where the man is, but then if the man goes away to another magistrate's jurisdiction, what would happen then?

1973. (Mr. Justice Pearce): It would be dealt with, would it not, in the same way as a maintenance order which was made in the magistrates' court?—Exactly. (Mr. Maddocks): That is, if the High Court were content to leave it solely to the magistrates' court to deal with the order, because magistrates would hesitate to vary a High Court order.

1974. (Mr. Justice Pearce): As long as it is left as a High Court order, dependent on the wife's applying for enforcement in a magistrates' court, you are going to have the difficulties which do beset cases where wives let arrears pile up?—Yes.

1975. Now supposing it were handed over to the magistrates' court entirely and automatically, would it not work satisfactorily if there were a power either in the High Court when making the order to say that any proceedings for enforcement should be taken in that court or in the magistrates' court subsequently to return to the High Court any order which seemed more suitable for enforcement there? I will tell you why I suggest that. I know that magistrates' courts are perfectly capable of collecting large sums, but there are many cases, are there not, where the right way of finding out how to enforce the maintenance order is by the investigation of balance sheets, and various matters like that, which, in the normal course, are better done by someone with more leisure than magistrates, and by a person who is used to dealing with accounts. Would you agree?—Yes, I think that we should all agree there. I should say that the best way of dealing with the difficulty would be first to give the High Court a discretion on the application of either party at the beginning to make the order payable through a magistrates' court and then, as you say, to empower magistrates' courts to return to the High Court any order they thought should be enforced there.

1976. With regard to paragraphs 3 to 5 of your memorandum, I want to ask you about the position which arises when cohabitation or residence continues after the making of an order. You say that when a confirmable order has been confirmed it should be enforceable unless cohabitation continues. That suggestion seems to me to give rise to this difficulty. The order having once been confirmed, the wife may feel compelled to leave the husband, even although she wants to continue cohabiting with him and even although he has got into the habit of regular payment, merely to keep her order alive. Might it not be better to dispense with the provision that the order should be unenforceable if cohabitation continued? Could it not be said that where the court has made a maintenance order under which the husband is paying and yet the spouses have continued living together, the court has set right the only real trouble between them?—What we had in mind was that a confirmable order would subsist perhaps for a year and by that time, as you say, the husband would have got into the habit of regular payment. Then, there would be no occasion for the court to intervene at all, and no occasion for the wife to leave.

Cohabitation can continue, the order will come to an end, and if the trouble starts again, she will have to come back to the court. (Mr. Sutton): I look at it in this light. If the court is given power to make a confirmable order, she has not got to leave the home, and even if the order is confirmed she can still stay there. But it has always been recognised that where parties are cohabiting then the court should not be asked to step in to enforce an order, which may result in the husband going to prison. Our suggestion means, therefore, that the wife is not forced to leave the home, but if she wants to enforce the order against her husband, she should cease to cohabit with him, although she can still remain in the house and the family can continue as a whole.

1977. Yes, I see your point, but I was thinking that perhaps in a number of cases it would not become necessary to enforce payment, though it is necessary that the order should be enforceable to make the husband keep up his payments?—(Mr. French): You mean that the order should be a confirmable order capable of being confirmed at any time, so there would always be over the man's head the threat of having the order confirmed.

1978. I suggest that is a possible view of the case, otherwise she might leave the home merely in order to save her order?—Yes.

1979. She may say, "Whatever happens I want my order, because I am determined that I and the children shall have enough to eat", but she would be content that it remained in the background provided she is given that assurance?—I think she would. As we have drafted our suggestion, she would not be able to get her order confirmed unless her husband had neglected to maintain her during the year, to the extent of at least two weeks, so that if he had become a regular payer she would not be entitled to get the order confirmed and therefore would not leave.

1980. On the question of appeals, do you think it is desirable that, in all cases where the Divisional Court overrules a magistrate's court, the transcript should be sent to the latter court?—Yes, most certainly. We have had a good example of that recently at West London. There was an appeal and the Divisional Court criticised the magistrate's decision, but the criticism only came to the notice of the magistrate through the solicitor for one of the parties. That was most unsatisfactory.

1981. You appreciate that that would entail a certain expense, and it is desirable to know that it is considered necessary?—Yes, it is.

1982. With regard to cases where the Divisional Court has dismissed the appeal, do you think that there is any real necessity for a transcript?—I do not think so. I do not know if my colleagues do.

1983. I suppose that it might be desirable to have a transcript of those cases where, though the appeal was dismissed, the Divisional Court drew attention to any mistakes that had been made?—Yes, we want to be told of our errors, but not of the things that we do right.

1984. I fully appreciate the reasons which lead you to think that there should be an appeal to quarter sessions, but there are considerations on both sides, are there not? The real substance of your criticism is, that as the magistrates have seen the witnesses in court, the Divisional Court is very reluctant to interfere on questions of fact unless it is obvious that the magistrates must have gone wrong?—Yes.

1985. Now the difficulty about giving a wider appeal from magistrates than there is at present is this, is it not, that the only deterrent to an appeal would be the question of costs?—Yes.

1986. It would not, of course, be right that poverty should deter one discontented litigant from appealing when another is able to, so one would really have to have the position where a large proportion of the appeals fell on public funds?—Yes.

1987. Both sides of the appeal, namely, appellant and respondent?—Yes.

1988. Do you think that it is really necessary to have re-hearings on fact in these cases?—In view of the consequences to a man of having an order made against him, and the consequences to a wife who fails to get her order—consequences which may last for the rest of their lives—it seems to us most important that there

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should be a re-hearing on the facts, because of the many instances which we have in mind where, had the High Court heard the facts, they might have come to a different conclusion.

1989. Of course your same arguments would apply to the importance of decisions in the Divorce Court?—Yes.

1990. There is no certainty that the second decision is the right one, because it is merely a case of human beings trying to gauge the credibility of the witnesses?—Yes, that is so. (Mr. Sutton): The position, as I see it, is this. I sit with metropolitan magistrates every day and I have every confidence in them, but there are times when I think their decisions are wrong. At other times, I am quite sure that they are wrong and we do, time after time, get the woman or the man saying, "We want to appeal". When we tell them the procedure to be followed, they simply give the matter up as hopeless.

1991. In such a case, whether the appellant would win or lose his appeal would depend on whether it was heard by a magistrate who took the same view as you did or by a magistrate who took the same view as the magistrate who tried the case in the first place?—The justices are often sitting with a clerk who may be biased. For one thing, he is a local man. My experience shows that some magistrates make orders very easily; other magistrates on the same set of facts would not make an order. That is the thing that should be guarded against.

1992. Let us assume that experience in a Divisional Court leads one to find that there are a certain number of cases where one feels completely certain that the magistrates were right; that there are a larger number of cases where one thinks one would have come to exactly the same conclusion if one had seen the witnesses but one is not sure; and that there are a few cases where one feels surprised that the magistrates came to that conclusion, though one realises that as they saw the witnesses, it may have been the right conclusion. Are you not causing a great deal of expense for the few cases in which you think that a different decision might be reached by some different tribunal?—I look on it in this light. In criminal matters, when a man is convicted by a magistrate, rightly or wrongly, he has a right of appeal. He appeals, and in a great many of those cases the decision of the magistrate is upset on the facts. Why should the decisions not be equally upset on the facts in civil matters? We get numerous appeals to quarter sessions. The magistrates are not universally right. Why should there not be an appeal in these matrimonial cases?

1993. You keep using the word "right". You may get a different decision—wherever people are exercising judicial faculties, they will not always all arrive at the same decision. I agree that you may have a different decision on many questions of fact if you go to a different tribunal, whether it be a different judge or a different magistrate. But is it not rather dangerous to assume that it is always the wrong decision when two or three magistrates hear the case the first time, and the right decision when two or three magistrates hear the case the second time?—(Mr. French): Might I say this? Firstly, I think that what we have in our minds, in putting forward this proposal, is a desire to have a unity of procedure in magistrates' courts. Apart from matrimonial matters, all appeals are to quarter sessions on fact. Even hasty orders can be appealed against; their refusal can be appealed against to the County of London Sessions. It does seem to us, at any rate, that there is no particular reason for distinguishing a matrimonial order from a bastardy order. Secondly, we are very anxious to have a clear-cut settlement of the law in all cases. So often it is extremely difficult to tell what the decision has been in a particular case, because it must have been partly on fact and partly on law. If the appeal on fact were to quarter sessions, and then we had a case stated on the law, we should get our law much clearer than it sometimes is now.

1994. (Chairman): One question arising out of that: are you suggesting that there should be this appeal to quarter sessions where the only dispute is on the amount of payment to be made?—No, as to the facts of the order, whether there has been persistent cruelty, or whatever it may be.

1995. (Mr. Justice Pearce): Would you have an appeal from quarter sessions to the Divisional Court on the question of law which is involved in the question of fact?

Take the question whether there could have been desertion as a matter of law—that is quite different from the question of fact whether there was desertion?—Exactly.

1996. In an ordinary case of desertion, on your suggestion the loser goes to quarter sessions for a re-hearing before the justices?—Yes.

1997. And supposing the winner in the first court considered that there was no legal possibility of that second court finding that the facts could not amount in law to desertion, he would be entitled to go to the Divisional Court?—Yes, he would.

1998. (Chairman): Would that be on a case stated?—By quarter sessions, yes.

1999. (Mr. Justice Pearce): There would be a very large number of appeals if this were introduced?—I do not know. There might not be. For one thing, the law might become rather clearer than it is at present and there would not be so much ground for appealing on the law. I do not think that there would be a great increase in the number of appeals on fact, because I can say that at present, whenever we feel that there is an occasion for an appeal by either of the parties, even if they have no money, we finance them out of the poor box. Most of the cases in West London, at any rate, which go to the High Court, have gone because we have financed the appeal.

2000. You say that the law might become clearer, but the real trouble about the law is its application to facts?—That is the great trouble.

2001. And really, all the difficulties of matrimonial law, on the whole, have been whether a particular set of facts can come within certain quite clear legal principles?—That is so, but with a case stated one formulates the point precisely. The opinion of the court is required on the following, and so we get a direct opinion.

2002. (Chairman): I only want to add this. If you had an appeal and re-hearing at another court, and if people who could not afford it were assisted or were allowed to have it free of expense to them, would not the loser appeal almost every time? My experience is that the defeated litigant always thinks he is right, especially on a question of fact. Can you imagine the loser not appealing, if he could have a complete re-hearing before another court which might take a different view, without expense to himself?—(Mr. Sutton): A court of quarter sessions would have power to award costs and that would be in the person's mind. He would not appeal for the sake of appealing, if he knew that he might have costs awarded against him.

2003. (Mr. Beloe): Could I ask what is the great difficulty of appealing now? Why is it that people are discouraged from appealing when you tell them about the present method of appeal?—The position is that there is practically no appeal on facts at the moment. (Chairman): The difference is this, I think, Mr. Beloe. At present, it is said that the appeal to a Divisional Court will be dismissed if there is any evidence on which the magistrate could come to his decision, whereas under the new procedure suggested, there would be a complete re-hearing from the beginning, with power to call fresh evidence, by a body which is going to form a completely independent conclusion. (Mr. Beloe): I thought there was something more to it than that.

2004. (Mr. Justice Pearce): May I intervene? So many of these questions arise from the sort of case where the wife says the husband drove her out, told her to go, pushed her out of the door and so on. The husband says he did nothing of the kind, and that the wife said she was going back to her mother and wanted to go. The magistrates listen to this, with various witnesses supporting the parties on either side, and come to a conclusion. When that goes to a Divisional Court, the court, having gone through it, generally says: "We did not see the wife. The magistrates say that they firmly believed her, though some of her answers in cross-examination were unsatisfactory. Therefore we should not interfere with the findings on fact". If you have a re-hearing it is a different matter. It does not matter whether the first magistrate believed or disbelieved the wife, the whole of the evidence is heard again. It is that re-hearing which you would like?—Absolutely. (Mr. Beloe): I did not

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realise that the litigant would understand, when he asked whether he could appeal, how much would depend upon what had happened in the lower court.

8005. (Chairman): I think that the point is this. If he asks somebody, "Have I a chance on appeal?", he would be told at present in many cases, "No, you have no chance at all, because if there is any evidence justifying the finding, your appeal will be dismissed". Whereas if there is a re-hearing his advisers might say, "Yes, go ahead, you will have a fresh tribunal who may take a different view".—(Mr. French): At present, if we are asked, "How do we proceed, what is the procedure for going to the Divisional Court?", we say, "Go there and find out", whereas, if it is an appeal to quarter sessions, we say, "We will show you how to make out your appeal and you will hear from quarter sessions", and that may be much sooner than through the Divisional Court.

8006. (Mr. Justice Pearce): If you mean that the procedure should be simplified for appeals to the Divisional Court, that is a matter which could be attended to on the suggestions you put before us, but if you are making that point, it should be clear that that is the point.—We are not making that point, but it is an additional discussion when a person asks how he should appeal.

8007. (Mr. Beloe): If I were an ordinary litigant, that would be the thing which would influence me in the first instance. If I asked the clerk of court, "What shall I do?", and he said, "You must start an action in the High Court", it would immediately muddle me.—(Mr. Hughes): He has to go to a solicitor to do it for him. That is what it amounts to in practice.

8008. (Mr. Mace): Would you turn to paragraph 26? Do you mean that the giving of legal aid in matrimonial cases may be a good thing in that both parties will be represented by solicitors, but that at the same time it may not help conciliation?—(Mr. French): I think we mean rather more than that. We mean that there are quite a number of cases where it is not necessary for legal aid to be given at all, a number of cases which the court can deal with quite easily, looking after the interests of both parties. Then, we did mean that sometimes there are solicitors, usually young and inexperienced, who may do rather more harm than good where there is a possibility of reconciliation.

8009. (Mr. Young): You would not oppose the Legal Aid Act applying to your courts?—Not at all.

8010. The point you are making is that legal representation may hinder, and very often in fact does hinder, reconciliation?—It does. So many of the young counsel who are sent down are completely inexperienced. They are finding their feet; and novices can sometimes make a mess of things.

8011. May I turn now to paragraph 6? I leave entirely the point which Mr. Justice Pearce took. I am dealing with another point, and I am looking at it, not from the viewpoint of the metropolitan courts where you have a metropolitan magistrate, a reasonably small staff, and—excuse my saying it—a reasonably small number of cases, but from the northern cities' point of view—Liverpool, Manchester, Leeds—where we have a number of matrimonial courts sitting each day and dealing with the type of husband and wife who come from the dock area of Liverpool and the hard industrial areas of the North. Are you not going to invite a very great number of cases where a wife comes down and says: "He is not paying me enough; I want an 'interim' order. I have not got real grounds to leave him, but he is not paying me enough".—It may be that there will be an increase in the number of such cases and then it will be for the court to decide whether there has been wilful neglect to maintain, and the order will only be made if the husband has committed that matrimonial offence. It is far better that the court should deal with a husband who is committing such a matrimonial offence than that it should be unable to deal with him because his wife does not want to leave him.

8012. Would it be your view, that the fact that the wife can go and get an order while she and her husband are still living together will cause matrimonial strife between husband and wife, where it does not exist today?—I suppose that the strife exists anyhow, if she is not getting the money she thinks she should get. And going

to the court may not make it much worse; it may in fact make it better because it will be brought into the light of day.

8013. You do not think that the fact that the wife may threaten court proceedings for a matrimonial offence which does not necessitate her leaving the home, is going to cause more difficulty in the home?—I do not think so. It depends entirely upon the temperaments of the respective parties, of course.

8014. (Mr. Maddocks): Following that up, you do deal now with applications for orders on the ground of wilful neglect to maintain where the wife has not left the home and does not intend to leave the home?—We do, certainly.

8015. (Chairman): Then what are you adding by this suggestion?—At present, we make an order which is a permanent order, and it is really rather a piece of eyewash. We know that both parties are going to continue to live together. We make the order and say to the husband: "You have to pay your wife £2 a week", and we hope that he will not read the note at the bottom of the order which says that it is not enforceable as long as they reside together.

8016. (Mr. Maddocks): I want to refer again to this question of appeal that Mr. Justice Pearce was putting to you. He was seeking to draw an analogy between appeals on fact from magistrates and appeals on fact from judges. Is the view of your Association founded on this, that it is so much easier for a magistrate to go wrong on fact when he has no one to help him, and the parties are not represented, than possibly it is for a High Court judge to go wrong on fact, where he has a solicitor and counsel?—Undoubtedly.

8017. The Chairman asked you about multiplicity of appeals, should your suggestion be acceded to. Is it your experience with appeals that, generally speaking, people do not appeal when they are in the wrong?—Yes, I think that is so. It did occur to me when my Lord was speaking about that. The surprising thing about many of the people we deal with is that they go into the witness box and tell a number of lies, and appear extremely indignant about it all, and then they go out and say: "I got off very well there, didn't I? It is well worth paying £2 to get rid of her".

8018. (Mr. Young): Mr. Justice Pearce has asked you most of the questions I had intended to put, but I am still puzzled about your proposal for appeals. Do I understand that under the re-hearing that you suggest, not only would the witnesses who appeared at the first hearing be recalled, but both parties would be entitled to bring new evidence by new witnesses?—(Mr. Sutton): It would be a completely new hearing, and so the parties could call whatever witnesses they liked. (Mr. Hughes): I am drawing an analogy with the hearing that takes place at quarter sessions, and what we have in mind is something on those lines. New evidence can be called and the parties have an entirely new hearing.

8019. I wondered if it was that. I have had only one experience of that, where a man discovered that he had not brought the evidence which he ought to have brought; he appealed and was very successful. It shocked me, as a Scottish lawyer, that in the criminal courts you could have a second try, in that way. If you adopted that procedure in matrimonial cases, then any party could go to a first hearing and say, "I think I have enough evidence". Then, when he finds that he has in fact lost the case, and it is due to his not having the appropriate evidence, he can appeal for this re-hearing. Would that not be the result of it?—That would be the result. If the witness was not called in the court below, and was called in the court above, there might easily be a different decision, and that is what we have in mind.

8020. As I understand it, you want this procedure because you think that the decision of the magistrate may be wrong?—Appeals are so rare in these matters that we feel there is something wrong.

8021. What I am suggesting to you is that if this procedure were introduced, could it not be used for a different purpose altogether, that is to say, the party could present a certain amount of evidence and then, if he finds either that he has not brought enough evidence or that he has not brought the right kind of evidence, he could apply for a re-hearing, and have the case tried all over again?—

That happens in affiliation appeals, hasty orders. The woman can have an appeal and call further witnesses, even though the justices did not see them in the court below.

8022. It is quite clearly having a second attempt—I think that is what we have as our aim. (Mr. French): The aim is to get at the truth, and if a second go results in the truth being revealed in the court, then I think the second go is justified.

8023. If that is the principle, why should you not have a third go?—One has to be practical as well as an idealist.

8024. (Mrs. Allen): In paragraph 4 you refer to the fact that quarrels may arise over money. Have you any idea how this can be resolved, apart from the present procedure? We have had suggested to us that a good deal of it would be resolved if the wife had a legal entitlement to a certain proportion of the husband's earnings.—It seems to me that the fewer rights that are stressed in marriage the better. Marriage is a matter of give and take. My Lord, I feel that this question would perhaps be beyond the scope of our memorandum. Our Association has not instructed us to express any opinion on this. (Chairman): The Association's remedy appears in paragraph 6.

8025. (Mr. Seloe): May I turn to paragraph 19? I should like to try to get clear what is to be the procedure if the magistrates' courts have the duty of dividing furniture between the parties. Would the magistrate say to the parties, "Now, you can ask me to do this, or you can go to the county court about it"?—(Mr. Hughes): The order would be binding. (Mr. French): That would be so, I think.

8026. You see my point? It should be a final order, but the wife should know before she asks for it that she has another kind of right if she wishes to exercise it.—(Mr. Hughes): Certainly. We would not suggest that we should deprive the county court of its jurisdiction in this matter, and it would be a matter for the wife to decide to which court she would go.

8027. In many cases the wife is represented, is she, by a solicitor?—Very often not.

8028. So that it would be very important that her rights should be fully understood by her before she elected to go to the magistrates on this point.—We are always explaining rights of that kind to parties, and I am sure that we should do it very carefully and, if necessary, say: "This is a difficult matter; you had better go and see a solicitor", and if need be we would pay his fee out of the poor box. (Mr. Sutton): In every case where a woman is not represented, she is always referred to the probation officer when she makes an application for a summons, and the probation officer would give her advice on those lines.

8029. I wanted to be sure that there would be no question in the wife's mind as to what her rights were?—(Mr. French): No.

8030. Then with regard to paragraphs 23 and 24, I imagine that you are aware of the kind of home which is visited by all sorts of welfare officers. You might, for instance, have a home that was visited at one and the same time by about seven different officers. I just wondered whether you were sure that in these children's cases the probation officer would always be the right person to visit and make a report to the court, or whether, for instance, the children's officer might be used?—(Mr. Sutton): I should like to say that I had in mind Section 1 of the Children Act, 1948, when that particular portion of the memorandum was drafted. The children's officer could do the visiting and reporting equally as well as the probation officer, except that the probation officer is an officer of the court and would have an official standing in that particular matter, to visit at any time, and it would be the duty of the probation officer to report when the matter came before the court.

8031. I imagine that if the home were unwilling to receive the children's officer, you would think that there would be something odd about it?—Yes.

8032. I notice you suggest that it should be sworn evidence?—Yes.

8033. I am not trying to put the children's officer up against the probation officer, but it seemed to me that in some cases possibly the children's officer might be even better trained and qualified to investigate the conditions than the probation officer?—(Mr. French): The wording there should be "probation officer"—leave out the word "female"—and then add, "or other person approved by the court", and then the court can decide.

8034. Then, as to paragraph 25, have you any evidence that children have been actually prevented from receiving continued education because of the absence of this provision?—(Mr. Hughes): We have not very much evidence that that has happened, but we do not hear of the applications that have been frustrated in the absence of provision for that. I myself have no particular evidence that there have been many cases in which applications would have been made. (Mr. French): I have come across one or two cases where husband and wife have separated; one of the children is over sixteen but still going to school, and the magistrates' court has no power to deal with the child.

8035. And I suppose what might happen then is that the local education authority would be asked to provide some money out of public funds to help?—Yes.

8036. And it is really very unfair that the father should not provide that money himself?—Exactly.

8037. I am not very well qualified to ask you about this further point but I am interested in it. As to paragraph 13, would you care to enlarge upon this suggestion that the court should have discretionary power to limit the duration of an order, having regard to the length of time the parties have been married, their circumstances, their ages and the ages of any dependent children?—(Mr. Hughes): We have in mind there the younger married people, couples of the age of twenty-three or twenty-four, and an order made until one of them perhaps is seventy. We think that there should be some limit put on an order and that a wife should not be, so to speak, a life-long pensioner of her husband. That is the main class of case we have in mind. At our court at Old Street, we have orders of over twenty years' duration which are still being paid, and the husband and wife have long ceased to have any regard for each other at all. She calls him "Mr. Smith" and he calls her "Mrs. Smith".

8038. And you would give complete discretion to the court about this, with no safeguards at all?—(Mr. Sutton): Very often we have two young people who, for various reasons, separate after perhaps twelve months of married life. The wife is entitled to a maintenance order and obtains one. We do think it unfair, where the wife can earn her own living, that she should become a pensioner on her husband for life. (Mr. French): There are so many wives who say, "I am not going to work when my husband can keep me".

8039. (Lady Haggis): May I ask a question about the confirmable maintenance order? If the husband's circumstances changed, could he apply to the court for the order to be varied?—Yes, we should have to have a provision like that. Any order made by a court, including a confirmable order, must be able to be varied on the application of either party, on the production of fresh evidence.

8040. And the matter will be rather more difficult when you have only one person's word against the other, will it not? It will not be such an easy question to decide as when the money is paid into court in the ordinary way?—The court may have to make up its mind which of two people is speaking the truth, but it often has to do that.

8041. Then as to paragraph 26, have you had experience of the husband, after the summons, quickly getting rid of the furniture and going to live with his mother?—Very often.

8042. I am wondering whether your suggestion might not make that more likely to happen. Have you known other cases where the husband has been very disagreeable about the furniture at the time, but when feelings have cooled down a bit, the probation officer has persuaded him, for the sake of the children, into giving up some of the furniture peacefully? I am putting it to you that if your proposal came into force, the husband might, especially in the heat of the moment, just get rid of the

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furniture before any arrangement was arrived at?—I think that in some cases he might, if he realised that this might happen. (Mr. Sutton): We could safeguard the position where the husband refused to hand over the furniture and disposal of it, by placing a value on it, and the husband would then be bound to pay a sum equivalent to the value of the furniture.

8043. You would have to take his word for its value if he got rid of it?—The court would assess the value. (Mr. French): There will always be some rogues who will find a way of circumventing whatever we plan.

8044. You say at the end of paragraph 28:—

"The solicitor accepting the case receives a detailed report from the probation officer and is thus fully aware of the efforts already made to restore matrimonial harmony. . . ."

What I do not quite understand is, which solicitor? Should not both parties have one?—(Mr. Hughes): We are thinking there of the difficult cases where the wife should have legal assistance in putting her case before the court, and in those cases she is given a solicitor free of charge. The probation officer, having already investigated the case, as they always do in our courts, is able to give the solicitor some particulars of the history of the case, including the attempts which he or she has made to effect reconciliation. The solicitor on coming into court is, therefore, in full possession of all the facts, including an indication of what hope there still is of achieving reconciliation between the parties. Very often, of course, if one party is granted legal representation, the magistrate says that the other party must have it too, and in very many cases both parties, if the facts are difficult, or if the law is involved, are given legal help.

8045. Both solicitors can see the report of the probation officer—I am thinking simply in terms of reconciliation?—(Mr. French): They would, I think, generally.

8046. Then, with regard to paragraph 34, would you tell me how, in a metropolitan court, you put into effect a suspended committal? Has it to go back to the magistrate at all, or do you as clerks straightaway, obviously with a warning to the man, put it into execution?—(Mr. Hughes): The warrant is signed on the day on which the order is made and kept, so to speak, in reserve, until the man has failed to keep the conditions of the suspended order. Then usually the wife will come along and ask for the warrant to go out and for the man to be arrested and sent to prison. The practice is to ask her to fill up a form so as to get something in writing from her to say that she has not had the money. Then the warrant is issued to the police for execution. But when the man has fallen on evil times since he was before the court and the adjudication made, it sometimes happens that the magistrate will say, "We will not issue this today". The great difficulty about a suspended warrant—I think I was responsible for putting this in the paper—is that something may happen after an adjudication. A man may fall out of work, therefore he is no longer wilfully refusing to pay, nor is his failure to pay due to his culpable neglect. It seems to me that there should be some safeguard; once a suspended warrant is made in court it should not leave if his failure to pay is due to causes beyond his control. With that in view, we did attempt to draft something which might form a suitable addition to summary jurisdiction rules dealing with this matter. (Mr. French): I think that Lady Briggs wanted to know whether the magistrate decided whether a suspended warrant should go out or not. The answer is, as far as my court is concerned, where a magistrate has made an order fairly recently and the man has failed to comply with that order for more than a week, I issue the warrant without consulting him, unless I see any particular reason for not doing so. But where there has been a lapse of time, or there seems to be any difficulty, I always speak to him.

8047. Do you bring the man into court and explain?—Sometimes I have a note attached to the committal order for the warrant officer: "This man must be brought before the magistrate before being sent to prison". (Mr. Sutton): At our particular court a warrant is signed and put into suspension. If the man fails to comply with the conditions the warrant is issued, but the warrant

officer has explicit instructions that if the man gives any explanation of any kind as to why he has not paid, he must be brought before the magistrate before being taken to prison. When the suspended order for committal is made, the man is told in court that if he falls ill or out of employment, it is his duty to inform the court. If he fails to inform the court he has only himself to blame if the warrant issues. He is told that quite clearly when the suspended committal order is made.

8048. (Mr. Brown): In paragraph 1, you say:—

"During the last twelve months the sum received at the courts on periodical payments of maintenance, and subsequently paid out, totalled £575,533."

Am I right in thinking that the remuneration of London magistrates' clerks is not in any way dependent on the amount of money they collect?—Most unfortunately, you are.

8049. Have you any information about other courts that have a different system?—(Mr. Hughes): I think it is a custom in the provinces that a commission of five per cent. is charged. Whether that goes to the clerk I do not know, but it is not the case in London. (Mr. Sutton): I think that very few clerks who are collecting officers are remunerated on a commission basis. It is now included in their salaries.

8050. That is an opinion, not a statement of fact?—I think it is the present position. I think there are very few cases of payment on a commission basis.

8051. (Lord Keith): I should like to be a little clearer in my mind about the division of the home. I suppose that in the great majority of cases the household chattels will have been provided by the husband?—(Mr. French): If the wives we hear are to be believed, no.

8052. When the wives say that they have paid for the household chattels, do they mean, do you think, that they have paid for them out of money they have received from their husbands?—Some of them have worked before marriage; some continue to work after marriage and to add to their homes.

8053. I appreciate that there may be many cases where the wife has herself provided, out of her own money, some at any rate of the household chattels. What I want to get clear in my mind is this—if the magistrates' courts were empowered to make an equitable division, what would be the position in relation to Section 17 of the Married Women's Property Act? As I understand it, that Section authorises the county court to decide who has paid, or in whom is the right of property in the particular case. Is that right?—Yes.

8054. If the magistrates' court has made an equitable order, are you suggesting that, so far as that equitable order is concerned, Section 17 should simply be washed out?—Yes, we are.

8055. I thought you were suggesting that in some way Section 17 was still going to stand. That is not so, or rather the Section would stand, but it would not affect the order you have made?—Exactly.

8056. (Mr. Justice French): On the question of appeals, a large proportion of cases where desertion is found by a magistrates' court come in three years or so to the Divorce Court, do they not?—I would not like to say whether a large proportion do. A great many of them do, but there are a great many husbands and wives who do not go on to the Divorce Court.

8057. A great many of them do?—Yes.

8058. And in point of fact many of them case, if they wish, go to the Divorce Court on the ground of desertion when the separation has lasted for three years?—Yes.

8059. And you know of course that the Divorce Court does not consider that it is bound by magistrates' decisions?—No.

8060. And in some cases the judge comes to a contrary conclusion to that arrived at by the magistrate. It may be because he differs as to the credibility of witnesses, or it may be because the loser in the court below has taken the precaution of bringing forward points and

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witnesses which were omitted in the first hearing. So there is quite a large number of justices' decisions in matrimonial matters where the loser does get a second chance?—Yes, that is so.

8061. And it is quite fair to say that the Divorce Court does not hold itself bound, but gives to the magistrates' decision just this much weight, that rightly or wrongly, at a time nearer the events, people, presumably reasonable people, came to that conclusion. Judges sometimes agree with the magistrates' conclusions and sometimes differ from them.—Yes, but we do not really know what

happens, because an application is usually made after a revocation of our order, because proceedings are brought in the Divorce Court, and we do not know what happens after that.

(Chairman): I may say, in regard to the question asked by Mr. Brown, that the Commission has now applied to the Home Office for accurate information as to the remuneration of magistrates' clerks by comparison with amounts collected, so that will be cleared up.

Thank you very much for your memorandum and for helping us today.

(The witnesses withdrew.)

MEMORANDUM SUBMITTED BY THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN

(NOTE.—The memorandum submitted by the National Council of Women of Great Britain has already been printed as Paper No. 83 in the Minutes of Evidence for Thursday, 6th November, 1932 (Twenty-Eighth Day), when the witnesses representing the Scottish Standing Committee of the Council gave oral evidence (Questions 7004 to 7078) before the Royal Commission.)

PREAMBLE

1. The National Council of Women of Great Britain is established in the interests of no one particular social, political or religious organisation. Its objects include the promotion of the social, civil, moral and religious welfare of the community, the promotion of such conditions as will assure to every child an opportunity for full and free development, and the removal of all disabilities of women, whether legal, economic or social. There are eighty-nine branches and ninety-seven nationally affiliated societies.

2. The proposals put forward in the following memorandum to the Royal Commission on Marriage and Divorce represent the agreed policy of the Council, much of which has been advocated for many years. In regard to marriage, the policy of the National Council of Women has always been directed to the promotion of the welfare and stability of the family and the encouragement of the highest public and private morality for both sexes.

3. It will be realised, however, that the National Council of Women, being composed of such a large number of women and affiliated societies, cannot be united on the subject of divorce. There are those among its members whose religious principles do not permit of divorce under any circumstances whatever, who believe in and propagate the doctrine of the indissolubility of marriage, but who recognise that the law of this country provides for divorce, and relief for those suffering from matrimonial offences, whether by divorce or separation. There is common agreement that so far as divorce is concerned the parties should have made available to them every suitable means for prevention and reconciliation.

4. The National Council of Women believes that education for marriage and family life are of paramount importance. Stability of family life is the basis of civilised society, and instruction in the responsibilities of marriage and parenthood, and in the art of home-making, should be available for all young people, and given to boys as well as girls at a suitable stage of their education.

RECOMMENDATIONS AND ARGUMENTS

CHANGES IN THE LAW CONCERNING DIVORCE AND OTHER MATRIMONIAL CAUSES

5. The law should be amended so that if a return to cohabitation is tried for the purpose of reconciliation, it should not be regarded as condonation, and therefore a bar to proceedings. The reason is that the present law frustrates the attempt at reconciliation.

6. The law should be amended so that "the woman named" may be cited as co-respondent and liable for costs and damages in the same way as the male co-respondent. This is to secure equality between the sexes.

7. Where a separation order has been made on the ground of desertion and a non-access clause has been

inserted as a protection for one of the parties, this clause should not preclude desertion running from the date when the desertion was found to commence.

CHANGES RECOMMENDED IN THE POWERS OF COURTS OF INFERIOR JURISDICTION IN MATTERS AFFECTING RELATIONS BETWEEN HUSBAND AND WIFE

8. Magistrates should have the power to make interim orders for maintenance up to the time of an order for alimony or maintenance made by the divorce judge in the High Court.

RECOMMENDATIONS RELATING TO PROPERTY RIGHTS OF HUSBAND AND WIFE

9. A wife should be entitled to a portion of the joint income of husband and wife for her own separate use. Self-respect and mutual respect are a necessary basis for successful marriage, and complete financial and economic dependence of either party militates against this respect.

In this connection members of the Commission are asked to consider the peculiar hardship to a wife, especially if there are children, that a husband guilty of adultery or desertion has the power to sell the house and furniture without regard to his wife or the welfare of the children. If, on the other hand, she is driven by his conduct to leave him, he may install another woman into the home which she has made.

RECOMMENDED CHANGES IN THE ADMINISTRATION OF THE LAW

10. The scheme of legal aid and advice as laid down in the Legal Aid and Advice Act, 1949, should be implemented in so far as it relates to matrimonial cases. At present legal aid only is available and only in the High Court, on account of national economy measures. This has the effect of eliminating legal advice which might lead to reconciliation, and/or the seeking of a separation order, and encourages the parties to take the more extreme measure of divorce. It is necessary that advice should be given first, before legal aid is sought.

11. Decisions as to maintenance should be dealt with by the judge during or immediately after the hearing of the suit.

12. Decisions as to the custody of the children should normally be made by the judge at the hearing of the suit or immediately after it, and a woman answer who has heard the whole of the case should assist the judge when such decisions are being made.

13. There should be court welfare officers, of both sexes and with equal status, to assist the court as required in cases of custody.

14. In deciding custody, both parties should appear, and the welfare of the children should be the paramount consideration.

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MRS. C. JOLLIFFE, B.Sc.

15. The broken home is one of the gravest social evils of our time, particularly in its effects upon the children. The importance of providing one stable home for the children should be the first consideration, and where possible, the children's wishes should be consulted. If a parent, not having the custody, remains within reach, this not only unsettles the child, but often induces corruption and deceit, and spoils the relationship with the parent who has the custody. Therefore, in adjudicating custody of the children both in separation and divorce, an order for non-access of the other parent in some cases might be desirable.

LAWS OF KINDRED AND AFFINITY

16. No suggestions offered.

MISCELLANEOUS RECOMMENDATIONS

17. *Income tax.* Married women should be taxed and assessed as separate persons, and the income of the parties should not be aggregated for the purpose of taxation. The position and status of the woman is involved. The higher amount paid in income tax when the incomes are aggregated can work out as a heavy penalty on marriage.

18. *Domicil.* A woman on marriage should not be compelled to take her husband's domicil. She should be entitled to retain or acquire a domicil of choice in the same way as a man or single woman. Again, the position and status of the woman is involved. A certain relief provided in the Matrimonial Causes Act, 1950, will become unnecessary if a woman is entitled to her own domicil independent of her husband.

19. *Procedure and law of marriage.* Marriage within a matter of hours after the issue of a licence should only be permissible in very exceptional circumstances, e.g., in connection with calling-up papers. The stability of

marriage concerns not only individuals but the State. Marriage should not be contracted in a hasty manner without forethought, and every precaution should be taken to see that young people understand the nature of the contract they are making. For this reason certified mental defectives should be deemed incapable of contracting marriage. (See para. 24.)

20. *Reconciliation.* The intervention of the court welfare officer should not be compulsory in divorce cases, but only by the wish of either or both the parties or at the request of the court.

21. The work of the Churches and recognised voluntary bodies in giving help and guidance, both in preparation for marriage and in difficulties after marriage, should be encouraged by the State and receive adequate financial assistance, but the voluntary status of this work should be preserved. Conciliation services should be available should the parties contemplate separation or divorce.

22. *Education.* Education for marriage and family life in the widest sense is of the utmost importance. As an essential basis for this, the biology of sex must have an adequate place in the educational system, and be presented with the greatest discretion and delicacy. The co-operation of the Churches and of voluntary bodies in the educational field should be encouraged. (See para. 4.)

23. *Change of name.* Consideration should be given to the question of stopping the informal way in which names can be changed at a food office, thus facilitating irregular relationships.

24. *The marriage of mental defectives* who at the time are subject to the provisions of the Mental Deficiency Act, 1913 to 1958, should be illegal. (See para. 19.)

(Dated December, 1951.)

EXAMINATION OF WITNESSES

(MRS. M. LEFROY, M.A., J.P., MRS. M. F. BLIGH, B.Sc. and MRS. C. JOLLIFFE, B.Sc., representing the National Council of Women of Great Britain; called and examined.)

8062. (Chairman): We have here, I understand, representatives of the National Council of Women, namely, Mrs. M. Lefroy, M.A., J.P., the President of the National Council; Mrs. M. F. Bligh, B.Sc., Secretary of the Moral Welfare Committee; and Mrs. C. Joliffe, Parliamentary Secretary to the Council. Is that right?—(Mrs. Lefroy): Yes.

8063. We have been informed that your Council will be referring to the memorandum submitted by the British Federation of University Women, Ltd. That body intimated that it did not wish to give oral evidence, and I am not sure in what way you wish to refer to its memorandum?—The particular point I wished to make on that was in regard to their reasons for recommending the compilation of certain statistics. We have had the point raised several times in some of our specialised national committees that there was no information available about the number of children who have been involved in custody orders in the broken home. We felt that that was very important, and we particularly wished to draw notice to it. It is one of the points which was specially stressed by the Federation, which is one of our affiliated societies. That was the principal point. The Federation also stressed the recommendations of the Denning Report, which has been before us, and which has our general approval in so many ways.

8064. Thank you very much. Do you wish to make any statement by way of addition to your memorandum?—The particular point that we wanted to make was rather to explain why we had no strongly developed opinions to put forward on the question of divorce and the breaking up of marriage. It is owing to the nature of our constitution; we are built up of something like sixty branches throughout the country, and ninety affiliated societies. Among the affiliated societies we have the Mothers' Union and the Catholic Women's League, and we have also quite a number of more extreme feminist societies. It is thus apparent that we cannot come to any real agreement on questions of divorce, on which many different views are held, but we have a very

strong opinion on the stability of marriage and the urgent necessity for doing all that can be done to stabilise and strengthen marriage. On that we have been able to agree on a policy.

Our policy is built up by resolutions which come forward at our annual conference. We have been in existence for well over fifty years and quite a number of conferences have been held. The main features of our principles are the working for equal status for women and, above all, for the greater welfare of the children, on whose future the country depends. I think that those two points will provide the clue to the suggestions which have been put forward in our memorandum. We had a conference about a fortnight ago, when the question of financing the home came up. We feel very strongly that this question must be dealt with, because marriage is changing from the old idea that the woman was the chattel and belonged to the man. That position was rectified to some extent by the Married Women's Property Acts of seventy years ago or so, and we are now moving towards the idea of partnership in the home. The fact that that development is in progress is one of the reasons for the many broken homes, because it is always difficult changing from one theory of the home to another. Anything that can be done to facilitate that change of attitude, from the man being the complete law of the household—one law of the household which is his law and the wife and children having to conform to it whether they like it or not—to the idea of fair partnership between the husband and wife, is highly desirable. We shall get much better marriages out of the partnership concept. That, I think, is our general position.

The other matter which we would stress is the section dealing with legal advice. It is our urgent desire that legal advice should be made available, but that is entirely conditioned by clarification of the position in regard to condonation and also collusion. When it comes to making an attempt to see if the parties can "make a go of it", it is no use at all for the solicitor to be bound, as he

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[Continued]

is now—I may say that I am a practising solicitor myself—when a client comes to him, to say, “Yes, you have got grounds for an application to the court. It might be possible to try a reconciliation, but the chances are that if you do anything by way of taking steps towards reconciliation you will lose your ground of action.”

8065. That is very fully in our minds—So on this question of legal advice, it is so good at all unless that point has been completely cleared up. In my experience, it is very desirable, too, that the law of collusion should be clarified. The basic principle of collusion, as I believe, has nothing to do with reasonable and proper suggestions as to how the children are to be dealt with, or with questions of maintenance and custody. One ought to be able to deal with those matters and the arrangements made should not be considered collusive and should be generally known not to be collusive. Such arrangements should be regarded as collusive only when one side is bribing the other to facilitate divorce.

8066. I noted particularly what you say at the beginning of the third paragraph of your memorandum:—

“It will be realised, however, that the National Council of Women, being composed of such a large number of women and affiliated societies, cannot be united on the subject of divorce.”

For that reason, I thought that it would not be fair to ask you to express any views as to whether you do or do not approve of any particular suggested new ground of divorce.—Thank you very much. We are glad we shall be spared that.

(At this stage the Commission adjourned for a short period.)

8067. (Chairman): During the adjournment, we have been handed two resolutions adopted at the Eastbourne Conference of your Council. [See Paper No. 99.] We have read them through, and they speak for themselves. You will realise, I think, that the second resolution as to matrimonial finance raises some difficulties in deciding how this sum would be allocated and on what basis, but no doubt these matters would have to be thought out. Turning to your memorandum, I have very few questions to ask, for two reasons: firstly, because many of your suggestions have been made by many other bodies, and secondly, because you have stated them so precisely and so clearly. On your recommendation in paragraph 7, you say:—

“Where a separation order has been made on the ground of desertion and a non-access clause has been inserted as a protection for one of the parties, this clause should not preclude desertion running from the date when the desertion was found to commence.”

You recommend that that should apply in every case where a non-access clause has been inserted?—I think on the whole that the non-access clause should be treated in that way, because in many cases it was inserted through lack of realisation that it would deter any subsequent right to divorce. On that particular point, we have many magistrates on our magistrates’ committee, and it arose from their experience that the non-access clause was necessary sometimes, for the safety of one or other of the parties, as a warning to one party that he or she was not to molest the other party.

8068. Yes, but my question was directed to this: are the words, “as a protection for one of the parties”, intended to introduce some limitation on the generality of your suggestion?—I think that the position was that we had not all made up our minds as to the generality. We were quite certain that where the non-access clause was inserted for protective purposes it ought not to be a bar.

8069. But would you always know whether it was inserted for protective purposes or not?—Magistrates would generally know.

8070. I will tell you the difficulty I feel . . . —I realise the difficulty myself, I was not able to persuade everybody that the more general form was better.

8071. I just want to state my difficulty. Three years later the party comes along and says: “I want a divorce for desertion.” It might be quite impossible at that time to determine whether the non-access clause was inserted as a protection for one of the parties or for some other reason.—I entirely agree, my Lord, but we did not succeed in getting that point across to the whole of our body. That is about the only answer I can give there, I think.

8072. I wondered what exactly was meant by your recommendation, but I see now.—I think that they would rather have the whole loaf than lose the half.

8073. Then will you turn to the recommendation in paragraph 9, relating to property rights of husband and wife:—

“A wife should be entitled to a portion of the joint income of husband and wife for her own separate use.”

That has already been suggested, and I asked a question on it which I am going to ask you: if there is a joint income, that means that the wife has got some income and the husband has also got some income. Do you not really mean that if a wife has got no income of her own, she should be entitled to a portion of her husband’s income?—Yes, that is really what was meant by the clause, I think. I know that it is not quite accurate, but I should like Mrs. Jolliffe to say a word on that. (Mrs. Jolliffe): I think that the additional resolution on matrimonial finance, which we passed at our Conference this month, is really a much more detailed explanation of our views.

8074. Paragraph (a) of your resolution on matrimonial finance deals with that?—Yes.

8075. I have nothing to ask on your next few paragraphs. I quite understand your proposals, and many of them have been put by other bodies, but when you come to reconciliation, you say:—

“The intervention of the court welfare officer should not be compulsory in divorce cases, but only by the wish of either or both the parties or at the request of the court.”

At the present time I think the position is—and Mr. Justice Pearce will correct me if I am wrong—that a judge makes up his own mind whether it would be helpful to make use of the services of the court welfare officer. (Mr. Justice Pearce): Yes. (Chairman): The present position is that, in custody cases, the judge has jurisdiction to consult the welfare officer, and I think that as a matter of fact he sometimes consults the court welfare officer for reconciliation purposes also. So far as your proposal on reconciliation is concerned, that meets the case, does it?—(Mrs. Blyth): Yes, I think so. We do not wish intervention to be compulsory.

8076. As regards paragraph 22, we feel a doubt as to whether pre-marital education is within our terms of reference, but we may be able to make some mention of it.—There was one additional point which we really wished to make, and that is that we feel very strongly that the biology of sex should be presented within a framework of teaching on the sanctity and permanence of marriage. We feel that if biology is taught, as it were, in isolation, it sometimes leaves the children with the wrong attitude, and we feel very strongly that it should be within this general framework.

8077. I quite understand. May I refer to one other matter? Some time ago, you submitted certain correspondence in regard to the position under the National Insurance Act of a child of a deceased father previously divorced. A suggestion has been made that if a woman has divorced her husband and has got rights of maintenance against him at the time of his death, she should be given a right to apply, under the Inheritance (Family Provision) Act, 1938, for provision to be made for her as a dependant out of his estate. That suggestion might go some distance to remedying the situation which you describe in that correspondence?—(Mrs. Lefroy): Yes, we should agree with that, it seems very helpful.

8078. (Lord Keith): I would like to ask some questions about your detailed recommendations on matrimonial finance, passed at your Conference in November. This matter has been before us before, and I have always

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found some difficulty in understanding how it is going to be worked out. Would you look at (a) and (b) of that resolution? You see, in (a) you have resolved:—

"That the common law obligation of a husband to support his wife be deemed to include an obligation to allocate and transfer to her a proportion of his income, from whatever source derived, this sum to be her own spending allowance free from his control."

That resolution in itself does not seem to me to take any account of the obligations of the husband in the matter of the upkeep of the home. We are not always dealing with husbands worth thousands of pounds a year, we are dealing with all husbands, and by the time a husband has met the living expenses of his home he may have no income left out of which to allocate anything to his wife. I do not suppose that you are suggesting that a wife should have a first charge on his income, and that he should then be left to maintain the home out of the balance which is left to him? I want to know how you work that out?—(Mrs. Jolliffe): I think we would agree that the home would be the first charge on the husband's income, or the family income, but we do, you notice, in paragraph (d), recommend that this should be enforceable at law if necessary. We do envisage that every case would have to be treated separately on its individual merits, as that the upkeep of the home, and so on, is different according to family circumstances, and, of course, the individual circumstances, the earning power of the husband and/or wife. Therefore, if there is a dispute and the wife wants something, it would be for the wife to claim her legal right by going to court, and the court would have to consider all those points and decide as it thought fit. If a man were earning a very small income he would have to disclose that fact, and the court might say that then there is nothing left for the wife's pin-money, or, for that matter, for the husband's beer and tobacco.

8079. I can understand it if you say that the wife's allowance is not a first charge on her husband's income, and if you say that the living expenses are to be a first charge on the husband's income, and that if there is any balance left over out of that the husband should make an allocation to his wife. Is that what you mean?—(Mrs. Blyth): We do not say that it is a first charge, we say that it should include an obligation.

8080. Yes, but you say that it is an obligation to allocate a proportion of his income. All I am pointing out to you is that if an obligation is imposed by law on a husband to apportion to his wife a portion of his income, that takes no regard of his commitments for the family living expenses?—Yes, it would have to take some regard to the expenses and to the income, and it may be that the amount left over will be so small as to be almost nil. But in my experience, even in the poorest working class families, a man nearly always retains a certain amount for his pin-money, for tobacco and football, and the like, and the wife may have nothing at all. It is that small portion of pin-money which should be divided between them.

8081. That is what I thought you meant, and that means that what is left over after the family expenses have been incurred should be shared between the wife and the husband—or am I not putting it rightly?—(Mrs. Jolliffe): It depends, I think, my Lord, whether "shared" means shared equally. We do not say that, and I do not think we would insist on that, it depends on circumstances.

8082. Never mind whether it should be shared equally or unequally. Do you agree that it is what is left over after household expenses have been satisfied that should be shared?—Yes, because I think we feel that the upkeep of the home and the children is the more important.

8083. It seemed to me that your proposal (a) put the cart before the horse, and that proposal (b) really should come first, i.e., that the total amount allocated by a husband and actually given to a wife for household expenses and for her personal allowance should be a reasonable sum proportionate to his total resources. But I think I see now that what you are suggesting is that it is the free balance, after all household expenses have been met, which should be shared between the husband and the

wife?—(Mrs. Blyth): Yes. (Mrs. Leroy): I think that is what was agreed in the minds of the Council.

8084. (Lady Bragg): On the question of custody, you say in paragraph 12:—

"Decisions as to the custody of the children should normally be made by the judge at the hearing of the suit or immediately after it, and a woman assessor who has heard the whole of the case should assist the judge when such decisions are being made."

Do you feel that to be a necessary public expense, bearing in mind that we are told that there is a welfare officer who is available to judges?—(Mrs. Blyth): Yes, we do feel very strongly that that is necessary, and we should like to make one addendum there, and that is that when the time comes that women can be judges, it would then be a man assessor who would sit with the woman judge.

8085. That was a point I had thought of putting to you, but I thought that it was rather premature?—We do want the two points of view, of both the man and the woman, to be brought to bear upon this question of the custody.

8086. So if the welfare officer were a man you would not approve of that?—We are not referring to the welfare officer here, we are referring to a woman assessor who would sit beside the judge and hear the whole of the evidence of the case. A welfare officer visits the home and has contact with the clients apart from the court. The woman assessor is, as it were, an assistant to the judge.

8087. (Mr. Justice Pearce): Perhaps I might add this, that the welfare officer always reads the whole of the evidence and is always in court if there is any oral evidence—at least in my court, and I think in others. That is quite true, but the welfare officer approaches the matter perhaps from a slightly different point of view, having had contact with the people in their homes and having perhaps tried to effect a reconciliation. The judge comes, as it were, fresh to the case, and we want the woman assessor to be in a like capacity.

8088. (Lady Bragg): What qualifications is she to have?—(Mrs. Leroy): I do not think it is necessary that she should have legal qualifications, but I believe that at one time, at any rate in one of the London courts, it was customary for a woman assessor to sit with the magistrate in children's cases. It was that kind of thing that we had in mind.

8089. I still have not got the answer. Is she to be somebody who has had legal training?—Ordinary lay magistrates have not had legal training. We would say somebody who was considered suitable to be a lay magistrate might quite well do as an assessor.

8090. But paid?—Yes—we did not put that in.

8091. (Lord Keith): Can you tell me, on that question, what is she to advise the judge about?—(Mrs. Blyth): On questions of custody, and also, I think, on questions of maintenance which, as you will have noted, we ask should be dealt with during or immediately after the hearing of the suit.

8092. That is almost the same as saying that she is to be an additional judge?—It almost amounts to that, I think. (Mrs. Leroy): Only that there should be a woman who can present the woman's point of view. You see, we want the children to appear. We think that the judge should see the children. And certainly, where there is a girl involved, there are two dangers which you have to guard against, there is the type of girl who would very much like to try and "put at naught" the male judge, there is also the girl who would be rather shy—they would probably both be adolescents. Therefore, I think that for the sake of the child it is highly desirable that there should be a man and a woman considering the case. It makes a balance, whichever type of child you get. I do not think that it matters so much in the case of boys, unless they are very small, but in the case of girls I think that it is highly desirable. I find in the magistrates' court that it is highly desirable that a girl should not be before a male court.

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[Continued]

8093. (*Lady Bragg*): Then would it not be logical to have a woman assessor to sit with the judge in all divorce cases, if you want to get the women's point of view?—Yes, quite desirable, but we are thinking first and foremost of the children, and of their protection. (*Mrs. Jolliffe*): Is there not this distinction—that the Divorce Court is judging points of law, whereas custody is a matter of discussing the future welfare of the children? That is rather a different thing, where a feminine and a masculine point of view may be different, whereas on points of law we expect them to be the same.

8094. Thank you. Then one point on the resolution on marriage guidance from the Eastbourne Conference:—

"The National Council of Women of Great Britain regrets that while something like £1,200,000 has been granted as free legal aid to those seeking divorce, the marriage guidance organisations are having their grant cut by half."

Are you presenting this resolution for the special benefit of the Commission, or is it going to the Home Office by way of protest?—It is going to the Home Office, yes, and any other bodies who would be interested, as do all our conference resolutions. It came up spontaneously from one of our branches, it has nothing to do with our appearing here at all, but since it is relevant to our memorandum we thought that you would like a copy of it.

8095. (*Mr. Bloch*): I would like to return to the question of custody of children. You know that the majority of petitions for divorce are undefended, and I believe it is also true that the vast majority of prayers for custody are undefended. It is also true that in some cases there is no prayer for custody where there are children of a marriage. Do you want the children brought before the judge in every case?—(*Mrs. Bloch*): Yes, I think so.

8096. You realise what that means?—Yes.

8097. It would be a tremendous addition to the amount of work.—Yes, but we do not think that too much trouble can be taken for the welfare of the children, and we have had so much evidence of cases where the children have, as it were, been an afterthought to either a divorce or a separation, and have suffered. That suffering might have been prevented if a wiser decision had been made in the first instance.

8098. Do you think that the judge could make a wiser decision than what the parents have agreed?—Yes, the parents are parties to the dispute, and are perhaps prejudiced.

8099. Could I ask your opinion on this: suppose it were not done in that way, but that it were left to the judge to decide when he wished to see the children? Would you think it at all possible that the judge could be provided with some information about the children by an independent person?—Yes.

8100. So that he could decide on the basis of that information?—We have definitely asked that the court welfare officer shall investigate.

8101. Every case?—Yes.

8102. You realise that that would mean an enormous addition to the staff of the court?—Yes, we do realise that. In fact, in many instances, we should think it desirable that as soon as any application is made, or even before, a welfare officer should visit the parents and ask them what plan, if any, they have made for the future of their children. Indeed, if such a question were asked in the early stages, very often it would help to bring about a reconciliation.

8103. I wondered if you had perhaps considered the possibility of using an existing service, such as the children's officers, who are, of course, trained to assess the situation in regard to children?—I think that on the whole we were in favour of there being a special court welfare officer who would specialise in this work. I may say that we have a special sub-committee of the National Council of Women, which is very closely watching the working of the new Children Act. We have made a special study of the question of qualifications of children's officers, and so on, and we are of the opinion that there is a slightly disturbing tendency at the present time for the children's officers to take on work which is outside their

province. We feel that this work which we are now discussing is very special work, requiring special training, and we want to have special court welfare officers for it.

8104. Could I ask Mrs. Leroy whether she, as a solicitor, would object to her clients being visited by such a person?—(*Mrs. Leroy*): There are certain objections which one might quite well raise, but I think that the children's welfare must come first, they are the future generation and it is these children from broken homes who are causing so much trouble, not only among the "cock" boys, and so on. I have been closely associated with education—I was teaching, originally, and I am a governor of one or two schools—and I do know that it is the nightmare of the headmaster and the headmistress when they find they have got children coming from broken homes, there are such difficulties to be faced. I feel that anything which can be done in the early stages for the children should be done, to be quite sure that somebody who is unbiased, who has no axe to grind, who has no pull, investigates the position. You see, grandparents on either side always take sides in the family, and it does make things so difficult for the children, and anything we can do for the children is worth while, they ought to come first. I think that quite possibly when one gets the second or third generation of children's officers, they may develop into people who would be even more suitable for this work than probation officers. But at the present moment there are not nearly enough people who are suitable candidates for the job, and you have to take people who are going to learn their job by practising it, like the old pupil-teacher. And until we get a much higher standard of training for children's officers you might well expect that the probation officer would have a higher standard of training for that special work. The children's officers have a very wide range, and the best ones that I know are working enormously long hours in putting children into foster-parents' homes, and getting them out of the old residential homes where they were all grouped together. I know one of these officers very well, and I do know that whereas the percentage over the country for children in foster-parents' homes, as contrasted with local authorities' homes, was 33½ per cent., in the short time that she has been working there, by indescribable toils and self-devotion, the proportion has been altered to 66½ per cent. There we have one exceptionally fine children's officer who has had very long experience in other ways, but I do not think that the generality is yet up to doing that job.

8105. Do you feel that the schoolmaster or schoolmistress could afford any useful information to the judge?—Yes, quite possibly. I think that information should be receivable from anybody who can help.

8106. That is a bit sweeping?—Yes, I know, but I did say that it should be "receivable". I do not think that it necessarily should be sought. If the headmaster or headmistress is willing to give information, at any time they should be allowed to do so. The point is that it is so highly desirable that whoever is deciding on the custody of the children should be able to have a look at both parents, that they should both appear in court, because the children are their responsibility. The children should be seen, and the parents should be seen, in such a highly personal matter.

8107. You do not think that it is perhaps rather an ordeal for the children?—I think that it is an ordeal that they might well afford to go through. If it is done properly, it does not necessarily have to be such an ordeal. I can remember so well one case, when I was a magistrate, where it was a question of deciding on the custody of the child. Our magistrates' clerk, who is peculiarly dexterous with children, talked to the little girl, who was about five years old, and her reactions as to which parent she wanted to go to were so utterly unmistakable that the magistrates had not the slightest doubt as to where she ought to go. We should have been in very great doubt without having seen both the parents and the child.

8108. (*Lady Keith*): How were her reactions tested?—The clerk, who has a number of grandchildren of his own, was talking to the small child about her school, where she stayed, and asking her when did she last see her daddy, and so on; her mother was there, and she said: "Daddy is going to somewhere by the seaside, do you want to go with Daddy or do you want to go back to

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[Continued]

Mummy?", and the immediate reaction was that she certainly wanted to go back with Mummy. She had said nothing against Daddy up to then, but she certainly was not going with him.

8109. The father and mother were both present, or only the mother?—They were both there, but the reaction was absolutely decisive on the part of the child.

8110. (Mr. Beloe): After an order for custody has been awarded, do you feel that the court ought to have any continuing interest in the children?—(Mrs. Bligh): I think that a social worker should continue to visit and keep in touch from time to time to see how the decision is working. If it is not working, I think that possibly in a certain limited number of cases the question of custody might be re-opened, especially as, when the children get older, the position might change.

8111. Whom do you mean by a social worker?—It might be the court welfare officer, if such were appointed.

8112. That would mean even more court welfare officers—please do not think I am raising objections, I am merely trying to get you to see what your proposal entails—if there is another social worker, who for some other reason is in touch with the family—supposing, for instance, the child is on probation, or if the probation officer is in touch for some other reason—it would be better that the case should be handed over to that particular officer, who knows the family better. That is one reason why, a couple of years ago, the local authorities were asked in a circular to have a designated officer for all matters relating to children, so that this work could be co-ordinated, and I take it that cases of that kind would be considered by that designated officer.

8113. Would you really think that just because a child is the child of divorced parents, that child's name should be brought up before that group of people who meet to discuss cases of children who have got into difficulties?—It is confidential, like all social work, and names of that kind are brought up before a committee for a great variety of reasons. The child very often would not be to blame in such cases. Confidential social work of that kind is going on all the time. I am myself a social worker, independent of all these bodies—I am a children's moral welfare worker—but I work in close co-operation with them, and a case conference is not an unusual thing, with a child guidance clinic, for instance, and many other agencies, and for reasons where there is no blame attaching necessarily to anyone. (Mrs. Leffroy): Surely where there is a headmaster or headmistress involved, in a school—a secondary school, at any rate, or a public school—it seems to me that the headmaster or headmistress would be a very suitable person to be asked to hold a watching brief.

8114. You are talking of a boarding school?—Not necessarily, but the grammar schools and the public schools. I know so well how they do follow up everything and are watching, and they might quite well report. But, on the other hand, when you get a suitable case, it seems to me that the same sort of procedure could be used as when you have a child who is a ward of court. You have got the Chancery welfare officers on the same sort of lines. Wards of court are kept under review, and the same method ought to be capable of being adapted to suit other children.

8115. You realise that it might involve in the neighbourhood of 15,000 children a year?—Yes, I know. One hopes that the number may become less and less, but the real importance of the problem is much that I feel you cannot afford to let any of these children be disregarded. After all, you have to remember that the most expensive person in the country is the criminal, and that it costs more to keep any individual in prison than to keep him in an expensive hotel. Those are the terms on which you have got to consider it as to cost, and of course you also get various people who do not get as far as prison, whose various degrees of disability are so hideously expensive to treat. Thus the costs of the proposed service, which one hopes will be only for the time being, should definitely be confronted.

8116. (Dr. Baird): May I follow up the question of custody of children? From your experience, Mrs. Bligh, you have indicated the importance of the broken home

in a child's life, what a dreadful thing it is to happen to a child. Would you agree that the important thing is that that breaking of the home should effect as little disturbance and shock to the child as possible? And that, therefore, if the parents do agree and one of the natural parents is willing to be the guardian, that he or she should have custody; that that is much more likely to be the right thing for the child than anything which a children's officer or any other kind of social worker can possibly arrange for the child?—(Mrs. Bligh): Yes, it might be much the best for the child, and surely a sensible welfare officer paying one visit to those parents would in such circumstances recommend that the child should stay with the parent who is more suitable.

8117. I think you did say that the children should be seen?—Yes, we did think that the children should be seen.

8118. I feel very doubtful about that. I wonder if it is not unnecessarily dragging the child into an ordeal which it really need not suffer. And although your fears may be right, I feel that in the event they would be justified probably in such a small number of cases, which could be picked out otherwise, when things were going wrong, without doing much harm?—I do not think, if it is properly handled, that to appear in court should be such a devastating thing for the child. There is no need to have an open court. (Mrs. Leffroy): Presumably the judge would see the child with the parents in chambers, or quietly in some other place, and I do not think that the average child is going to be terrified of the judge. I do not think that our judges are such terrifying people in themselves, any more than the policemen—there was an enormous amount of talk about the policemen appearing in mufti in the juvenile court, and it was an extraordinary assistance to the policemen, changing in and out of uniform just to come into the juvenile court. That rule has been abolished and the general experience is that the children all seem to be extraordinarily friendly with the police and not in the least alarmed by them.

8119. These are children who have been in trouble, of course, but we are discussing children who have not.—But surely they are being brought up specially to know that if they get into difficulties or get lost, the first person to go to is the first "bobby" they see, and they should all be brought up to know the police as their particular friend, and the attitude of the police to the children is such as to encourage that.

8120. The other thing about which I wanted to ask you was the constitution of the National Council of Women. Did all the affiliated societies approve of each of the resolutions?—The resolutions, yes. Our organisation allows for any affiliated society to dissociate itself from any resolution which is passed at any conference. And when that resolution goes out—for example, all our resolutions are sent to the Home Office, there are one or two places to which they go automatically—it will be stated that such and such a society dissociates itself from this resolution. Unfortunately, we prepared this memorandum rather under pressure of time, and it was not circulated, after it was produced, to all the societies, but it was very carefully restricted to resolutions which had the support of the National Council of Women as a whole. Therefore, there are a great many things which many of us wanted to bring in which were not brought in.

8121. But could we take it that this idea of an enquiry about the custody of every child was generally approved?—No, that has not been before all the societies, and we cannot say that that, taken by itself, would have had the approval of all the societies which are affiliated to us.

8122. And the one about matrimonial finance?—That was passed with a very large majority at Eastbourne, and no one has attempted to dissociate themselves from it. (Mrs. Jolliffe): But it is very early days, they have a month in which to do it and it is only about a fortnight since our Conference, so I cannot say that there will not be someone writing in, but so far no one has done so. (Mrs. Bligh): It might be added also that many of the detailed proposals which we have put before you, although they have not been before each of our affiliated societies, have been before our specialist committees on which the interested affiliated societies are represented. We have four committees which are dealing with children, in the National Council of Women: we have the Public Service and Magistrates' Committee; the Education Committee; the Public Health, Maternity and Child Welfare Com-

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8108. (*Lord Keith*): How were her reactions tested?—The clerk, who has a number of grandchildren of his own, was talking to the small child about her school, where she stayed, and asking her when did she last see her daddy, and so on; her mother was there, and she said: "Daddy is going to somewhere by the seaside, do you want to go with Daddy or do you want to go back to

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Mummy?", and the immediate reaction was that she certainly wanted to go back with Mummy. She had said nothing against Daddy up to then, but she certainly was not going with him.

8109. The father and mother were both present, or only the mother?—They were both there, but the reaction was absolutely decisive on the part of the child.

8110. (Mr. Balce): After an order for custody has been awarded, do you feel that the court ought to have any continuing interest in the children?—(Mrs. Bligh): I think that a social worker should continue to visit and keep in touch from time to time to see how the decision is working. If it is not working, I think that possibly in a certain limited number of cases the question of custody might be re-opened, especially as, when the children get older, the position might change.

8111. When do you mean by a social worker?—It might be the court welfare officer, if such were appointed.

8112. That would mean even more court welfare officers—please do not think I am raising objections, I am merely trying to get you to see what your proposal entails.—If there is another social worker, who for some other reason is in touch with the family—supposing, for instance, the child is on probation, or if the probation officer is in touch for some other reason—it would be better that the case should be handed over to that particular officer, who knows the family better. That is one reason why, a couple of years ago, the local authorities were asked in a circular to have a designated officer for all matters relating to children, so that this work could be co-ordinated, and I take it that cases of that kind would be considered by that designated officer.

8113. Would you really think that just because a child is the child of divorced parents, that child's name should be brought up before that group of people who meet to discuss cases of children who have got into difficulties?—It is confidential, like all social work, and names of that kind are brought up before a committee for a great variety of reasons. The child very often would not be to blame in such cases. Confidential social work of that kind is going on all the time. I am myself a social worker, independent of all these bodies—I am a children's moral welfare worker—but I work in close co-operation with them, and a case conference is not an unusual thing, with a child guidance clinic, for instance, and many other agencies, and for reasons where there is no blame attaching necessarily to anyone. (Mrs. Leboy): Surely where there is a headmaster or headmistress involved, in a school—a secondary school, at any rate, or a public school—it seems to me that the headmaster or headmistress would be a very suitable person to be asked to hold a watching brief.

8114. You are talking of a boarding school?—Not necessarily, but the grammar schools and the public schools. I know so well how they do follow up everything and are watching, and they might quite well report. But, on the other hand, when you get a suitable case, it seems to me that the same sort of procedure could be used as when you have a child who is a ward of court. You have got the Chancery welfare officers on the same sort of lines. Wards of court are kept under review, and the same method ought to be capable of being adapted to suit other children.

8115. You realise that it might involve in the neighbourhood of 15,000 children a year?—Yes, I know. One hopes that the number may become less and less, but the real importance of the problem is such that I feel you cannot afford to let any of these children be disregarded. After all, you have to remember that the most expensive person in the country is the criminal, and that it costs more to keep any individual in prison than to keep him in an expensive hotel. Those are the terms on which you have got to consider it as to cost, and of course you also get various people who do not get as far as prison, whose various degrees of disability are so hideously expensive to treat. Thus the costs of the proposed service, which one hopes will be only for the time being, should definitely be confronted.

8116. (Dr. Baird): May I follow up the question of custody of children? From your experience, Mrs. Bligh, you have indicated the importance of the broken home

in a child's life, what a dreadful thing it is to happen to a child. Would you agree that the important thing is that that breaking of the home should effect as little disturbance and shock to the child as possible? And that, therefore, if the parents do agree and one of the natural parents is willing to be the guardian, that he or she should have custody; that that is much more likely to be the right thing for the child than anything which a children's officer or any other kind of social worker can possibly arrange for the child?—(Mrs. Bligh): Yes, it might be much the best for the child, and surely a sensible welfare officer paying one visit to three parents would in such circumstances recommend that the child should stay with the parent who is more suitable.

8117. I think you did say that the children should be seen?—Yes, we did think that the children should be seen.

8118. I feel very doubtful about that. I wonder if it is not unnecessarily dragging the child into an ordeal which it really need not suffer. And although your fears may be right, I feel that in the event they would be justified probably in such a small number of cases, which could be picked out otherwise, when things were going wrong, without doing much harm?—I do not think, if it is properly handled, that to appear in court should be such a devastating thing for the child. There is no need to have an open court. (Mrs. Leboy): Presumably the judge would see the child with the parents in chambers, or quietly in some other place, and I do not think that the average child is going to be terrified of the judge. I do not think that our judges are such terrifying people in themselves, any more than the policemen—there was an enormous amount of talk about the policemen appearing in multi in the juvenile court, and it was an extraordinary sentence to the policemen, changing in and out of uniforms just to come into the juvenile court. That rule has been abolished and the general experience is that the children all seem to be extraordinarily friendly with the police and not in the least alarmed by them.

8119. These are children who have been in trouble, of course, but we are discussing children who have not.—But surely they are being brought up specially to know that if they get into difficulties or get lost, the first person to go to is the first "bobby" they see, and they should all be brought up to know the police as their particular friend, and the attitude of the police to the children is such as to encourage that.

8120. The other thing about which I wanted to ask you was the constitution of the National Council of Women. Did all the affiliated societies approve of each of the resolutions?—The resolutions, yes. Our organisation allows for any affiliated society to dissociate itself from any resolution which is passed at any conference. And when that resolution goes out—for example, all our resolutions are sent to the Home Office, there are one or two places to which they go automatically—it will be stated that such and such a society dissociates itself from this resolution. Unfortunately, we prepared this memorandum rather under pressure of time, and it was not circulated, after it was produced, to all the societies, but it was very carefully restricted to resolutions which had the support of the National Council of Women as a whole. Therefore, there are a great many things which many of us wanted to bring in which were not brought in.

8121. But could we take it that this idea of an enquiry about the custody of every child was generally approved?—No, that has not been before all the societies, and we cannot say that that, taken by itself, would have had the approval of all the societies which are affiliated to us.

8122. And the one about matrimonial finance?—That was passed with a very large majority at Eastbourne, and no one has attempted to dissociate themselves from it. (Mrs. Jolliffe): But it is very early days, they have a month in which to do it and it is only about a fortnight since our Conference, so I cannot say that there will not be someone writing in, but so far no one has done so. (Mrs. Bligh): It might be added also that many of the detailed proposals which we have put before you, although they have not been before each of our affiliated societies, have been before our specialist committees on which the interested affiliated societies are represented. We have four committees which are dealing with children, in the National Council of Women; we have the Public Service and Magistrates' Committee; the Education Committee; the Public Health, Maternity and Child Welfare Com-

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MRS. M. LEFROY, M.A., J.P., MRS. M. F. BLIGH, B.Sc., AND
MRS. C. JOLIFFE, B.Sc.

[Continued]

mittee; and the Moral Welfare Committee. Questions of this kind are thrashed out at these specialist committees, on which there are members from a large number of our affiliated societies, who can put their societies' point of view as the matter is discussed.

8123. I wonder, my Lord, if we might ask the witnesses to let us have a note of the amount of support which these resolutions eventually have? (Chairman): You mean the Bascombe resolutions? (Dr. Baird): All of them, apparently.—(Mrs. Lefroy): They are built up on our policy, as we said. The memorandum was prepared on policy which has been built up for more than fifty years.

8124. (Chairman): I suppose that there would be no difficulty in telling us, first of all, what sort of majority you got for these resolutions at the Bascombe Conference, and secondly, whether within the month any dissent had been signified?—(Mrs. Joliffe): I can answer the first question straightaway. I think that the resolution on "Marriage guidance and divorce" had no dissenters, and the other was passed by a majority of 191 to 28; the other information we could submit to you by the end of the month.*

8125. (Dr. Baird): Thank you. One other point on which I wanted to be quite clear was what exactly you meant when you said that the biology of sex should be presented within a framework of teaching on the sanctity of marriage. You do not mean that human biology should be delayed until the children are thinking of marriage?—(Mrs. Lefroy): The point is really that it is, one might say, a philosophical matter. We did have a most illuminating address in one of those four committees, I think it was the Moral Welfare Committee, by an Inspector of very high standing in the London County Council, who was explaining to us how they had been pressing for sex education in one local education authority, and the authority said, "Yes, that is all right so long as you teach it with pure biology and do not go and tie it up with anything else". About a term later they were frankly asking what they were to do, because they had to teach some sort of philosophical background to it. The sort of question which they were being asked by an earnest small boy of thirteen was: "I cannot understand all these small families, why don't they all have twenty-five children?" You cannot teach just plain biology without its being put into some kind of context as to the home-building and the care of children, and so on, and it must also have some kind of a background. You have to remember that almost the first game the children play is that the small boys want to build houses and have bits, and if they can have a bit up in the tree that is about the most blissful thing which can happen to them; and the small girl wants to play around with her dolls, and you have got all the basis of the home-making at a very early age. So long as that is kept there, and your handicrafts and all that can be associated with the home and the idea of the home becomes the background in which you can put this instruction in biology, it is all right. Also, if you just treat it as pure biology alone, you are raising a most terrible danger of experimentation. One has had some really dreadful cases of quite small children who have not been properly taught, who have not had some sort of background taught along with their biological instruction. They have been driven to practising, experimenting, and the results can be really dreadful.

8126. (Mr. Maddocks): I understand that you are a magistrate, Mrs. Lefroy. Have you dealt very much with applications under the Guardianship of Infants Act?—A certain number, yes, they come up fairly regularly.

8127. Have you not found that, in most applications, usually it is the mother who turns up, and the father never turns up at all?—Very frequently that is so, and I always wish we could see the father and learn the cause of the trouble.

8128. You suggest in your memorandum that in deciding custody both parties should appear. Is it your suggestion that in a case where the mother comes and asks for the custody of her children, and says that her husband quite agrees to it, you would direct the probation officer to see

the husband. Then, after an adjournment, the probation officer might come back and say, "Yes, the father agrees to it". Is there any point in issuing a warrant to bring the husband to court, if he does not want to come?—It rather depends on what the probation officer can produce as regards that. In many cases, I think that would be very well worth while in order that you might impress on the man, if nothing else—and not only the particular husband who comes, but other husbands who hear about it—their responsibility and their duty to look after the children whom they have brought into the world.

8129. Does it not occur to you that, human beings being what they are, if you were to do that kind of thing, you would instantly antagonise the husband towards his wife—perhaps even more than he is already antagonised to her, and perhaps to the child also—by having him arrested and brought to the court?—If you are going to enquire into custody questions in this way, that surely presupposes that the matrimonial home has been broken up. Thus I do not know that it matters very much, except, of course, on the question of finance. But I do not think that it need be done in such a way as to antagonise him.

8130. I am putting the case to you from your practical experience: where the husband says, "I am quite content that my wife should have the children, she is a good mother, I am not going to the court, I am not going to lose a day's work", are you going to send your warrant officer along to fetch him?—We said "should", we did not say that he must appear.

8131. (Mr. Macle): May I return to your recommendation about the financial arrangements between the parties? Is it your suggestion that, in future, magistrates should set the standard of life which a married couple are to adopt, merely at the wish of the wife?—May I say that this is a little awkward for me, because I myself drafted the resolution in quite a different form, but that was not acceptable to the proposer of the resolution when it was put forward, and this was re-drafted by her on lines which I myself should not have chosen? But I think our basic line is to make things equal between the sexes, so that if the wife had applied then the husband certainly could apply. That is certainly acceding to our principles.

8132. Then you agree that either party should be able to go to the court, but that in future magistrates should have the power to set the standard of living of a married couple?—I do not think that it quite amounts to that. Our proposal is really mainly as to the allowance which the wife should be able to receive. It is practically setting the standard of what the wife's or the husband's pin-money should be, and that is a matter which depends on several considerations. (Mrs. Joliffe): I think that the standard of life is set primarily by the family income of the husband or wife. The court cannot alter that, therefore it cannot very materially change the standard of the family, because it cannot alter the total amount of money available, it can only, under the proposal, slightly alter the distribution of that money between the partners.

8133. May I give you two examples? My first case is of the husband who is a saver, or you can call him mean, whichever you like, he will not part with his money. The wife has a tendency to go to the pictures a lot, and to dances, and to have a lot of nice clothes, which cost money. She goes to the court. The court is going to decide how much she shall spend on her clothes and dancing, is it not? That is my first case. My second case is of the husband who is a spender, his beer, tobacco and football pools cost far too much, and the wife is the saver. She wants to save money very badly, she is complaining because he spends so much, and she is not getting a proper allowance. That wife goes to the court. Now, with those two examples, will it not be the case that the magistrates will set the standard of life?—(Mrs. Lefroy): It seems to me that both cases are very apt illustrations. In both cases the wife is being extremely cramped, either because the husband is a spendthrift or because he is extremely mean. It seems to me that in both those cases she has a grievance and, if the grievance continues long enough, there is danger of the home being wrecked altogether. It is surely much better that she should be able to go to the magistrates and state her case, and that the magistrates should say: "It is only reasonable that you should be allowed so much for your own spending".

Chairman: Thank you very much for your memorandum, and for your help in coming here today.

(The witnesses withdrew.)

* NOTE.—Notification was subsequently received from the Secretary of the National Council of Women that there had been certain individual expressions of disagreement with the resolution on "Matrimonial finance", but that no affiliated society or branch of the Council had dissociated itself from the resolution.

PAPER No. 99. RESOLUTIONS ADOPTED AT THE CONFERENCE OF THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN, NOVEMBER, 1952

PAPER No. 100. LETTER SUBMITTED BY THE SECRETARY OF THE NATIONAL BABY WELFARE COUNCIL

PAPER No. 101. MEMORANDUM SUBMITTED BY DR. D. H. GEFFEN, M.D., D.P.H.

PAPER No. 99

RESOLUTIONS ADOPTED AT THE CONFERENCE OF THE NATIONAL COUNCIL OF WOMEN OF GREAT BRITAIN, NOVEMBER, 1952

MARRIAGE GUIDANCE AND DIVORCE

The National Council of Women of Great Britain regrets that while something like £1,200,000 has been granted as free legal aid to those seeking divorce, the marriage guidance organisations are having their grant cut by half. This must gravely curtail the useful work they are doing in saving the break-up of marriage, and the Council urges that grants should be made adequate for this work.

MATRIMONIAL FINANCE

In view of the fact that there can be no freedom or equality of status in marriage where one spouse is without means and is entirely dependent upon the other, the National Council of Women of Great Britain in Conference resolves:—

(a) That the common law obligation of a husband to support his wife be deemed to include an obligation

to allocate and transfer to her a proportion of his income, from whatever source derived, this sum to be her own spending allowance free from his control

(b) That the total amount allocated by a husband and actually transferred to a wife for household expenses and for her personal allowance should be a reasonable sum proportionate to his total resources.

(c) That where the husband through age, incapacity, disablement or other misfortune including bankruptcy becomes penniless, and his wife has separate resources, she shall be liable to maintain her husband to such extent as the court may consider reasonable and just in the circumstances; and such maintenance should include any allocation of spending money to the husband by the wife, freed from the wife's control.

(d) That the allowances referred to in (a), (b) and (c) above should be enforceable at law if necessary.

(Received 21st November, 1952.)

PAPER No. 100

LETTER SUBMITTED BY THE SECRETARY OF THE NATIONAL BABY WELFARE COUNCIL

14th January, 1952

Dear Sir,

Further to my letter of 15th December, my Executive Committee have had under consideration the possibility of submitting to you a memorandum for the consideration of the Royal Commission on Marriage and Divorce. Owing to the shortage of time it is not possible for my Council to submit a complete document and I am, therefore, asked to place before you the following matters which my Executive Committee wish to have placed before the Royal Commission.

The Executive Committee is of opinion that apart from the consideration of actual alteration in the law there are various factors to be taken into account which are causing dissolution of marriage. It would appear that in many cases marriage is entered into without due forethought and consideration of the responsibilities which it involves, and the National Baby Welfare Council in particular is anxious that parents should realise that marriage concerns not only the husband and wife, but the welfare of the children who may be born of the marriage. The Committee is also of opinion that there is a real need for more education of the public in the making of a good home and that too little attention is paid to this problem. Once again in reference to children there is an urgent necessity for the encouragement of *wie parenten* staff.

Miss Gladys Sanders, F.R.C.S., the Chairman of the Executive Committee of the National Baby Welfare Council, considers that much might be done to prevent the

breakdown of marriage if more steps were taken to foster in individuals a personal sense of responsibility and to educate them to understand from the earliest possible age the principles and sanctity of all contracts. She feels that the days when British men and women were proud of the fact that their word was their bond is passing, and that there is a general tendency to believe that a contract is something which it is clever to avoid.

When a divorce has been decreed, the welfare of the children should be of paramount importance. At present, although custody may be given to one parent, the other is allowed access. This often means in practice that a child spends part of his or her holidays with one parent and the remainder with the other. A conflict may thus develop in the child's mind; and this conflict becomes even more accentuated if the respective partners have each married again. The child feels he does not belong anywhere. It would probably be better in the child's interest for one party only to have access.

Miss Sanders would be prepared to attend before the Commission in support of the views set out above.

In addition to these matters one member of the Committee (Dr. Dennis Geffen) is anxious that a specific alteration in the law on divorce should be considered and this is set out in the memorandum attached.

Yours very truly,

(Sgd.) EDITH A. WOOD, Secretary.

The Secretary,
Royal Commission on Marriage and Divorce.

PAPER No. 101

MEMORANDUM SUBMITTED BY DR. D. H. GEFFEN, M.D., D.P.H.

The writer is Medical Officer of Health to the Metropolitan Boroughs of St. Pancras and Humpstead; Vice-Chairman of the National Baby Welfare Council; Lecturer on Public Health and Child Welfare to the Institute of Child Health, Hospital for Sick Children, Great Ormond Street; Honorary Medical Adviser to the British Red Cross Society; and author of various books and articles on child welfare.

1. The present legislation is such that consideration of the welfare of the children of the parties to a divorce is not effected until a decree nisi has been granted.

2. The object of this memorandum is to request that the legislation be altered to secure that the welfare of the children be considered prior to the presentation of a petition for divorce.

3. To secure this it is proposed that, where there are children of a marriage who are under sixteen years of age, the petitioner shall apply by originating summons to a judge of the High Court in chambers for permission to present a petition for divorce, and that the judge shall have discretionary power to postpone the presentation of such petition for a period of three years or such lesser period as he may in his discretion so consider wise.

PAPER No. 101. MEMORANDUM SUBMITTED BY DR. D. H. GEFFEN, M.D., D.P.H.

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MISS GLADYS SANDES, F.R.C.S. AND DR. D. H. GEFFEN, M.D., D.P.H.

4. As the legislation stands at present, the discretionary power of the court is such that it can be used:—

(i) To allow divorce within three years of marriage.

(ii) To grant a divorce to a petitioner despite his/her own misconduct.

(iii) To the granting of the custody of children to either party of the proceedings, his decision presumably being guided by his opinion as to which party will make the better parent irrespective of guilt in the divorce proceedings.

5. A petitioner, however, having made good his/her claim in law that he/she is entitled to divorce, the court has no power to refuse or postpone a decree nisi provided such partner is guiltless. It will be noted that this decision takes no heed of the fact that there may or may not be children of the marriage.

6. I would argue that the court should have a right to discriminate between petitions where there are or are not children. In the first case, only two parties are concerned and one of these parties is guilty of creating a set of conditions warranting the termination of the marriage. In the second case, there are three parties who, although guiltless, stand to suffer very considerably from the dissolution of the marriage.

7. It is realised that where a marriage has irretrievably broken down it would be right to grant a divorce, even if there be children, in order that they may be removed, in so far as this may be possible, from an atmosphere of disharmony and conflict. This set of circumstances would be covered by the discretion given to the judge as set out in the proposal in this memorandum.

8. The effect of the above legislation would be that the parties to a divorce would have to consider not only the sanctity of marriage but their responsibilities as parents.

9. In seeking the advice of solicitors when desiring a divorce they would be counselled that there would be delay unless the circumstances were exceptional.

10. The judge would be legally aware of the fact that there were children to a marriage and would have the right to take this into consideration in granting leave to file a petition for divorce.

11. Finally, I would argue that if it be right to refuse divorce within three years of marriage it must be even more justifiable to postpone it for a similar period if there be children whose future is at stake.

12. I shall be pleased to attend before the Commission to support the above amendment to the law if so desired.

(Received 15th January, 1953.)

EXAMINATION OF WITNESSES

(MISS GLADYS SANDES, F.R.C.S., representing the National Baby Welfare Council, and DR. D. H. GEFFEN, M.D., D.P.H.; called and examined.)

8134. (Chairman): Miss Sandes, you are the Chairman of the Executive Committee of the National Baby Welfare Council?—(Miss Sandes): That is so, Sir.

8135. And Dr. Geffen, you are Vice-Chairman of the National Baby Welfare Council, and you are also the Medical Officer of Health for the Metropolitan Boroughs of St. Pancras and Hampstead, and Lecturer on Public Health and Child Welfare to the Institute of Child Health?—(Dr. Geffen): That is so, Sir.

8136. I understand that Miss Sandes has come to speak to the letter which we received, dated 14th January, 1952, putting forward certain views, and that you, Dr. Geffen, appear to speak to the memorandum which you yourself submitted?—That is so, Sir.

8137. Turning to Miss Sandes' letter first, we note the Committee's recommendation set out in the second paragraph of the letter, and of course these are very desirable results to achieve, but it is not such an easy matter to decide how to achieve them. I do not want to ask anything on that, but in the fourth paragraph, it is stated:—

"When a divorce has been decreed, the welfare of the children should be of paramount importance."

With that, of course, we should all agree—

"At present, although custody may be given to one parent, the other is allowed access."

I should like perhaps to qualify that by saying "is generally allowed access", you would agree that is so?—(Miss Sandes): Yes, Sir, I am sorry.

8138. The paragraph continues:—

"This often means in practice that a child spends part of his or her holidays with one parent and the remainder with the other. A conflict may thus develop in the child's mind . . ."

Again, I would personally agree with "may"—

" . . . and this conflict becomes even more accentuated if the respective partners have each married again. The child feels he does not belong anywhere. It would probably be better in the child's interest for one party only to have access."

There I think, if I may say so, you mean that it would be better in the child's interest for one party only to have custody and for the other not to have access?—Yes, I am sorry, it should have been put that way.

8139. Are you laying it down as a rule which should be followed in all cases, when there has been a divorce, that

one party should have custody and the other have no access, or are you laying it down as a state of affairs which should generally prevail?—I think one should say, "generally prevail". Our Committee and many of us spend our time dealing with a very large number of these children who are very much imbued with a sense of insecurity. I realise that it is not possible for us to say exactly what proportion these represent of the total—for every maladjusted child we see, how many others may not be maladjusted. I would like your judgment on that, because we just do not know, we have no way of finding out. We are very impressed, not only with our experience in this way, but with that of teachers, headmistresses, who have come to us on the subject. It is most devastating. That was what I meant to imply and, if I may say so, I do not think that our Council or I myself were wishing to, or are able to, proffer any solution of this difficulty, but we did feel that we wanted to put to you a fact that has struck us very forcibly, and that point of view was quite unanimous.

8140. I am sure we would all agree that difficulties very often arise if a child has to be divided between two households. That you wish to stress, and I can assure you that the Commission has it very well in mind. What I wondered was whether you were suggesting an all-embracing rule for all cases. I will tell you why. I was a Chancery judge, and you do get cases where people have been divorced but each of them is very fond of the child or children and you do not want to cut the children off wholly from one parent; although you are giving the custody maybe to the mother, you do not want to deprive the father altogether of seeing them and keeping his interest in them. You do appreciate that there are cases of that kind?—One sees a great many of those, too, but even then, Sir, if I may say so, it may be more comfortable but it is not always the wisest thing for the child.

8141. I quite agree, it depends on the circumstances.—Exactly.

8142. (Lord Keith): Miss Sandes, I see you are from the National Baby Welfare Council and I wondered when a baby comes to be a baby?—That is, I am afraid, rather a misnomer. We do deal with children for the whole of their school life, but when the Council was founded by Dr. Prichard he was particularly emphasising the baby aspect and we have never changed the name although that has been discussed from time to time. We are concerned with children up to school leaving age.

21 November, 1952] MISS GLADYS SANDS, F.R.C.S. AND DR. D. H. GIFFEN, M.D., D.P.H.

[Continued]

8143. (Chairman): There are so many bodies concerned with the welfare of children that I wondered if you perhaps specialised in some degree?—Our Council is mainly concerned with propaganda and education. We do not, for instance, deal with cases of cruelty to children; we would refer them to the N.S.P.C.C. We act as a clearing house. People and groups come in us for advice as to how some effort shall be made to get over a difficulty. We are rather more a co-ordinating body although we have our own specialist experience, which is mainly in propaganda.

8144. (Lord Keith): You have a constitution?—Yes, a very simple one.

8145. Is it capable of being expressed in a few words?—Yes, we were originally founded in 1917 to run the National Baby Week, to draw attention to the difficulties with young children, and a week of propaganda was considered the best way of doing it. There were notices in the cinema, in the Press and so on, and out of that grew, I think I am right in saying, although it was long before I was connected with it, this idea of supplying reliable information as far as possible by experts in an entirely honorary capacity as the need arose. Our work varies very much according to what the particular demand is.

8146. (Dr. Raveil): I want to ask Miss Sands what her opinion is about what the last witness has said in connection with the arrangements for deciding the custody of children. That witness was of the view that there should be an enquiry into the arrangements for the children even in cases where the custody has been agreed and there is no contest. What is your view about that?—My view would have to be given in a personal capacity, you will appreciate, because I have not asked my Council for any special views on this. From what I heard of the last witness, I am afraid I think that the machinery suggested is unnecessarily elaborate, if I may be allowed to express a personal opinion. Where the parents are agreed, it is much better to accept the arrangement without bringing in an outside person. I find particularly with one's private practice—because I am in practice—that very often parents start off with the idea that they will work this arrangement of custody and access, and it is approved by the court. Then one of them changes his or her work, changes the district in which he or she lives, perhaps gets married to a different type of person and so on, and difficulties develop that were generally not foreseen in the first place. Then you get conflicts, particularly if someone marries someone who goes abroad. Those of us who are medical practitioners, and have to advise on these matters, find ourselves in very great difficulty sometimes. I should like very much to feel that one could go to the court and get something out of it. That is putting it very crudely, but I feel it is awfully difficult. I sympathise very much with Her Majesty's judges. The child may be only three, four or five when the divorce happens and conditions may have altered by the time he is fifteen or sixteen. Father may have come into money or a wife which he had not thought of. The thing is bristling with difficulties. What I feel strongly about is that the irrevocability of something which is settled at a time without enough pause, I do not say for thought, but pause for developments perhaps to arise. I was not quite expecting that question, and I am afraid I am not posing it very clearly.

8147. It was very kind of you to answer it. Would you mind telling me, are you a child psychiatrist?—I am a gynaecologist and obstetrician. I am a consultant in the London Lock Hospital, and I have referred to me quite a large proportion of children who have been assaulted, cruelty cases, and venereal infections. I have had charge for thirty years, that is where I come across the children's side of it.

8148. (Chairman): I should have said that you are a Fellow of the Royal College of Surgeons, but that does appear in the letter. May I turn to Dr. Giffen's memorandum? As I understand it, Dr. Giffen, you are making one suggestion only, and that is for a discretionary power to postpone the presentation of a petition?—(Dr. Giffen): That is so, my Lord.

8149. We will go through that shortly. The suggestion is set out as follows:—

"2. The object of this memorandum is to request that the legislation be altered to secure that the welfare

of the children be considered prior to the presentation of a petition for divorce.

3. To secure this it is proposed that, where there are children of a marriage who are under sixteen years of age, the petitioner shall apply by originating summons to a judge of the High Court in chambers for permission to present a petition for divorce. . . ."

Pausing there, you are contemplating that a ground for divorce has arisen, are you not?—I presume so, yes.

8150. You must be, must you not?—The alteration I am suggesting is that instead of filing a petition in the present way the petition would have to be presented by means of originating summons. I am assuming that at this stage the parties think they have grounds for divorce; whether they have or not will be a matter for the judge to determine later.

8151. I quite follow, of course nothing has been proved. The petitioner presents a petition in divorce but presumably, as you say, thinking that he or she has got a ground for divorce?—Yes, Sir.

8152. Whether it is adultery or cruelty or anything else?—Yes, Sir.

8153. Then you go on to:—

" . . . and that the judge shall have discretionary power to postpone the presentation of such petition for a period of three years or such lesser period as he may in his discretion so consider wise."

I suppose that he would take into account such matters at the seriousness of the position—for example, there might be such cruelty that it would not be right to postpone it. Then you go on to mention the present discretionary power of the court, and you say that this is such that it can be used:—

"To the granting of the custody of children to either party of the proceedings, his decision presumably being guided by his opinion as to which party will make the better parent irrespective of guilt in the divorce proceedings."

I think that is quite true; the guilt in the divorce proceedings is not in any way conclusive but is a matter to be taken into account. You appreciate that?—Yes.

8154. Then you go on to:—

"A petitioner, however, having made good his/her claim in law that he/she is entitled to divorce, the court has no power to refuse or postpone a decree nisi provided such partner is guiltless. It will be noted that this decision takes no heed of the fact that there may or may not be children of the marriage."

Then you set out your suggestion that the court should have a right to discriminate between petitions where there are children and petitions where there are not, and you give your reasons. One point that has troubled some of the witnesses is this. You are then creating in a sense two kinds of marriage contract, one where there are no children, and as long as there are no children it can be dissolved in a certain way, and then as soon as children arrive it can only be dissolved in a different way.—Yes, my Lord, but that discrimination has already been made, in that where parties have been married for more than three years, they can file their petition for divorce. Where they have not been married for three years the law has already determined that they shall have to apply by originating summons. If it is good enough in the first case, I am holding that it is even more necessary in the second case.

8155. I appreciate your answer. Then you say:—

"It is realised that where a marriage has irretrievably broken down it would be right to grant a divorce, even if there be children, in order that they may be removed, in so far as this may be possible, from an atmosphere of disharmony and conflict. This set of circumstances would be covered by the discretion given to the judge as set out in the proposal in this memorandum."

There, I take it, you are contemplating again that there has been some offence giving rise to a right to divorce under the existing law?—Yes, Sir.

8156. And you are just dealing again with this discretionary power to postpone?—Yes, Sir.

21 November, 1952]

MISS GLADYS SANDER, F.R.C.S. AND DR. D. H. GIFFEN, M.D., D.P.H.

[Continued]

8157. At first when I read your memorandum, I thought you might be putting forward new grounds for divorce. I see you are not—No, not by any means, Sir.

8158. (Mr. Young): Are you suggesting that the analogy of barring the presentation of a petition for divorce within the first three years of marriage should be applied to the case where there is a marriage with children?—That already applies. Under my proposal, at the end of the three years, if there is a child, say, one year old, the judge would have discretion to postpone divorce for another three years.

8159. I do not follow. I thought you were suggesting that, if there are children in a marriage, where one of the parties wishes divorce, he or she should not get the divorce unless with the leave of the court?—And that the court should have power to postpone such decision for a period of three years or such lesser time as the judge in chambers might so desire.

8160. So this question is limited only to legislation to delay the divorce for three years?—Yes. What I have in mind is this. As the situation stood some years ago, there was a period after filing a petition for divorce of about eighteen months before the case was heard. Furthermore, the period between the decree nisi and the decree absolute was six months, so there was a period of two years. Today, it is possible to file a petition for divorce and for the case to be heard and the decree nisi given within three to four months, and decree absolute in another six weeks. I am asking this Commission to ask themselves—has there not been a swing of opinion a little bit too far from the somewhat tardy procedure of divorce some years ago, so that today we have come to a period where there is an indecent haste? And, if I may say so, particularly so where children are concerned. Let us take the ordinary action of a husband or wife who finds that his or her spouse has been guilty of misconduct. I think probably at that stage the husband's feeling is, "I am going to divorce my wife, she has been unfaithful to me," and to a certain extent he is doing it as a spirit of revenge. I do not know that three to four months is a sufficient time for proper and mature consideration. Where children are concerned, I am pretty well satisfied that it is not. Let us see the effects of this. Mr. Jones has formed an attachment for Mrs. Brown, and at that stage his only desire is to secure divorce and marry her as quickly as possible, but what he thinks is love may turn out to be passion. Meanwhile, in four months he may have been divorced. I think that a little longer period is required for tempers to cool, and for parents to consider the question of divorce in a cooler, calmer and proper frame of mind. There is another aspect. The guilty party will have to consider, "Well, this is not quite so easy, it is not a question of my wife (or my husband) filing a petition for divorce and in four months' time I am free and I can marry again." He will have to think to himself, "There may be a delay of two to three years: in my passion going to last two or three years, am I not going to find that before that time is up I would sooner live with my wife whom I have known for quite a considerable period, am I not going to want my children?" At the end of four to five months, is he not going to have had about enough of a guilty situation? The present situation where divorce is so easily and quickly obtained conduces to very hasty feelings in these matters. Again, we have heard over and over again those words, "the sanctity of marriage"—I think every speaker and every report to this Commission has used them. It has been drummed into us right and left. I think that that is perfectly correct, I think it is as it should be,

but it is about time we thought of the sanctity of parenthood. Marriage is important, marriage is a very sacred covenant, but so also is the sanctity of parenthood. And I think that the court, before it considers breaking up a home, should also have to consider what is going to happen to the children, what the children are like, how serious this matter is and so on. If I may, I would like to stress another point. We have heard so much about the damage and the danger to children from living in an atmosphere of disharmony, bickering and argument. We are told that this is one of the causes of juvenile delinquency, and I think that may be so, but my experience is this. You have got to realise that mothers and fathers are human beings and I think the average child, certainly the average Cockney child, can adjust himself with reasonable happiness to the bickerings of two parents. It is life, it is almost natural, and I do not believe that it does all the harm that we are inclined to think today. We know that children come home and hear their parents cursing one another, fighting, bickering, and the next minute they are going out together, but somehow or other they can accept that. What does make, in my opinion, an indelible mark on a child, and what he cannot accept, is the complete breaking up of his household and his sense of security. It is with these feelings in my mind that I put forward a suggestion which is not going to make divorce easier. The suggestion I put forward may be called in these modern days a retrograde step, but I do not think it is. It is a step which is going to make divorce more difficult for people who have children. It is going to make them pause, it is going to make them think. Lastly, if I may say so, I have a very profound faith in the judges Her Majesty has appointed, and I feel certain that when a petitioner for divorce has to come before a judge in chambers and say how many children there are, the judge in chambers is going to make that person perhaps postpone matters for a little while, perhaps come back in six months time. I think there will be perhaps fewer divorces than there are now and fewer homes broken up.

8161. If that is the principle, would not that apply to a childless marriage too?—In a childless marriage there are only two persons concerned. I am speaking purely and simply on behalf of the children. If a childless marriage is broken up then no home is broken up.

8162. So in the case of the childless marriage you would not want that?—No.

8163. (Lord Keith): There is just one point that occurs to me, Dr. Giffen. If the divorce proceedings were to be postponed for three years, which I gather would be the maximum period the judge would allow, and at the end of the three years divorce proceedings commenced, there might be some danger in losing evidence, might there not? You probably appreciate that it is not always easy after three years to find the evidence or keep the evidence together?—That is certainly so, but may I once again say that the position is exactly the same under the requirement that a couple have to be married three years before a petition can be filed?

8164. Yes, I quite see that the position is the same. It is just that it is really an addition to what you say in the existing practice in the first three years of marriage?—I am only asking for an extension of what I think was a very wise decision, no divorce for the first three years of marriage, and I think my proposal is even more important than that as it would apply where children are concerned.

(Chairman): We are much obliged to you for your memorandum and letter and for attending here today.

(The witnesses withdrew.)

(Adjourned to Monday, 24th November, 1952, at 10.30 a.m.)

MINUTES OF EVIDENCE

TAKEN BEFORE THE

34

ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

THIRTY-FOURTH DAY

Monday, 24th November, 1952

WITNESSES

LADY LITTLEWOOD, J.P.
MISS MARION CROWDY, J.P.

} representing the National Federation of Business
and Professional Women's Clubs of Great
Britain and Northern Ireland.

MRS. VERA WEBB
MRS. BILLINGTON-GREIG
MRS. J. V. S. PETRIE, R.R.C.

} representing the National Women Citizens'
Association.

MRS. HELENA NORMANTON, Q.C.



LONDON: HER MAJESTY'S STATIONERY OFFICE
1953

THREE SHILLINGS NET



MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

THIRTY-FOURTH DAY

Monday, 24th November, 1952

PRESENT

The Rt. Hon. LORD MORTON OF HENNINGTON, M.C. (Chairman)

Mrs. MARGARET ALLEN
Dr. MAY BAKER, B.Sc., M.B., Ch.B.
Mr. R. BRUCE, M.A.
Lady BRAGG
Sir WALTER RUSSELL BRAIN, D.M., F.R.C.P.
Mr. H. L. O. FLICKER, C.B.E., M.A.
The Honorable LORD KEITH
Mr. D. MACE

Mr. H. H. MADDOCKS, M.C.
The Honorable Mr. JUSTICE PEARCE
Dr. VIOLET ROBERTSON, C.B.E., LL.D.
Sheriff J. WALKER, Q.C., M.A.
Mr. THOMAS YOUNG, O.B.E.
Miss M. W. DENNHY, C.B.E. (Secretary)
Mr. D. R. L. HOLLOWAY (Assistant Secretary)

MEMORANDUM SUBMITTED BY THE NATIONAL FEDERATION OF BUSINESS
AND PROFESSIONAL WOMEN'S CLUBS OF GREAT BRITAIN AND NORTHERN
IRELAND

(Note.—The memorandum submitted by the Federation has already been printed as Paper No. 64 in the Minutes of Evidence for Wednesday, 29th October, 1952 (Twenty-Second Day), when the witnesses representing the Scottish Division of the Federation gave oral evidence (Questions 5095 to 5153) before the Royal Commission. It is reproduced below except for those parts which relate solely to the law of Scotland.)

This memorandum is based on the views expressed by members of some of the 244 clubs (with a total membership of over 14,000 women) who together form the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland.

1. (A) CHANGES WHICH SHOULD BE MADE IN
THE LAW OF ENGLAND

Changes in the present grounds for divorce

Desertion

1. It is recommended that Section 1 (1) (b) of the Matrimonial Causes Act, 1950, be altered by providing that the period during which the respondent shall have deserted the petitioner shall be a period of at least three years during the three-and-a-half years immediately preceding the presentation of the petition, instead of a period of at least three years immediately preceding the presentation of the petition, as at present.

2. A husband who has deserted his wife who is anxious for him to return to her may ask to come back to his wife without any intention of making a permanent reconciliation but merely with the idea of preventing the wife from obtaining a decree against him. If the deserted wife genuinely attempts a reconciliation she should not be penalised where the husband's offer to return is not genuine. By allowing the parties a period of, say, six months, during which they may live together without the period of desertion having to commence again from the subsequent separation, the intentions of the deserting spouse could be tested.

Cruelty

3. It has been held that conduct sufficiently grave to justify a refusal to cohabit any longer with the offender may, nevertheless, be insufficient to entitle the sufferer to relief on the grounds of cruelty. It is recommended that the definition of cruelty be extended to cover conduct such as would justify a refusal to cohabit but which, at the present time, would not amount to cruelty.

Insanity

4. It is recommended that Section 1 (1) (d) of the Matrimonial Causes Act, 1950, be amended by deletion of the words "and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition", thus making a ground for divorce that the respondent is incurably of unsound mind. The proof that the respondent is of unsound mind should be a matter for medical witnesses

and should depend on the state of medical knowledge at the time the medical evidence is given.

5. If a husband or wife is, according to the best medical opinion, unlikely to become sane, no good purpose is served by insisting on the petitioner waiting for five years before presenting a petition.

New grounds for divorce

6. While many clubs recommend that the law should be changed by adding to the grounds for divorce, one club at least deprecates the attention which is being given to making divorce easier and recommends that far more consideration should be given to preventing it, on such lines as are advocated by the Marriage Guidance Council. A further suggestion is that entrance into the marriage contract should be made more difficult.

7. The following are the recommendations which have been made by clubs who are in favour of extending the grounds for divorce:—

(a) *Divorce by agreement*

(i) It is appreciated by those who put forward this recommendation that to make provisions for divorce by mutual agreement strikes at the foundations of the present law relating to divorce. But, nevertheless, provided that proper safeguards are made for the care and maintenance of the children of the marriage, if any, it is the opinion of many that when two people of full age and understanding have, after due consideration, come to the conclusion that they can no longer continue to live together, then those two people should be able to apply to a court and obtain a dissolution of their marriage. A provision such as this would put an end to the "hotel divorce" which at present brings the law into disrepute.

(ii) A modification of this recommendation is that it should be possible for both parties to agree to apply for a divorce after total separation for a period of, say, three years.

(b) *Divorce after a long period of separation*

It is recommended that some form of relief should be available to a spouse who has been living apart from the other spouse for a considerable period of time even though that spouse be the one who is now known as "the guilty party" unless "the innocent party" can prove that he or she has conscientious objections to divorce. The period of time which has been suggested varies from five to seven years. Under the present law a spouse who has been deserted may refuse to divorce

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the other because of unworthy motives, and such refusal prevents the other spouse from marrying again, although he or she may be living with another woman or man, and would marry and lead a happy family life if not prevented by the spite or other unworthy motive of the deserted spouse. This state of affairs can work great hardship, particularly if the separation occurs when the parties are young. If the deserted spouse has genuine objection to divorce on moral or religious grounds such objection should be respected. There should be proper safeguards for the care and maintenance of young children of the marriage and for the maintenance of the deserted wife.

(c) Divorce by husband on grounds of his wife's unnatural practices

By Section 1 (1) of the Matrimonial Causes Act, 1950, it is provided that a wife may present a petition for divorce on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality. It is recommended that an amendment should be made enabling a husband to present a petition for divorce on the ground that his wife has, since the celebration of the marriage, been guilty of lesbianism.

(d) Divorce on grounds of long term of imprisonment

It is recommended that where a husband or wife has been sentenced to a long term of imprisonment or several terms of imprisonment for a grave criminal offence committed after the celebration of the marriage, the other spouse shall be enabled to obtain a divorce on that account. It is felt that the term of imprisonment or the aggregate of the terms of imprisonment should not be less than seven years.

Abolition of damages for adultery

8. It is recommended that Section 30 of the Matrimonial Causes Act, 1950, be repealed.

9. For a husband to be able to claim damages from any person on the ground of adultery with his wife is a relic of the time when the wife was regarded as chattel. Judges are frequently questioning whether there is any, and if so what, value to be placed on an erring wife.

10. If a claim for damages against the co-respondent is to be retained then power should be given to a wife to claim damages from any person on the ground of adultery with her husband. It is inequitable that a wife should not be able to make such a claim whereas her husband in similar circumstances can make a claim. If damages could be recovered from a woman named, it would be of assistance to the wife who had been left to bring up a family of young children.

Maintenance

11. It is recommended that after a decree of dissolution or nullity of marriage the court may have the same powers to order the wife to pay alimony and maintenance to the husband and to order security as it now has in the case of orders against the husband in respect of the wife.

12. It is unfair on a husband that such orders cannot be made at the present time. A husband with little or no income may have been married for a great many years to a wife with a substantial income. He would during this time have been living in a style suitable to his wife's income. If the wife should then, through no fault on the husband's part, leave the husband to live with another man, perhaps leaving the husband with young children to bring up, it is a great hardship to the husband not to be able to make any claim against the wife and it is considered only fair that the husband should be able to obtain an equivalent order against his wife as a wife would be able to do if the circumstances had been reversed.

Enforcement of maintenance orders

13. It is recommended that the periodical payment of any sum of money not exceeding £300 a year directed to be paid by any order of a court having jurisdiction in divorce should be enforceable by a court of summary jurisdiction in the same manner as the payment of money is enforced under an order of affiliation.

14. At the present time many women suffer hardship because they find that orders which they have obtained

against their former husbands are both difficult and expensive to enforce. It is felt that it would be a great advantage if the machinery which has been found to be effective for the enforcement of orders of courts of summary jurisdiction was made available for the enforcement of the small orders of the High Court.

II (A) CHANGES WHICH SHOULD BE MADE IN POWERS OF COURTS OF INFERIOR JURISDICTION IN ENGLAND

19. Recommendations under this heading have also been dealt with under Section IV and reference should be made to that part of this memorandum.

Separation and maintenance orders

20. (a) It is recommended that a maintenance and/or separation order should not be granted within twelve months of the marriage unless a probation officer or recognised social worker has placed before the court a report that all attempts at reconciliation have proved abortive.

It is appreciated that many enlightened magistrates' courts are reluctant, indeed often refuse, to grant a summons until such time as their probation officers have reported that reconciliation is impossible, and indeed, the number of reconciliations brought about by probation officers is most commendable.

(b) It is further recommended that should the court deem it wise or necessary to have both parties to the dispute before them, they should be given the power to insist on the attendance of either or both parties. In particular, where a husband has deserted his wife leaving her and her children without support there should be power to bring him before the court on a warrant.

It is appreciated by those who make this recommendation that the National Assistance Board have power to apply to the court for such a warrant if the husband leaves his family chargeable (National Assistance Act). Moreover, the officials of the National Assistance Board often have knowledge of the whereabouts of the husband. It is felt, however, that this power is insufficiently exercised.

In this connection, it is further recommended that the attention of the National Assistance Board, centrally, might usefully be drawn to this point, with a recommendation that instructions be issued to local officers along these lines. Prompter action might well be taken, and it be thus ensured that the summons granted to the wife could be served upon the husband immediately upon his arrest on a warrant granted to the National Assistance Board.

(c) It is suggested that more use should be made of probation officers' reports including information as to means obtained prior to the hearing of a case. A precedent for this lies in the home surroundings report prepared by a probation officer prior to the hearing of a case before a juvenile court; such reports are not produced until the case has been proved, and are then found to be invaluable to the magistrates.

(d) It is recommended that power should be vested in a magistrates' court to order that payments under a maintenance order which have fallen into arrears might be deducted at the source of earned income, where applicable, and remitted direct to the court's collecting officer by the employer. (It should be noted that this power already exists under Scottish law.)

It is appreciated that power exists to distrain on the property of the husband in some cases, and where applicable, but this power is seldom exercised. Maintenance orders are difficult to enforce, and all too frequently the only course open to magistrates in dealing with non-compliance to pay, and arrears, is punishment by imprisonment. This method is of no help to the wife, nor to the taxpayer if the wife is receiving national assistance benefit, as is frequently the case.

It is fully appreciated that this power would not meet the case where the husband is self-employed, but power to collect at source of income where men are employed in large factories would cover a large percentage, as was the case, say, via Army allowances, used extensively during the war.

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III. (A) CHANGES WHICH SHOULD BE MADE IN THE LAW RELATING TO THE PROPERTY RIGHTS OF HUSBAND AND WIFE IN ENGLAND

22. There is a very considerable body of opinion in the Federation in favour of changes in the law relating to the division of the income to a matrimonial home and the ownership of furniture bought out of housekeeping money.

23. In cases where the wife has no income of her own she is at a great disadvantage in that she has no money which she can spend entirely as she likes. Furthermore, she cannot claim any profit which may accrue by the expenditure of money given to her by her husband for housekeeping. For example, if a wife spends some out of her housekeeping money in a football pool and wins a large sum of money, that money belongs to the husband.

24. In cases where the wife has an income of her own, difficulties and hardship may arise when she buys furniture for the matrimonial home out of money which are made up of the housekeeping allowance given to her by her husband and her own earnings.

25. It is appreciated that solutions to these and allied problems are very difficult to formulate and that many changes which could be suggested would alleviate some cases of hardship but at the same time would create new cases of hardship and might aggravate present difficulties.

26. It can be argued that where, as at present, the wife is not entitled to claim any part of the housekeeping allowance as her own, she is not encouraged to be thrifty. On the other hand, if a provision was to be made whereby the wife would be entitled to retain as her own a proportion of the amount she was able to save out of the housekeeping allowance, it might be argued that many husbands might suffer by reason of their wives' miserly attitudes. Nevertheless, it is only fair to the wife that some credit should be given to her for the pecuniary value of her unpaid work in the home, which work the husband would have to pay a housekeeper to do should his wife die leaving him with young children.

27. In spite of the difficulties, the consensus of opinion of the members of the clubs forming the Federation, is that change should be made giving a wife a right to some part of her husband's earnings in cases where she has no income and, conversely, a husband who has no income should be entitled to some part of his wife's income. [See Question 8173.]

28. The law of Sweden gives the husband and wife a special right or "gift" in the property of the other, of a legal nature. The study of Swedish law on the subject might prove very helpful and the introduction into English law of some of the principles which have been found to work well in Sweden might help to solve some of the difficulties which now exist in England.

29. As regards the furniture of the matrimonial home, such furniture as belonged to the husband or wife before marriage should remain his or her property but some scheme of equitable division of the furniture, bought in contemplation of or after marriage, should be devised. The need for such a scheme becomes apparent on the break-up of a marriage and one way of dealing with the matter would be to give power to the court granting a decree of divorce or nullity or a maintenance or separation order of complete discretion as to the division between the husband and wife or otherwise of the furniture in the matrimonial home.

30. The court should also have power to make an order relating to the tenancy of the dwelling-house which up to the time of the separation of the parties has been used as the matrimonial home. Great hardship is caused at the present time when the husband, who is usually the tenant of the house occupied by the family, deserts his wife. Landlords, including local authorities, are reluctant to transfer the tenancy to the wife. This lack of security for the wife and children could, in appropriate cases, be prevented by giving the court power in its discretion to vest the tenancy of the matrimonial home in whichever party the court deemed desirable.

IV. CHANGES WHICH SHOULD BE MADE IN THE ADMINISTRATION OF THE LAW

(1) County courts to have divorce jurisdiction

34. County court judges have shown themselves capable of dealing with matrimonial cases, because when sitting as a special commissioner acting under a Special Commission, a county court judge may try and determine all classes of matrimonial cases, subject to rules of court, and all the county court judges have been appointed special commissioners for this purpose.

35. It is recommended that county court judges should be empowered to try and determine all classes of matrimonial cases, not only as special commissioners but also as county court judges, in their own courts.

36. Difficulties would be encountered by county court judges being unable to give sufficient time to long defended actions, having regard to their other work. It is suggested that to obviate this difficulty the county court judge should be given power to transfer any such action to the Probate, Divorce and Admiralty Division of the High Court.

37. The advantages of giving divorce jurisdiction to county court judges in their own courts would be many, but chief among them would be the saving of expense. The cost of an undefended divorce case is very high at the present time and a great deal of the expense would be saved if it could be tried in the county court.

(2) Proceedings under the Summary Jurisdiction Acts, 1895 to 1925

38. The matrimonial jurisdiction at present exercised by justices is probably the most difficult of the work done by justices, as the law which they have to administer is complicated and the cases are ones in which personal prejudices and feelings are liable to prevail. Justices have difficulty in reaching a decision which is in accordance with a decided case but which, at the same time, is in their opinion contrary to common sense and not in accordance with their personal feelings.

39. Two suggestions are made with a view to overcoming this difficulty. Those who support the second suggestion are not in favour of the introduction of the first suggestion. The first suggestion is that the matrimonial jurisdiction at present exercised by justices under the Summary Jurisdiction Acts, 1895 to 1925, should be transferred to the county court, because a county court judge, owing to his training, should not experience the same difficulties as lay magistrates experience.

40. The second suggestion is that power under the Summary Proceedings (Domestic Proceedings) Act, 1937, as to the constitution and sittings of domestic courts, be further extended to provide that a special panel of justices be appointed to sit in domestic proceedings courts similar to the special provisions now in force relating to the constitution of juvenile courts.

41. It is appreciated that although the majority of justices may well be men and women who are familiar with social work, the special experience of some justices along these lines might well be used to better advantage if such provisions were in force.

(3) The court having matrimonial jurisdiction to have powers regarding property

42. In this memorandum it has been recommended under Section III that on the break-up of a marriage the court granting a decree of divorce or nullity or a maintenance or separation order should be given complete discretion as to the division between the husband and wife or otherwise of the furniture in the matrimonial home and should be able to make an order regarding the tenancy of the house used as the matrimonial home.

43. At the present time, on the break-up of a marriage, there are very often two sets of proceedings in two different courts. If the recommendations were effected, the court dealing with the case from the aspect of the marriage would also deal with questions between the husband and wife as to property which have hitherto been dealt with by the High Court or county court under the Married Women's Property Act.

44. It is felt that this recommendation should be adopted whether or not the alteration suggested in Section IV (2) above is effected. Not only would the adoption

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of this recommendation often save long and costly proceedings but it is felt that justice would be more likely to be done between the parties if all aspects of the dispute were dealt with by the same tribunal.

(4) The provisions under the Legal Aid and Advice Act, 1949, to be implemented as soon as possible

45. It is recommended that legal aid be made available to litigants in county courts and magistrates' courts immediately.

46. Some injured parties prefer to seek redress in the lower courts but cannot do so as assisted persons. Not only does legal assistance help the litigant but it also assists the court. At the present time many justices' clerks ask solicitors who practise in their courts to act for one or other of the parties to matrimonial cases for no fee or a nominal fee (sometimes paid out of the poor box). Such arrangements are only possible through the generosity of the solicitors concerned and an unfair burden may fall on those who are willing to assist. The courts recognise the value of legal assistance and justices and clerks to justices look forward to the day when any litigant who comes before them and who wishes to have legal aid is able to obtain such assistance without relying on the charity of members of the legal profession.

(5) Reconciliation

47. It is believed that many of the ills that beset marriage are like many of the ills that beset the body, in that they can be cured if taken in hand in time by skilled people. Few couples want to see their marriage break, but there is rarely hope of successful reconciliation when matters have become so bad that one spouse has filed a petition for divorce.

48. It is felt that what is needed is a nation-wide service of skilled conciliators to which married people may turn for guidance and help when signs of matrimonial trouble first show themselves. Marriage guidance councils are doing good work, but they are not ubiquitous, their work and existence are not widely enough known and too much reliance is placed upon voluntary work.

49. At the present time, when trouble starts in the married life of young people, so far as those young people know, there is no one to whom they can turn for advice except their parents. Often they are too proud to let parents know of the trouble, and even if that is not the case parents are not the best people to view the matter dispassionately and advise disinterestedly.

50. It is felt that if there was a nation-wide conciliation service staffed by trained men and women to whom any married person could apply for advice and help knowing that anything disclosed would be secret and that the only desire of the person consulted would be to help to maintain the marriage, in the course of time husbands and wives would readily make use of such a service and thousands of marriages would be saved from breaking up.

51. In spite of what has been said in the second paragraph under this heading, it is thought by those putting forward the suggestion that there would be no objection to a person seeking a divorce being required first to consult a member of the conciliation service.

(6) Child witnesses

52. It is recommended that it be made illegal for any child of sixteen or under to be called as a witness in a case before a domestic proceedings or divorce court.

53. In a court of summary jurisdiction where, for example, a wife makes an application for a maintenance and/or separation order on the grounds of persistent cruelty, it happens quite frequently that the only available direct witness of such cruelty on the part of the husband is a child or children of the marriage (or step-children). In cases where a child is called to give evidence it is very likely to be harmful to the child and experienced magistrates feel that the evidence of children is of little value.

54. As well as the harm which may be done to the child who is called to give evidence, there should also be considered the effect on the parent against whom the child has given evidence. If the case is not proved and home life is resumed, children's references to the case in court can be troubling to both parents, and productive of further trouble which might otherwise be gradually resolved. Where a case is proved the guilty parent finds it difficult to forgive the child for speaking against him or her.

V. CHANGES WHICH SHOULD BE MADE IN THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

55. It is recommended that the following be substituted for Part II of the First Schedule of the Marriage Act, 1949.

- (a) (i) Deceased or divorced wife's sister.
Deceased brother's wife.
Brother's divorced wife.
Deceased or divorced wife's brother's daughter.
Deceased or divorced wife's sister's daughter.
Father's deceased brother's wife.
Father's brother's divorced wife.
Mother's deceased brother's wife.
Mother's brother's divorced wife.
Deceased or divorced wife's father's sister.
Deceased or divorced wife's mother's sister.
Brother's deceased son's wife.
Brother's son's divorced wife.
Sister's deceased son's wife.
Sister's son's divorced wife.
- (b) Deceased's sister's husband.
Sister's divorced husband.
Deceased or divorced husband's brother.
Father's deceased sister's husband.
Father's sister's divorced husband.
Mother's deceased's sister's husband.
Mother's sister's divorced husband.
Deceased or divorced husband's brother's son.
Deceased or divorced husband's sister's son.
Brother's deceased daughter's husband.
Brother's daughter's divorced husband.
Sister's deceased daughter's husband.
Sister's daughter's divorced husband.
Deceased or divorced husband's father's brother.
Deceased or divorced husband's mother's brother.

56. This recommendation is put forward by several clubs as they feel that hardship is caused to persons who are not allowed, after dissolution of an earlier marriage, to marry their previous "in laws". As against this, there are others who hold the opinion that if further exceptions were added to the prohibited degrees in the manner suggested above, this would remove a possible deterrent to divorce and would therefore be a bad thing.

(Received 15th January, 1952.)

24 November, 1952]

LADY LITTLEWOOD, J.P. and MISS MARION CROWDY, J.P.

EXAMINATION OF WITNESSES

(LADY LITTLEWOOD, J.P. and MISS MARION CROWDY, J.P., representing the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland; called and examined.)

8165. (Chairman): We have before us, as representing the National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland, Lady Littlewood and Miss Marion Crowdy. Will you tell us what position you personally hold in the Federation?—(Lady Littlewood): Speaking for myself I am legal adviser to the Federation. I am also on the Executive Committee of the Federation and have been for the past two years. This is the second year in which I hold that position.

8166. We were told in Scotland that you took a major part in the drafting of this memorandum. Is that right?—That is correct, I think, my Lord.

8167. Are you a solicitor or a barrister?—I am a solicitor in private practice in Guildford and also a magistrate for the county of Middlesex.

8168. And Miss Crowdy, what position do you hold?—(Miss Crowdy): I have been on the National Executive for the past two years. I am a member with Lady Littlewood of our sub-committee dealing with legislation and have assisted her in drawing up this evidence. I am a lay magistrate for the borough of Swindon. I have no legal training, I am in business.

8169. We heard your representatives in Edinburgh as to Scottish matters and I think they told us that you have twenty-four clubs in Scotland and 220 in England and Wales. Is that right?—(Lady Littlewood): That number has gone up. The present figure is 234 in England and Wales.

8170. Did you send out copies of the five questions which we issued about a year ago to all your clubs, as was done in Scotland?—Yes, that went out to all the clubs, and from the replies this memorandum was compiled.

8171. I may ask you some details later as to the replies, but how many clubs replied?—Eighteen clubs replied but I think I should add a rider to that. When such questionnaires go round to the clubs, it is understood that only those people reply who think they have specialised knowledge on the topic or very definite views. We do not on any topic expect to get anything like one hundred per cent. replies, because quite obviously there are some members who have not the knowledge with which to reply to the questions.

8172. That is quite true but some of our questions deal with human relationships which do not require any specialised knowledge, as you can appreciate. However, eighteen, you say, replied?—Yes, but if I may add something to that. After the evidence came in, there was one topic upon which I myself was rather disturbed, namely, the proposals for the division of the matrimonial assets. I sent round a subsequent questionnaire to all the clubs saying that the view had been expressed that the wife should be entitled to some portion of the matrimonial assets, but I put forward various practical difficulties, as I saw them, in enforcing such a suggestion. To that questionnaire we got eighty-one replies, and these were interesting because by far the largest number of those people who replied were against any legislation enforcing such a division. Having seen the practical difficulties, or having had the practical difficulties pointed out to them, they thought it was a bad thing to interfere with the present position. For that reason, if I may at this juncture, I should like to delete one of the paragraphs in the memorandum.

8173. Certainly.—Paragraph 27 reads:—

"In spite of the difficulties, the consensus of opinion of the members of the clubs forming the Federation, is that changes should be made giving a wife a right to some part of her husband's earnings in cases where she has no income and, conversely, a husband who has no income should be entitled to some part of his wife's income."

The replies to that second memorandum indicated quite definitely that that paragraph should be deleted.

8174. I am interested, because I was going to put a question on the views of the Scottish clubs on the changes

which should be made in the law relating to the property rights of husband and wife in Scotland. These are as follows:—

"All the clubs making reports, however, were unable to suggest methods of making practicable and enforceable the proposed right of a spouse to a share of the income of the other without the possibility of breaking up the marriage."

So apparently both in England and in Scotland there is a feeling of a substantial majority against that proposal, for the reason that it is so difficult to work?—Yes, the feeling is that they would like it, but it cannot be worked.

8175. Turning to Section I of your memorandum, "Changes in the present grounds for divorce", you make a suggestion as to desertion. A similar suggestion has been made by many other witnesses and I have no questions to ask on that. Then as to cruelty, you say:—

"It has been held that conduct sufficiently grave to justify a refusal to cohabit any longer with the offender may, nevertheless, be insufficient to entitle the sufferer to relief on the grounds of cruelty. It is recommended that the definition of cruelty be extended to cover conduct such as would justify a refusal to cohabit but which, at the present time, would not amount to cruelty."

I wonder whether you have any particular wording of the definition, or whether your suggestion might be met by what is called "constructive desertion", a phrase which I do not like very much? It has been held, though I think the Court of Appeal recently expressed some doubts about it, that if there is conduct on the part of one spouse such that no reasonable man or woman could be expected to remain in the house with that spouse after it, and the other spouse leaves on that account and there is three years' separation, then there is desertion on the part of the spouse whose conduct has led to the break-up, and not desertion on the part of the spouse who has actually physically gone away. You are familiar with that doctrine?—Yes.

8176. Would not that doctrine meet the views of your Federation just as well as extending the definition of cruelty?—Yes, except of course, in constructive desertion, there is a period of three years during which you have to wait before a petition can be filed.

8177. That is true, but if the conduct falls short of cruelty it may be that the spouse who has not behaved very well may repent and that delay perhaps gives the parties an opportunity to settle down again. What do you think of that?—I think that if the reason for the separation was similar to that for constructive desertion they should not have to wait the three years.

8178. Could you give me an idea of the sort of extension of the definition of cruelty which would meet the views of your Federation? You see, it is very vague, it is not, in this memorandum? I know it is difficult. You say:—

"It is recommended that the definition of cruelty be extended to cover conduct such as would justify a refusal to cohabit but which, at the present time, would not amount to cruelty."

You realise that one could hardly put that in a statute. It is necessary to define what is the kind of conduct which would justify a refusal to cohabit.—I think Her Majesty's judges could probably produce a definition. I myself have not produced a definition.

8179. A suggestion something like it has been made before. You appreciate the difficulty of giving it a precise definition?—I certainly appreciate it.

8180. When we come to insanity, it has been suggested, and I am going to leave Sir Russell Brain to develop this if he wishes, that there is a difficulty in simply calling evidence that a person is "incapable of sound mind", without some period of detention and observation. What do you say to that—the period need not necessarily be for five years?—If I may, with respect, I would

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suggest that the idea underlying the proposal is obvious. Might I place it on Sir Russell Brain's shoulders for him to produce a definition?

8181. Very well, I will pass from that. May I refer to the section on "New grounds for divorce", and, in particular, to the recommendations which have been made by "clubs who are in favour of extending the grounds for divorce"? These are suggestions by certain individual clubs. That is right?—Yes.

8182. First, on "Divorce by agreement", you say:—

"It is appreciated by those who put forward this recommendation that to make provisions for divorce by mutual agreement strikes at the foundations of the present law relating to divorce. But, nevertheless, provided that proper safeguards are made for the care and maintenance of the children of the marriage, if any, it is the opinion of many that when two people of full age and understanding have, after due consideration, come to the conclusion that they can no longer continue to live together, then those two people should be able to apply to a court and obtain a dissolution of their marriage. A provision such as this would put an end to the 'hotel divorce' which at present brings the law into disrepute."

I do not think myself it would be fair to cross-examine you on that proposal because it comes only from certain clubs and therefore I shall only ask you this. How many clubs in England and Wales made that suggestion?—I have not made a schedule of the number, but very few, a very small number.

8183. I think it would be helpful to the Commission if you could tell us how many clubs made that suggestion, and, if anyone suggested modifications, what the modifications were. Could you do that?—Yes.

8184. Send it to the Secretary, please. We should be interested to know that. Then the second proposal is:—

"A modification of this recommendation is that it should be possible for both parties to agree to apply for a divorce after actual separation for a period of, say, three years."

And, again, I should be glad if you would send in the number of clubs that suggested that. We got the figures for Scotland from the witness who attended in Edinburgh. Then, as to "Divorce after a long period of separation", you say:—

"The period of time which has been suggested varies from five to seven years."

There, again, will you let us have figures as to how many clubs made that suggestion and what periods each one suggested?—Yes. [See Paper No. 102.]

8185. Then, in the same paragraph, you say:—

"If the deserted spouse has genuine objection to divorce on moral or religious grounds such objection should be respected. There should be proper safeguards for the care and maintenance of young children of the marriage and for the maintenance of the deserted wife."

Many witnesses have pointed out to us the extreme difficulty, under this proposal, if a man has a second wife and possibly a second family, of making adequate provision for the maintenance of the children of the first marriage and the first wife. I do not know whether the clubs that suggested this have made any concrete suggestions as to how that should be achieved. Do you remember that?—No, I do not. I might be able to tell you that in the reply but I think, in a way, it is rather a pious hope. (Miss Crowley): Perhaps I can help my friend. If I remember correctly, that suggestion may have come from myself in connection with my interest with the Probation Officers' Association. As my friend says, I think possibly it was a pious hope.

8186. I am sure everyone would agree that if this proposal because law adequate provision for maintenance would be very essential, but it has been pointed out that only a rich man could afford to keep a wife and an ex-wife and two families. I pass from that. Then, as to "Abolition of damages for adultery", you say, in paragraph 10:—

"It is inequitable that a wife should not be able to make such a claim whereas her husband in similar

circumstances can make a claim. If damages could be recovered from a woman named, it would be of assistance to the wife who had been left to bring up a family of young children."

I feel the force of both sentences but is that not a reason for enshrining the husband or the wife to claim damages rather than for abolishing the claim for damages in both cases?—(Lady Littlewood): There are certainly reasons, but it is such a very difficult matter to assess the value of either of the erring spouses, I should have thought.

8187. However, you think on the whole that a claim for damages should be abolished altogether?—Yes, but if not, it should work both ways for both husband and wife.

8188. May I now refer to paragraph 51, on reconciliation, where you say:—

"In spite of what has been said in the second paragraph under this heading. . ."

That is, that there should be a nation-wide service of skilled conciliators:—

"... it is thought by those putting forward the suggestion that there would be no objection to a person seeking a divorce being required first to consult a member of the conciliation service."

That contemplates, I suppose, that before issuing a petition, or before getting leave to bring a petition for divorce, the petitioner or would-be petitioner should be bound to consult the conciliation service?—Yes.

8189. There is a difference of opinion as to whether compulsory provisions of that kind are desirable. Would you like to say anything about the respective advantages of voluntary and compulsory services?—I think that if you are going to have such a service, it should be compulsory. Then everyone would feel they were dealt with in the same way, much as is done in many magistrates' courts now, where the applicant for a summons is interviewed by the probation officer beforehand.

8190. I quite appreciate the proposal that applicants should always see the conciliation officer. That is one thing, but would it be a good thing to make it compulsory on them to see the conciliation officer, whether they wanted to or not? Others have said that it becomes a mere formality if you do that, and the parties are rather resentful—I can see that argument. On the other hand, there may be people who at the outset would say, "The conciliation officer cannot do any good for me, it is no use my going to see him". That is fact might not be the case, but you would not be able to get in touch with that person if the procedure were not made compulsory.

8191. Once such people got there the conciliation officer might be able to do some good, I quite follow that. Then, as to child witnesses, you say in paragraph 52:—

"It is recommended that it be made illegal for any child of sixteen or under to be called as a witness in a case before a domestic proceedings or divorce court."

I quite follow your reasons, but it seems to me that if such evidence were excluded, it might be very difficult, for example, for a wife to prove a meritorious cruelty case. Sometimes the only available witnesses might be children?—Might I leave that question to my friend? (Miss Crowley): My answer to that is that quite a few people do get separations who have no children.

8192. That is true. I do not say it is always vital to call a child but your proposal might raise a difficulty in some meritorious cases?—I should say at the outset that this particular piece of evidence is one in which I am very interested; it has come from my own club, following my own experience with small children in domestic proceedings courts. The argument which you put against the proposal has been advanced to me by quite a few people with whom I have discussed it. I would like to say at the outset that I have the backing of my own bench in the suggestion and of a number of probation officer members of the Federation. In the case of a small child, say a little boy of ten, who is brought into court to say that he has seen his daddy put his hand round mummy's neck, however carefully the solicitor may try not to lead that child, I would suggest that the evidence is never very reliable. It has a very bad effect on the child. The president of my own club knows a case of a woman whose separation from her husband was brought

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about entirely thanks to the evidence of their son, who was then fourteen. Every time the father meets that boy in the street, he threatens him because he spoke against him, and that will have surely a lasting effect on that boy. It is appreciated that sometimes the only evidence available is from the children, but if the mother knew that the children could not be brought, I submit that the mother would very often rush to her own mother or a friend to show the marks on her neck. I have seen many a woman come in to get a summons, she will come the next day and say, "Look at the marks on my neck". That would be done far more often if children could not be called.

§193. I am sure that you appreciate that any questions put to you do not necessarily represent the views of the persons putting them but represent the views which other witnesses have put before the Commission?—Yes, my Lord.

§194. (Lord Keith): I would like for a moment to pursue the question of child witnesses. This proposal is confined to calling children under sixteen as witnesses in domestic proceedings or divorce?—Yes, my Lord, as far as this memorandum is concerned.

§195. What occurred to me was this. There are other cases where it may be just as bad, if not worse, to call children as witnesses, for instance, in criminal proceedings. I do not know whether you would press your objection so far as to say that the same rule should apply in criminal proceedings?—Of course, I am not prepared to answer that question, because as far as this evidence is concerned, it is dealing with separation and divorce. I have not had an opportunity to consider that other aspect, but I have served in a juvenile court for quite a number of years now, and I would like to exclude children from giving evidence in adult courts if it were possible.

§196. I think I might say that we all sympathise with the view that children should not be brought unnecessarily into court as witnesses, particularly where they are giving evidence in a matter that affects their parents. Nevertheless, it may be necessary in the interests of justice to call children, let me say, in some criminal proceedings. It seems to me it is a little difficult, if it is not, to exclude them, where perhaps justice may require that they should be called, in divorce proceedings or in domestic courts?—I can understand the difficulties and I do not feel qualified to argue it.

§197. There was one statement in the memorandum which I was rather inclined to question, as a matter of fact, and that is that the evidence of children is of little value. Is that your experience? I quite see that the evidence of young children, children of five, six or seven, may not be very valuable—I do not say it is not valuable in some cases—but more mature children, children of twelve to sixteen, are surely intelligent beings who understand questions that are being asked, and may be able to answer and give evidence just as valuable as that of more adult people?—Yes, I agree wholeheartedly. I think I was very much influenced by the very small children that appear to be brought not infrequently before magistrates in domestic proceedings cases.

§198. There is one other matter of a general nature and that is this. After this memorandum had been prepared, Lady Littlewood, was it circulated to the various clubs?—(Lady Littlewood): It has been available to the various clubs. It has been on sale, it was not free.

§199. Do you mean on sale to the clubs?—It was on sale to the clubs and the whole issue has been sold out.

§200. Can you say that practically all your 200 odd clubs have had copies of this memorandum?—I think that one member from every club has probably got it, and perhaps I might add that I have not received any letters saying, "My goodness, why did you suggest this or that?"

§201. Nobody has dissented from the memorandum?—Nobody has dissented since it was published.

§202. (Mr. Justice Pearce): Lady Littlewood, you have heard from the Chairman what other witnesses have said about your suggestion of compulsory consultation with a member of the conciliation service before a petition is launched. Whether those objections are a valid answer to your suggestion or not, rather depends on the number of people you hope to catch in time and prevent breaking up their marriage?—Yes.

§203. And the mere fact, I suppose, that it became a formality with certain people who were intending to have a divorce in any event would not necessarily condemn it, if it saved a certain number of others?—No, it would not.

§204. Have you any idea in your mind as to how far it would be effective in saving, shall we call them, the few?—No, I have no definite idea, but I think that you should try to get them long before the petition is launched; in other words, when they first go to the solicitor's office or even perhaps before that.

§205. You cannot get them compulsorily before then, can you?—No.

§206. The only time you might get them compulsorily is when they come to the court and want anything, and then you can say before you issue your petition, "I want to be sure you have talked it over with some member of the conciliation service"?—If it becomes widely known that there is such a service you may get people going there as a preliminary step and therefore not coming into the category of petitioners at all, if the consultation is successful.

§207. That is really a recommendation for having a wide, and possibly, a State conciliation service?—Yes.

§208. That is what you are speaking of now, is it?—It must be.

§209. But that is not quite on the subject of whether the court ought to say before it issues the petition, "I want to be sure that you have talked it over with a member of the conciliation service". I fully see the advantages of that, but there are disadvantages which have been put forward that have to be faced. Have you any idea as to how effective it is likely to be, or are you merely considering it as an abstract proposition?—I have no facts to go on at all.

§210. On the question of child witnesses, I wonder if that has not also got to be considered, not only from the point of view of making them give evidence in the interests of justice, but also of making them give evidence in the interests of themselves. The case mentioned was a case where a wife got a separation order, which she would not have got if the son, aged fourteen had not given evidence?—(Miss Crowdy): I have no first-hand evidence of that particular case. One assumes that.

§211. The assumption was that he was instrumental in his mother procuring a separation order?—I would say that he was, in the eyes of his father. I was not at that particular hearing.

§212. Assuming he was an effective cause, as the father thought, and assuming it was a case of cruelty, as it must have been, I think, if there was a separation order, then the mother would have fallen out then. If your procedure had been effective, he would have known that his mother was trying to get a separation order against a cruel husband; he would have known that the law stopped him helping her; he would have known that his mother failed to get a separation order; and in addition to that knowledge he would either have had to go on living with a cruel father who had succeeded in deceiving the magistrates and depriving the mother of her remedy, or would have found himself with a mother who had no means of support. Is that fair?—Well, Sir, I would say that your imagination is as good as mine in that case.

§213. I am trying to deal seriously with that case. You brought it forward and, as you put it, the father said to the child, "It was because of you that your mother got an order". The situation I have suggested has seriously to be faced. You deprive the child of the opportunity of helping the mother, and if he could not be the effective instrument of securing justice he would be put in a difficult position in that he, along with the mother, would be defenceless. Do you agree?—I agree, but I feel that evidence can be brought apart from the children in so many cases, and your scheme would then be incorrect.

§214. That brings me to the case I really want to put to you. Do not you agree that every court more or less dissuades the parties from calling the children unless in the view of the justices, the evidence of the children is necessary for them to make up their minds?—Yes. But it is very difficult, as the law stands at present, to persuade people not to bring children if they feel they must bring them. If they really want to bring a child, they bring a child as things are at the moment.

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8215. Let me put it to you, is it not the case in most courts, as one is rather accustomed to find in the High Court, that counsel or solicitor says when the child has been a witness of those assaults, "I have the child in attendance, if you want me to call him or her", and the court, if it thinks it is not necessary, says "No", or in some cases it may say, "We will leave over that question for the moment and see how the case develops". Only if the child's evidence is necessary is the child called as a rule, is that not so?—That is not my experience in a lay magistrate's domestic proceedings court; the solicitor does seem to want to bring the child as a witness and does bring the child.

8216. I suppose he wants to feel that he is safe. If courts do see, as I suggest many do, that children are not called unnecessarily, but only where their evidence is really going to be a deciding factor, do you not think that it is much more in the interests of the children themselves that they can be called?—By and large, Sir, no. But I am afraid that all the time I am thinking possibly of small children. I am influenced largely by cases of children of ten years of age.

8217. Do you think that it really adds tremendously to the troubles of a ten-year old, over whose head a home is broken, that in addition he or she had to spend a few minutes before a kindly tribunal?—Yes, I do not like it.

8218. (Sir Russell Brierly): I should just like to put to Lady Littlewood some of the difficulties of the task which she wants me to carry out. On the meaning of unsoundness of mind, many people think that this is a positive definition, but in fact, of course, it is a negative one. It merely means, "not of sound mind or mentally abnormal", so the recommendation would make a ground for divorce that the respondent was incurably mentally abnormal, and in that there is no indication, is there, of the degree of mental disorder required? In other words, it would cover many people who have never been in a mental hospital, as well as many who may have been in a hospital but have been discharged partially cured. So that the period of care and treatment is in fact a criterion of the severity of the illness. If the medical profession found that it could not define unsoundness of mind otherwise, would your organisation accept perhaps a shorter period of care and treatment, one or two years, for that practical reason?—(Lady Littlewood): Yes, I think I might say they would. The feeling was that the five years might be quite unnecessary. At the beginning of the period, one visualises someone who would not recover, and it was thought that the period of waiting for five years was unnecessary. But if the medical profession feels that some period is necessary, in order to ascertain whether or not the individual is of unsound mind, then obviously one could not raise an objection to such a period.

8219. I appreciate that logically your recommendation does seem to follow from principles already adopted, but I do not know if you have seen the medical evidence already submitted. I do not think that any medical organisation has suggested doing away with the period of care and treatment, but they have suggested considerable reductions.—Yes.

8220. (Dr. Baird): I was not quite clear about your answers to the Chairman about the amount of support which your memorandum has from the various clubs. Do I understand that, with the exception of the clause which you have withdrawn about property, these suggestions have at least not been objected to by any club?—Yes.

8221. When you say that one club put forward a suggestion and that so many more clubs put forward another suggestion, do you mean that these suggestions were all put together by you in this memorandum, circulated to every club in England and Wales, and that there is only one which has been objected to?—They were not actually circulated. Anybody interested could buy a copy of the memorandum, and, I think, they have in fact bought it, because copies were on sale at the annual general meeting and the whole stock was exhausted. The objection to Section III, I found out through sending out a subsequent questionnaire.

8222. (Chairman): As I understand it, you yourself or somebody else felt practical difficulties in that suggestion?—That is so. The suggestion was made and it was felt to be unworkable in practice.

8223. So you sent out an additional circular?—Putting the problems to them.

8224. (Dr. Baird): It would be wrong for the Commission to take it that the recommendations for extension of grounds for divorce which are in this memorandum have really received positive support from the majority of your clubs or from all your clubs?—I think that that is so.

8225. So these are really suggestions which have come in from some clubs and have not been violently objected to by anybody?—I think that the preliminary paragraph under some of the headings makes it clear that some clubs are not in favour of an extension of the grounds of divorce at all.

8226. Thank you very much. Then, I want to ask about custody of children, to which you have not referred in your memorandum, and perhaps Miss Crowdy could answer that. Are you satisfied with the present arrangements in uncontested cases? We have had suggestions that, in uncontested cases, the families should be interviewed, and that the whole question of custody should be considered in the light of an independent report on the situation of the children?—Might I deal with that? This is only my own personal opinion, but I would be in favour of some court officer, such as the probation officer, interviewing the children, and visiting the homes where they are going to live, before every custody application. I appreciate that the judges on at the present time refer the matter to a probation officer, but I would suggest that they do not do that nearly often enough.

8227. I was rather surprised that you did not raise the matter at all in your memorandum. Does that mean that most of your members are satisfied with the present arrangements?—I would not say that. If I had put it in, it would have been my own personal view, because it was not in fact mentioned in any of the replies which came in.

8228. (Lady Blyth): I want to ask you something more about the child witnesses. Would you have them excluded in cases of custody? Do you think it inappropriate that a judge should see the child or in the lower court that the child should be brought for some sort of interview?—I think I may say that the idea underlying our recommendations on the question of child witnesses was that the child should not enter into the dispute between the parents themselves. As regards the custody proceedings, there again it is my own personal view, I think the older child might be a valuable witness as to custody, not the younger one by any means, but the older one might be.

8229. Are you not going to get rather a difficult situation? I speak from the point of view of a magistrate's court. There are times when the magistrates really must have the opinion of the child. Both sides appear together and the child is put into the position of giving some sort of evidence which is going to make one parent come out of it better than the other. Do you want children excluded from that? May I ask Miss Crowdy as another magistrate?—(Miss Crowdy): I think I would want to exclude children from that. I do appreciate the difficulties, but by and large I think, yes, sayway under the age of fourteen.

8230. Do you think that you are under-estimating the toughness of children?—That is a possibility, but I do not think so, because it is the after-effects in life which I have in mind.

8231. I have two questions on paragraph 20. I am wondering how the wife is going to live, if she is not to have a maintenance order at once. Is the wife to live on national assistance during that time, because it might be, as I read it, a whole year, might it not, before she gets an order?—(Lady Littlewood): The proposal is qualified by the words, "Unless a probation officer or recognised social worker has placed before the court a report that all attempts at reconciliation have proved abortive". If there is an absolute break, where reconciliation is quite impossible, it is not going to be a bar then to applying for a maintenance order.

8232. The husband often is not to be found. In that case, would reconciliation be held to be impossible?—Then getting a maintenance order against him would be impossible because you could not serve the summons. (Miss Crowdy): Is it not often the case that wives are already receiving national assistance for that very reason? May I just add this point? I did discuss this part of the

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evidence with a probation officer member last week and she said, "How wise that is, this will stop some of these women who marry, proceed to get rid of their husbands and get a maintenance order".

8233. Did the probation officers put this forward?—If I remember rightly, this was put forward by a club where they have a well-known probation officer as an active member.

8234. And the other point I wish to put arises in subparagraph (c), where you say:—

"It is suggested that more use should be made of probation officers' reports. . ."

If a probation officer made a report about a couple, would not that be resented? I cannot think it is the same as the reports made to a juvenile court, where a juvenile has been charged in a criminal matter?—I can tell you from experience that, in my own borough, all our solicitors are already making use of this type of report before ever they bring a case to the magistrates. Unofficially, in the cases we get, invariably the solicitor will stand up and say, "I have already consulted the probation officer and he has done all he can and given us very great help on the home, and reconciliation is quite impossible. We have tried".

8235. (Mr. Beloe): Could I go back to the question of the probation officer having to certify that all attempts at reconciliation have proved abortive? I wonder whether that is not taking the trying of the issue out of the sphere of the court and putting it into the hands of certainly a very responsible person, but not a person who is appointed to judge these things?—(Lady Littlewood): The applicant must still have to prove his or her case.

8236. Perhaps I have read it wrongly, but is it not proposed that the court would not grant a separation order or a maintenance order unless the probation officer said that all attempts at reconciliation had failed?—That is in the first year of marriage, yes.

8237. That is really putting it in the hands of somebody who is not appointed to judge these things?—No, because you have still the next step before the maintenance order is granted, and that is that the applicant has to prove that there is ground for an order being made.

8238. But I gather that you would not grant this order at all, if you were a justice and if the probation officer could not say that all reconciliation attempts had proved abortive?—The matter would not come before the court.

8239. Is that not rather refusing people access to the courts?—But there must be time given to the probation officer to try to effect reconciliation. There might be perhaps a safeguard. If, after so many months, nothing came of the probation officer's attempts, then it shall be held, *prima facie*, that the attempts have proved abortive.

8240. (Chairman): Might I ask something arising out of that? It seems to me—I may be wrong—that the matter is bound to come before the court unless the probation officer effects a reconciliation?—Yes.

8241. Of course, if he effects the reconciliation, there is an end of the matter. If, on the other hand, he finds he is unable to effect reconciliation, then it comes before the court and the court will have to make up its mind whether or not an order is to be made. Is not that perhaps an answer to your question, Mr. Beloe? (Mr. Beloe): Probably it is, my Lord, but I thought that if the probation officer was not prepared to give his opinion, the court would not be prepared to hear the case for twelve months. (Chairman): I see, for a certain time? (Mr. Beloe): Yes, and it seemed to me to be refusing access to a court to one of Her Majesty's lieges. (Chairman): I quite see that for a considerable time that might be the result. (Mr. Beloe): There is nothing more you want to say about that?—No, I do not think that there is anything more than what I have said.

8242. Then, on the question of national assistance, referred to in paragraph 20 (b), I gather you feel that the National Assistance Board should do rather more than it is doing at present to trace the husband?—(Miss Crowdy): I have very definite experience to support that contention. They should do more, they are very reluctant to take action.

8243. And therefore public funds are paying where the husband might be?—That is, I think, the suggestion that has been made to me.

8244. Have you evidence?—I could prove it, yes.

8245. Have you ever had any experience of a husband going across the Border to Scotland?—We have had it in our own local court, and it is exceedingly difficult.

8246. Have you been able to find the man once he has crossed the Border?—I think there is a reciprocal arrangement now. I did raise that point with my own justices' clerk not very long ago, and I understood from him that you can now catch the men; but I do not know, it is a moot question. I believe Jersey is worse than Scotland.

8247. The next question I have arises under subparagraph (c). I gather that this suggestion to have a probation officer's report applies to any couple where one party is seeking separation?—I am trying to visualise the evidence we have before us. I do remember that it was urged that an investigation should be made so as to build up evidence as to a man's means, which would be available to the court before it heard a maintenance case. The court would then have something to go on, and I think we built this idea of a probation officer's report on that theory. We could not go in for a means test, but one might get information as to means in that manner.

8248. You had not thought of having a report on the home from the point of view of the children?—I think we had all those things in mind at the same time, to try to get a wider picture than just the means.

8249. May I ask Lady Littlewood a question on paragraph 37, about county courts? It is said there that a great deal of the expense would be saved if undefended divorce cases could be tried in the county court. There was a county court registrar before the Commission last week and, as I understood it, he said that the cheapest rate of taxing costs in the High Court came fairly close to the rate at which costs would be taxed in the county court if divorce did come within the jurisdiction of the county court, and that therefore the only saving that there could be would be the cost of the barrister's fee, because in the county court the solicitor could have audience. Would you care to comment on that?—(Lady Littlewood): It ill becomes me to disagree with a registrar on the question of costs but I would, if I may, disagree with him. Of course the scale of fees has not been set down, but I presume that if it was dealt with in the county court, fees would be lower and the saving on the barrister, I should have thought, would be considerable. It is all very well to say, "Of course, it would only be that saving", but it would be considerable in my view. A county court bill on any litigious matter is a very great deal less than a High Court bill.

8250. It has been suggested by some witnesses—not being a lawyer I find it difficult to express myself on this—that one of the great advantages of having High Court jurisdiction for divorce is that you get uniformity on matters of principle. Would it make any difference in that respect if the county courts had concurrent jurisdiction?—A county court judge would be bound by the decisions of the High Court.

8251. (Mr. Justice Pearce): Possibly what Mr. Beloe has in mind is this: that at the present time, of course, you have counsel presenting the cases, and counsel can help any judge with reference to what his brothers tend to decide in a certain matter. That is an undoubted fact, is it not?—Yes. On the other hand, the county court judge would have the advantage of the solicitor, if I may say so, in a good many cases. (Mr. Justice Pearce): That is quite different, because a solicitor is not able to say, "All your Lordships' brethren tend as a matter of practice to do so and so", he would not know the other courts, that is the point.

8252. (Chairman): May I just add to that? Counsel practising in the Divorce Court mostly confine themselves, very largely, to probate and divorce practice. That is not universal, but they are all, broadly speaking, experts in those subjects, whereas solicitors have so many different things to attend to that if they went to county courts all over the country they might not be familiar with the practice, and the tendency of High Court decisions—I would suggest that probably before county courts came into being similar arguments were put up in the case of

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Queen's Bench Division actions, that the county courts would not be able to interpret the practice of the High Court.

8253. (Mr. Justice Pearce): But it is quite different where one is dealing with undefended cases, in which the question is what line the court should take about certain matters, from where one has two parties arguing before the judge and the judge has to do justice according to the current law. In undefended cases it is a question of what is the proper way of proving a matrimonial offence and so on, what is the standard required. Do you follow what I mean?—Yes, but I feel that that is not a sufficient disadvantage, it does not outweigh the advantage there would be in cheapening the action. (Miss Crowdy): Might I remind Lady Littlewood of one thing? The club that put forward this proposal was not only thinking of cost in terms of legal expenses, but also of train fares, etc. The county court would be a local court.

8254. (Mr. Beloe): Of course there is this to be said in relation to that, that one presumably only obtains a divorce once in one's life?—Yes.

8255. And therefore it is only an expense once?—That point of expense was brought forward in that way.

8256. I have a question now on children as witnesses. Would it satisfy you if it could be held down that a child should only be called as witness, if the court were satisfied that by no other means could a plaintiff be likely to prove his case?—Yes, I think that would meet the case. It will not always do away with the ill that I pointed out, which to me is a very real one, and I have experience to prove it, but I think your suggestion is better than nothing, and I can see the argument for not ruling out completely child witnesses.

8257. (Mr. Young): In paragraph 2 of your memorandum, you propose that the fact of living together for, say, six months during the period of desertion should not be a bar to divorce. Your aim is to protect the spouse who attempts a reconciliation, but the other spouse's offer to return is not genuine. The principle would also be applicable to cases where both spouses want to try to be reconciled. It would be a good thing, you would agree, that a period of cohabitation should be allowed which would not be a bar if the parties find that reconciliation does not work out?—(Lady Littlewood): Yes.

8258. Your proposal relates only to desertion. Would you agree that the same principle should apply in respect of an attempt at reconciliation after the commission of adultery or cruelty? Take adultery as an example, a wife might say, "I will see if I could live with him again, though he has committed adultery". She might try living with him and then she might discover she could not get the adultery out of her mind. But as the law stands at present, she would lose her remedy. Do you not think that it would be a good thing to apply the proposal you have made in respect of desertion to cruelty and adultery as well?—Yes, perhaps it would be, but the two cases are not exactly the same.

8259. If you look at it from the point of view of helping towards reconciliation, the suggestion would be a good one, would it not?—Yes.

8260. (Lord Keith): There is this difference, is there not, Lady Littlewood? In the case of desertion, what happens is that the husband, let me say, who has gone back to his wife, then repeats his desertion, i.e., repeats his matrimonial offence. In the case of adultery, however, there is no repetition of the offence unless the husband commits a fresh act of adultery, and of course, if he commits a fresh act of adultery there would be a ground of divorce on that fresh act of adultery. The adultery situation is a little different from the desertion situation.—That is why I had difficulty in replying to the question, because in the case of desertion, if the deserting party returned at the end of, say, two years, at that time you have not got a ground for divorce, whereas in the case of adultery you have got your ground before the return of the spouse. The ground is not complete in the case of desertion until the three years is up. It is rather difficult to express what I feel about it, but I agree with you, my Lord, that the case of desertion is different from the case of adultery.

8261. (Chairman): Might I ask this additional question? Have either you or any of the clubs who have replied considered the matter which Mr. Young raised in his questions?—No, that was not suggested.

8262. (Mr. Young): May I ask another question? Supposing the parties, when desertion has run for three years and the ground of divorce has arisen, decide they want to attempt a reconciliation. They live together for three months, and the deserted spouse decides that it will not work; would not that be the very same position as adultery?—No, I would not agree it is the same position. I agree that the ground of divorce has been completed, but in my view it is not the same as in the case of adultery.

8263. (Sheriff Walker): May I go back to the question of child witnesses? I would like to consider the position of the wife suing for separation on the ground of cruelty. Suppose she was advised by her legal adviser, "If you call your boy as a witness you will probably get a decree, if you do not call him you will probably fail". I do not know if you have any experience, Miss Crowdy, as to the position of mothers in such circumstances, as to whether in some cases they might say, "I would rather fall than put my child in that position"?—(Miss Crowdy): I would not have knowledge of that, sitting as a justice, but I can well believe it.

8264. Then, other mothers might say, "I do not mind putting my child in that position". Take the latter class of mothers who say, "I will call my child to do what he can". Have you observed, Miss Crowdy, how such a child in the witness box keeps looking over at his or her parent as he is being asked questions?—Indeed, yes.

8265. Suppose you did not succeed in getting your full desire of excluding children under sixteen altogether, do you think it would be better to have a provision that, when a child under sixteen is giving evidence in a matrimonial case, he or she should do it without the presence of either parent, or have you not considered that?—I fully appreciate the point you have made. Indeed, I have seen a child in court recently where we considered that it was very necessary to get her away from her mother for that very reason you mention. Your suggestion might work in a domestic proceedings court, it might not, it depends on the child. It would be better than nothing to have some provision made.

8266. I think it was also suggested to you that it might be better than nothing if it were left to the court to decide whether a child should be called as a witness or not. Take the case where the judge who is hearing the evidence decides that it is not necessary to call the child. There is always an appeal in these cases to some higher court?—I have no knowledge of the High Court. I must confine my replies to my own experience in a magistrates' court. I am not familiar with a judge dealing with children in the Divorce Court.

8267. But in separation cases?—In separation cases in the domestic proceedings court, if a child is brought into us we have the questions asked and the child goes out again as quickly as possible, but we have never been asked if we want the child or not, the child is brought, that is the difficulty.

8268. You have never had experience of being asked to say whether it is necessary to call the child?—No.

8269. I have only one other question, for Lady Littlewood. Am I right in thinking that in England the service of a summons for a separation or maintenance order and the execution of the order are done by the police in the magistrates' court? Do they charge for this?—(Lady Littlewood): The only fee one pays is the fee one pays to the justices' clerk.

8270. But if such an order has to be enforced in Scotland, is it not necessary to obtain a decree of the Sheriff Court?—I know very little about Scotland, I am afraid.

8271. I think that in Scotland the Sheriff Court does enforce by the Sheriff's own officer and there you have to pay. Is that really the trouble about enforcing English orders in Scotland, that you have to pay perhaps quite a large sum to do this?—When the question was put I did not say I had any practical experience of the problem, but I should not have thought that was the reason. But I am not prepared to deal with that. (Mr. Maddocks): If I can answer that, my Lord, that is the trouble with Scottish orders.

8272. (Dr. Robertson): My questions regarding child witnesses have really been put, but may I ask this with regard to one small point of administration, Miss Crowdy?

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Are you satisfied that nowadays child witnesses are better protected than they used to be? Are they not generally kept apart from the adult witnesses? I am perhaps thinking rather of the higher courts.—(Mr. Crowdy): I believe that is so in the higher courts, but in the county districts we are all of us still in difficulties over accommodation and our witnesses' room is full of people. If there were child witnesses and a lot of couples up on domestic proceedings, the children would be confined in that room with those adults.

8273. It would be a very great advantage if they could be kept apart and under the supervision of some trained worker?—Yes, but it is extraordinarily difficult unless you employ a welfare worker for that purpose, otherwise they would have to be with the mother or father.

8274. May I ask one question on paragraph 7 (c), where you propose that lesbianism should be a ground of divorce? Has none of your clubs criticised this proposal?—(Lady Littlewood): No one has written in saying she objected.

8275. And do you have the feeling that this evil is perhaps more widespread than is known in the courts? Have you any evidence with regard to that?—Of course, it is not an offence which is recognised at the present time.

8276. But no club has objected to the proposal?—No one has written in saying she objected to the proposal.

8277. (Mr. Madocks): I want to ask you a question on paragraph 20 (c). You suggest that more use should be made of probation officers' reports, including information as to means obtained prior to the hearing of the case. Is the suggestion that, prior to the hearing of a case, a magistrate should consider a probation officer's report relating to the facts of the case that he is about to hear?—(Miss Crowdy): I think, my Lord, we must plead that we did not word that paragraph very well, because I am confident that neither Lady Littlewood nor I would dream of reading a report prior to the hearing of a case. I must remind you of what I said earlier, that this was a recommendation from a club that felt it would be advantageous for a domestic proceedings court to know the means of the husband before it made an award, and that it should have that information at the hearing so that it did not have to adjourn to get the information. Lady Littlewood and I put the evidence submitted by this club into the form of this suggestion, that it would be a good idea to have a probation officer's report prior to the hearing, the report being obtained prior to the hearing, but definitely not to be considered prior to the hearing. But it should be available for the use of the magistrates in the court once they have decided that there is a case to answer.

8278. That I can understand, because there is the practical difficulty at the moment that whereas a court can get a certificate from a man's employers, as to his earnings, on a maintenance arrears summons, it cannot get that for an original order. That is what you had in mind, I suppose?—That is what we had in mind.

8279. (Mr. Mace): Lady Littlewood, may I examine a little further your recommendations about county courts? Would you look at paragraph 13, where you deal with enforcement of maintenance orders? There you recommend that in respect of sums not exceeding £500 a year, enforcement should be by a court of summary jurisdiction. Assume that that is a good suggestion, how do you reconcile that with paragraph 39, where you recommend that there shall be a transfer of all matrimonial jurisdiction exercised by justices under the Summary Jurisdiction Acts to the county courts?—(Lady Littlewood): Speaking now of my own personal view rather than the view of the whole of the clubs, I would be in favour of the county court dealing with all matrimonial jurisdiction which is now dealt with by the magistrates' court. That, I might say, is a minority view. In that event of course, the enforcement would not be carried out by the courts of summary jurisdiction, it would have to be carried out by the county courts, but I would give the county courts powers, which they have not got at the present time, similar to the powers which magistrates have for enforcing their orders.

8280. Then, Lady Littlewood, may I make this suggestion to you, that what you are really seeking is to

appoint a gentleman with the qualifications of a county court judge to be the sole arbiter in matrimonial courts? If you want all the machinery of the magistrates' court transferred to the county court, what is the difference except that the tribunal is one consisting of one qualified county court judge instead of three lay magistrates?—Yes.

8281. (Chairman): That is what you had in mind, is it?—It would have to be as the questioner said, because there is no alternative.

8282. (Mr. Mace): So, Lady Littlewood, can we not call him a stipendiary and face it? You would like all matrimonial work transferred to a stipendiary?—I suppose that is what I am suggesting.

8283. Are you aware that there is now statutory power to set up in the metropolitan area a special domestic proceedings court constituted by a metropolitan magistrate assisted by two lay magistrates? That is a move in the direction of keeping matrimonial matters before lay magistrates?—Yes, as I say, the opinion which I have expressed is definitely that of the minority, and the majority are in favour of all matrimonial jurisdiction being dealt with by lay magistrates.

8284. May I take your suggestion about the county courts one step further, because I want to understand quite clearly what you are putting forward? You want to give them divorce jurisdiction—I have moved from magistrates' court matters to divorce—merely because it is cheaper?—Yes, I think that must be the case.

8285. Then would you in practice put divorce cases into the everyday list?—If a separate sitting could be arranged, I think that would be better, but, there again, I can see difficulties in districts which the county court judge only visits very seldom, once every two months.

8286. Let us face it, in actual practice—because you and I know the practice—the county court judge would start with judgment summonses, and then a divorce case would come in between with possession cases and landlord and tenant cases, hire-purchase summonses and the like. You realise that your suggestion entails that?—I realise it entails that, but I agree with what you are inferring, that it would be very much better if there were a separate string. But, from a practical point of view, that is what happens.

8287. As a practising solicitor, do you select counsel by reason of his qualifications to do the particular job?—Yes.

8288. If solicitors had the right of audience in the county court, do you think that the majority of cases would be conducted by solicitors or barristers?—I think one must be honest and say that they would be done by barristers.

8289. Would you recommend that the costs of a divorce case in the county court should be on scale A, B or C?—I presume it would have to be C.

8290. Landlord and tenant cases are on B normally?—Depending of course on the amount claimed.

8291. The rent pretty well puts it on B?—Yes.

8292. Are we going to have divorce cases on B or C—they will not be on A? What are you going to advocate to us to put them on if you ask for this change?—It must be C.

8293. Let us face it, it must be C. What is the difference between costs on scale C with counsel and High Court costs?—Although you have got it from me just now that barristers would be briefed in a greater number of cases, there are still those which solicitors would do. There are many solicitors who would be quite prepared to undertake a divorce case. I have not actually worked out a bill for divorce in the county court.

8294. Let us take the running down case with costs on scale C in the county court, with counsel, and the same case in the High Court. The difference is within £5 or £10, on a £20 bill, is that right?—It may be.

8295. (Dr. Belfrage): My Lord, do you think that we might ask Lady Littlewood to give us a note of the difficulties which she foresaw in giving the wife a right to part of her husband's income? (Chairman): Could you do that, Lady Littlewood?—I have the questionnaire that I sent round to all the clubs, pointing out the various difficulties. It is fairly short.

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[Continued]

PAPER No. 102—SUPPLEMENTARY NOTE TO THE EVIDENCE GIVEN BY THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF GREAT BRITAIN AND NORTHERN IRELAND

PAPER No. 103—LETTER FROM THE NATIONAL WOMEN CITIZENS' ASSOCIATION

8295. If it is short, would you read the questions?—
I will read it:—

"The idea that a married woman should be entitled to a definite part of her husband's income at first sight would be attractive to most women, but before recommending to the Royal Commission that the law should be amended to give a married woman a right to enforce by legal action payment to her of part of her husband's income, while she and her husband are living together, those making the recommendation should be prepared to deal with the following points:—

1. If a wife sues her husband under the proposed right, it would probably break up the home.

2. Should there be a like right in favour of the husband in a case where the wife has an income (whether earned or unearned) in excess of that of her husband?

3. What proportion is to be recommended (as should be borne in mind)?

4. How is the proportion affected when the wife earns?

5. How is the wife to ascertain the amount of her husband's income and the husband the amount of

the wife's income? In considering this point, bear in mind:—

(a) To give the spouse the right to demand from employers a statement of the amount of earnings of the other spouse would involve those employers in considerable expenses, and proof of marriage would have to be provided. Should employers be liable to a penalty if they refused the information?

(b) Many people are self-employed, and would have difficulty in supplying accurate information even if they had the will to do it, e.g., golf caddies and street news vendors (earnings precarious and variable and the individuals ignorant types), women taking in lodgers, travelling salesmen on commission bearing own travelling and subsistence expenses.

6. What court would enforce payment and how? To levy execution on goods would be to break up the home. To imprison on a judgment summons or otherwise would be to defeat the object and probably to break up the home."

(Chairman): Thank you very much, that is very helpful, and thank you for your memorandum and for your help this morning.

(The witnesses withdrew.)

PAPER No. 102

SUPPLEMENTARY NOTE TO THE EVIDENCE GIVEN BY THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF GREAT BRITAIN AND NORTHERN IRELAND

(See Questions 8182-8184.)

Four clubs supported the recommendation made in paragraph 7 (a), which is headed, "Divorce by agreement". The recommendations of three of the four clubs fall within sub-paragraph (i) of paragraph (a) and one club made the recommendation referred to in sub-paragraph (ii). One of the clubs suggested that in such cases a period of ten months should elapse after the decree nisi and before the decree absolute be granted.

Six clubs supported the recommendation made in paragraph 7 (b), which is headed, "Divorce after a long period

of separation". Two of these clubs did not specify what they thought the period should be, the remainder suggested periods of between five and seven years. One of the six clubs suggested as a possible modification that if relief is to be granted on the ground that the parties have been living apart from each other for a considerable period of time, then the granting of that relief should be within the discretion of the tribunal to which the application is made.

(Dated 2nd December, 1952.)

PAPER No. 103

LETTER FROM THE NATIONAL WOMEN CITIZENS' ASSOCIATION

The memorandum enclosed is submitted by the National Women Citizens' Association. This Association includes women workers in social services, public life and the professions, also housewives, administrative and clerical workers from all parts of Britain.

The Association is all party and non-sectarian, and was formed to educate women to accept their full responsibilities as citizens.

We submit this document as a summary of those aspects of the problems concerning marriage and divorce which have claimed our serious attention for some time.

It will be seen that we include matters of detail and also large questions of principle, for we cannot envisage a satisfactory revision of the laws dealing with marriage and divorce which does not take account of the changed status of women in the last hundred years.

The Acts passed by Parliament concerning property, franchise and removal of sex disqualification, culminating in our national acceptance of sex equality as set forth in the United Nations Charter, should, we feel, be more completely carried out in our laws. Our contribution is intended to assist towards this end.

(Sgd.) VERA WEEN
President.

(Sgd.) J. V. S. PETERS
Chairman of Executive Committee.

The Chairman,
The Royal Commission on Marriage and Divorce.

(Dated 14th January, 1953.)

PAPER No. 104

MEMORANDUM SUBMITTED BY THE NATIONAL WOMEN
CITIZENS' ASSOCIATION

1. Divorce laws: suggested changes

These should be reviewed to embody the sex equality standpoint now accepted in principle in this country. (Sex Disqualification (Removal) Act, 1919, and commitments in the United Nations Charter and by Parliament.) Thus:—

(1) It should be made legal for a woman to be cited as co-respondent. (S. 3, Matrimonial Causes Act, 1950.)

(2) Damages payable to either party should be only for actual damage suffered or handicap arising from the marriage or the breaking of the marriage, i.e., (a) damages for special wrong done; (b) special damages, if any.

(3) Such legal practices as seem to be based on a husband's property right in his wife or his claim on her unpaid services should be abolished (e.g., damages awarded to a husband against a co-respondent for loss of wife's domestic services).

(4) Both spouses should be liable to be made responsible for payment of alimony to the other spouse and of maintenance to the children as well as costs of legal action if he or she has adequate means or earning power; provided always that due regard is given to the inequalities of pay and opportunity by which women are still handicapped.

(5) The level of alimony and maintenance should be reviewed periodically and should vary with the cost of living.

(6) Where the handicap or damage suffered by one spouse through the fault of the other is terminable, the compulsory payment of alimony should also be terminable.

(7) It is highly desirable that there should be set up a rehabilitation training scheme (as provided for ex-Servicemen and women) to fit ex-wives for their old or a new suitable employment, which should be connected with the existing structure of Appointment Boards, Employment Bureau and Labour Exchanges.

(8) In all divorce cases, separation cases and cases involving custody and protection of children, a competent woman (either a magistrate or an assessor) should sit on the bench to hear the case with the magistrate, stipendiary or judge. (This same principle of equality on the judgment seat should apply in all cases involving conflict between the sexes.)

(9) To avoid or prevent those differences which are the causes of application for divorce a pre-marriage consultative service is needed, covering legal and health matters and marriage relations and suitable financial agreements between the partners, the purpose being to encourage young people to start their marriage on sound lines. (A sort of combination of marriage guidance and the Legal Aid and Advice Service instituted in 1949, but this one definitely concerned first and foremost with pre-marriage advice.)

2. Courts of inferior jurisdiction: changes suggested

(1) In special cases where a husband or wife has been made liable for payments by the court and he or she defaults persistently the magistrate should be empowered to arrange for the maintenance of the dependent spouse and children to be deducted from the income of the defaulter at source. This would prevent suffering of the neglected spouse and family, reduce the call on public assistance funds, and in many cases make it unnecessary for the defaulter to be subject to legal punishment.

(2) Local legal authorities should be instructed that, in all cases involving a conflict between the two sexes, two sexes should occupy the bench.

3. Marriage: property and financial considerations

(1) *Breach of promise of marriage.* Damages should be restricted to actual loss suffered by the plaintiff and the right to this remedy should be equally available to both sexes.

(2) Where a woman is made pregnant under promise of marriage and then deserted, her needs must be carefully safeguarded.

(3) *Equal partnership in marriage* is a necessary deduction from the passing of the Sex Disqualification (Removal) Act in 1919, and the later reaffirmations. It should now be implemented by the passing through Parliament of the necessary legal rewording of the marriage laws. This legalistic recognition of sex equality should make clear beyond question that in law the wife occupies a position of full partnership in the joint home, with the financial and material rights and responsibilities of that status.

(4) The personal income tax allowances for all adults should be the same; where one income is shared for the support of two adults they should be entitled to two allowances without any reduction. (This would apply to husbands and wives where the wife has no income and also to friends or relatives one of whom is supported by the other.)

(5) The Inland Revenue practice of combining the incomes of husband and wife and then taxing it as the husband's (a practice resulting in heavier taxation of marriage) is contrary to the several (Married Women's Property Acts and to the national commitment to sex equality and should be terminated. Individual returns should be made, and full individual allowances granted. (This applies where the wife has a private income.)

4. Changes in administration affecting the position or status of the wife and mother

Although the property and citizen rights of married women have been established a great number of usages continue which are relics of the days of "coverture". The chief examples occur in:—

(a) Passport discriminations against wives and mothers.

(b) The phraseology of legal and official documents.

(c) The practice of some juvenile and magistrates' courts and their officials of refusing to accept the signatures or testimony of mothers.

(d) The Inland Revenue contravention of the Married Women's Property Acts in income tax procedure. (See para. 3.)

We suggest:—

(1) that the survival of such usages shows that there is a gap between the decisions of the legislature and their application which ought not to exist;

(2) that all such practices should be listed and reviewed and brought into line;

(3) that a method should be devised by which legal changes of status of classes of individuals should be automatically conveyed to those who apply the law, so that it will present a harmonious and consistent procedure.

(Received 15th January, 1952.)

PAPER No. 105—RESOLUTION PASSED AT A MEETING OF MEMBERS OF THE NATIONAL WOMEN CITIZENS' ASSOCIATION AND FRIENDS

24 November, 1952]

MRS. VERA WEBB, MRS. BILLINGTON-GREGG AND
MRS. J. V. S. PETRIE, R.R.C.

PAPER No. 105

RESOLUTION PASSED AT A MEETING OF MEMBERS OF THE NATIONAL WOMEN CITIZENS' ASSOCIATION AND FRIENDS

Moved by Mrs. A. D. S. Large, seconded by Mrs. Nina Spiller and carried unanimously.

In the chair, Mrs. Webb, President.

That this meeting of the National Women Citizens' Association and friends requests the Royal Commission on Marriage and Divorce to note sympathetically that there is a general and emphatic consensus of opinion in the women's societies in favour of:—

1. Such changes in the laws which will lead to a greater equality of status between the spouses of a marriage, thus bringing into line modern thought regarding all contractual agreements between the sexes.

2. The introduction of legislation regarding the payment of alimony and maintenance so that sums ordered under these headings may be collected at source, or in

such manner as the courts may decide, so that there may not be the opportunity for a persistent defaulter to wipe out, by imprisonment, the obligations he owes to his wife and family.

3. The recognition by the Commission of the outstanding importance of preventive rather than remedial action in regard both to education for marriage and conciliation and guidance, where needed, throughout its course. On these two aspects of the marriage problem the documents submitted to the Commission by the women's societies are emphatic and practically unanimous and show that the women's societies feel they are of such fundamental importance as to claim the gravest consideration in your final Report.

(Sgd.) VERA WEBB

(Dated 22nd April, 1952.)

EXAMINATION OF WITNESSES

(MRS. VERA WEBB, MRS. BILLINGTON-GREGG and MRS. J. V. S. PETRIE, R.R.C., representing the National Women Citizens' Association; called and examined.)

8297 (Chairman): We have before us as representatives of the National Women Citizens' Association, Mrs. Vera Webb, President, Mrs. Billington-Gregg and Mrs. Petrie, R.R.C., Chairman of the Executive Committee. First, could you give some details of your constitution and membership? Perhaps there is an annual report which would give all the details, without troubling you to give them orally?—(Mrs. Webb): My Lord, our membership is approximately 4,000, there are four federations, and forty-eight branches. The Association was inaugurated in 1917 and was amalgamated with the National Council for Equal Citizenship in 1946, and with the Women for Westminster in 1949. It is really an Association for the training of women for citizenship. Its aims and objects are to put more women on local bodies and consumer councils and similar bodies, and in politics. Of course, we are not a party organisation, we are an all-party organisation.

8298. Before we ask you questions, is there any other suggestion you wish to add, or are you satisfied with what is set out in your memorandum?—We are, I think, completely satisfied. Mrs. Billington-Gregg has taken a great part in drawing up the memorandum and I think many of your questions could go to her; Mrs. Petrie is our Chairman and would take mostly the committee aspects; I am President and would take most of the general Association questions.

8299. I shall ask my questions and whichever of the three you think most appropriate can answer. In paragraph 1 (2) you say:—

"Damages payable to either party should be only for actual damage suffered or handicap arising from the marriage or the breaking of the marriage, i.e., (a) damages for special wrong done; (b) special damages, if any."

I have had a little difficulty in seeing just what you meant by "handicap arising from the marriage or the breaking of the marriage" and "damages for special wrong done". Could you elaborate that a little?—(Mrs. Billington-Gregg): I think, my Lord, what we had in mind was that with the break-up of an ordinary marriage, in which there has been no special viciousness or evil on one side or the other, damages should be based solely upon what handicap one or other of the spouses suffered through the change in his or her circumstances. This injury might be specially objectionable and harmful and therefore might require special consideration.

8300. You would base damages on the actual damage that one or other of the spouses suffered, I think you said,

but I suppose it would be the petitioner who has suffered by reason of the breaking up of the marriage?—Yes.

8301. Is that by way of contrast to what has sometimes been called the value of the wife?—Yes, I think a departure from that principle was definitely in our minds. We object strongly to the present system of assessing value.

8302. That links up with your next proposal, where you say:—

"Such legal practices as seem to be based on a husband's property right in his wife or his claim on her unpaid services should be abolished."

Then you give an example. I see what you have in mind. Then, in proposal (4), you say:—

"Both spouses should be liable to be made responsible for payment of alimony to the other spouse and of maintenance to the children . . ."

and so on. That is, of course, after divorce or separation?—Yes, and always, of course, with the proviso that at the present time the economic and financial position of the woman is liable to be very much lower than that of the man, and therefore in many cases she could not justly have damages against her on a similar level.

8303. Yes, I noted that. In proposal (6) you say:—

"Where the handicap or damage suffered by one spouse through the fault of the other is terminable, the compulsory payment of alimony should also be terminable."

As I understand it, alimony at present is based on a duty to provide for wife and children. Had you in mind, when you made that suggestion, the position of a wife who could earn or begin to earn?—That is one of the things we had in mind, that if the wife is capable of supporting herself—I think the next sub-paragraph rather elucidates what I am saying—she should be given the opportunity of receiving maintenance until she can rehabilitate herself. We are applying in this matter the principle that was applied to the Services men and women who, after service, returned to civil life and were given re-training, so that they should not be financially handicapped. The same thing, we think, ought to apply to women who are not too old to face this particular situation. We think they should be given the opportunity of re-training, and during that period the other spouse should be partly, or wholly, responsible for their support.

24 November, 1952]

MRS. VERA WEBB, MRS. BILLINGTON-GREGG AND
MRS. J. V. S. PERKINS, R.R.C.

[Continued]

PAPER No. 106—MEMORANDUM SUBMITTED BY MRS. HELENA NORMANTON, Q.C.

8304. I see. We note the suggestion about the rehabilitation training scheme, but I rather doubt if that is within our terms of reference. However, we have noted it. Then, in proposal (8), you say:—

"In all divorce cases, separation cases and cases involving custody and protection of children, a competent woman (either a magistrate or an assessor) should sit on the bench to hear the case with the magistrate, stipendiary or judge."

That, I think, I would link up with your second proposal in paragraph 2, which is:—

"Local legal authorities should be instructed that, in all cases involving a conflict between the two sexes, two sexes should occupy the bench."

Although on the surface these suggestions may be consistent with your view of sex equality, are you not treating men and women as two different sorts of beings? Would you not trust a man to judge a case about a woman and a woman to judge a case about a man?—I agree, my Lord, but large numbers of women object to that particular way of dealing with sex inequality. There are some of us who feel that the ordinary method of proceeding towards the higher, attractive positions in administration or in government affairs is much too heavily handicapped for us to be willing to wait for the natural evolution of the woman judge and the woman stipendiary in sufficient numbers to secure a fair representation in the courts. We therefore feel that, since women are excluded really on the ground of sex, and since men are included on the ground of sex, there is no reason why we should not claim the inclusion of women on the same grounds. If it is a good enough ground for men to take precedence, then it is a good enough ground for the women. We feel also that the effect of the absence of women from these positions has a serious and bad influence upon the people in court, and people generally. Always these legal cases have to be settled finally, except in certain magistrates' courts—a small number of women, 4,000 I think, are magistrates, but perhaps I am wrong about the figure—all these questions are settled finally by a great central figure that is male. We feel that that has a very bad effect upon the minds of litigants, the minds of the general public, the mind of the judge himself and the mind of whoever is the victim of the decision. We want to remove that influence and we believe it could be done in some measure by this change.

8305. I quite follow that.—(Mrs. Webb): May I add that it is not so much that justice should be done, but that it should be seen to be done both to men and women?

8306. It has been suggested to us that women are harder on women than men are as a rule, but perhaps that again is inconsistent with equality of the sexes; they should be absolutely impartial in each case. Turning to paragraph 2, dealing with courts of inferior jurisdiction, this suggestion for a deduction of maintenance payments from the income of the defaulter at the source again has been made by many bodies. We are very conscious of the suggestion and also such difficulties as there

are in working it out, and I have no questions. As to paragraph 3, "Marriage: property and financial considerations", I think that the first two recommendations, dealing with breach of promise of marriage and the case of a woman who is made pregnant under promise of marriage, are rather outside our terms of reference, but again we note the suggestions. Then, in the next subparagraph, you refer to the Sex Disqualification (Removal) Act and "the later reaffirmations", and you say:—

"It should now be implemented by the passing through Parliament of the necessary legal rewording of the marriage laws. This legislative recognition of sex equality should make clear beyond question that in law the wife occupies a position of full partnership in the joint home, with the financial and material rights and responsibilities of that status."

I quite follow the general drift of that, but I wondered if you could possibly make a little more concrete what you have in mind?—(Mrs. Billington-Gregg): It is not easy for a lay person to make suggestions for the definite form of such a change.

8307. I appreciate that.—We rather feel that there is an undue time lag between the profusion of a principle by our legislators and the changing of the numerous laws which embody the earlier principles.

8308. I see, this is a principle you are putting forward?—And our feeling is that there ought to be—we know it is outside your terms of reference—but there ought to be a time limit on the two contradictory rules, as it were, being allowed to exist side by side. We do find quite often that, in the case of the guardianship of children and other such matters, many of the local courts, and some of the higher ones, apply the one set of principles, and, in other cases, others apply other sets of principles. We feel that the re-drafting of the marriage laws on the basis of no privilege for either sex, but a fair deal for both, would be a task for the Law Societies under the direction of the House of Commons and with the co-operation of the Law Lords, so that we could have a completely revised and up-to-date set of laws recognising the principle of sex equality in marriage, and the passing of such a measure should be expedited as such a long period has elapsed since the principle was accepted.

(Chairman): Yes, thank you. As to the rest of your memorandum, I am rather afraid that most of it is outside our terms of reference. We cannot deal with the personal income tax allowance, however much many of us might like to do so. It is rather a matter for the Chancellor of the Exchequer. Then these other matters, passport discrimination, and the Inland Revenue contravention of the Married Women's Property Acts, are rather outside our terms. However, we have noted your suggestions and, in so far as they are within our terms, we shall certainly deal with them. I have no more questions. We have all your proposals well in mind, and in many cases they are so clear that there is no need for questioning on them. Thank you for your memorandum and for your help today.

(The witnesses withdrew.)

PAPER No. 106

MEMORANDUM SUBMITTED BY MRS. HELENA NORMANTON, Q.C.

PREFACE

I. From December, 1922, until shortly before her retirement in 1950, the writer practised at the English Bar; in general practice but mainly in matrimonial and criminal matters. She worked for the passage into law of the proposals of the Royal Commission on Divorce of 1912, from about 1923 until she dealt with the late Mr. Holford Knight, K.C., M.P. In 1936, at the Conference of the National Council of Women held in Edinburgh, under the Presidency of Lady Netherbourne, she moved on behalf of the National Union of Societies for Equal Citizenship the resolution giving support of the National Council of Women to the Bill then being presented by Mr. A. P. Herbert, M.P., which eventually became the

Matrimonial Causes Act, 1937. This duty she performed in the teeth of the most intense hostility of such organisations as the Mothers' Union. This is mentioned merely to illustrate the fact that the writer is by no means hostile to reasonable reform of matrimonial law. That having been established, she would further add that she has been for some years now gravely appalled at the increased numbers of dissolutions of marriage today prevalent.

2. The occurrence rate of statistics in juvenile crime—under the Welfare State—is in her view, most alarming. In the aggregated years 1948, 1949, 1950, 107,259 marriages were permanently dissolved, in the same years 125,552 cases of proved indictable juvenile delinquency were dealt with by magistrates' courts. She therefore advocates no

further addition to the grounds for dissolution (other than the one case in her section on equalisation plus the recommendation upon nullity) until there has been a most serious attempt for the next few years at the stabilisation of marriage as an institution. A dissolution of a particular marriage is not a "reform" of that marriage. Increase in the grounds for dissolving many marriages is not a reform of marriage as an institution.

3. Every possible attempt should be made to improve preparation and education for marriage, so that each union might at least have a good chance of becoming a biological success. Early marital trouble in that respect should be met by early aid, whether spiritual, surgical, psychological or medical. Complete impossibility of remedy should be met by an early decree of nullity, if necessary on the joint application of both parties to the union.

4. Assuming biological success, the next great necessity in the view of the writer is an enhancement of the economic dignity of the wife. It is respectfully submitted that a compulsory allocation to her of an amiceably agreed part of the family income, as part of her common law maintenance would be practical, because of its high degree of priority in the periodical partitioning of the family funds; and because of its elasticity in accordance with the varying budgets of varying families. So long as husbands and wives can agree between themselves what such allocation can and should be, then no outsider should have any right of scrutiny or adjudication. But absolute refusal of any allocation, or a demerit one, could be made the subject of outside arbitration.

PART I

SUGGESTED CHANGES TOWARDS EQUALISATION OF LAW AND IMPROVEMENT OF PROCEDURE

A. Administrative changes suggested

5. That the title of the High Court Division be changed to "The Probate, Matrimonial and Admiralty Division". "Divorce" is inadequate and undignified as a description of that part of the Division, nor is it a desirable target to set up.

B. Proposed amendments to the Matrimonial Causes Act, 1936

6. (Section 1 (1) (b)). For "has deserted the petitioner . . . for . . . three years immediately preceding the presentation of the petition" substitute "two years" and delete "immediately preceding . . . petition".

Until the 1937 Act "two years desertion at any time prior to the petition" was the ground. The new "three years immediately preceding the presentation of the petition" was put in by Mr. A. P. Herbert, M.P., hoping to mollify the Church of England. It had no such effect, but it does make the lot of the petitioner much harder and more expensive. By the time three years' desertion has been accomplished, the errand spouse has sometimes totally disappeared, and service is difficult. The petitioner may also have fallen into adulterous courses during so long a period of separation.

7. (Section 1 (1)). Add, "(c) A petition may be presented by the husband on the ground that the wife has committed an unnatural offence with another woman or has committed an act of bestiality".

By the Declaration of Human Rights, proposed at the United Nations General Assembly on 10th December, 1948, to which the British Government is a signatory. Article 16, paragraph 1, requires such a change. "Men and women . . . are entitled to equal rights as to marriage . . . and at its dissolution". Hitherto women only can allege sodomy and bestiality. These practices do occur in women. The writer has known of many and grave instances of lesbianism which have not only left husbands deprived of proper consortium, but have resulted in most anomalous and dangerous positions between the lesbian addressees. Reference might be made to *The Times* report of *Rex v. Scott*, 22nd February, 1952, where one lesbian actually murdered another. Other newspapers suppressed the nature of the "friendship". It is not adequately realised that some women are addicted to bestiality. (So far as professional etiquette may permit, the writer could give some oral evidence upon this.) The court has recognised the first as an aggravation of cruelty in *Gardner v. Gardner* (1947) 1 All E.R. 530, whereas

it used to be said that the courts would not recognise it at all. It should be a sufficient cause in itself apart from cruelty.

8. (Section 2.) Delete the whole.

This clause forbids presentation of a petition unless three years have passed since the marriage. It was awkwardly added to the 1937 Act by Mr. A. P. Herbert, M.P., to placate the then Archbishop of Canterbury. It failed to do so. Vide his remarks in Hansard when this Bill was before the House of Lords. It is a delay of justice contrary to *Magna Carta*, which promised that justice should not be denied nor delayed. A further evil followed in its train, namely, that a spouse could obtain leave to present an earlier petition by proving undue hardship or depravity of the proposed respondent. This was by summons heard *in camera*—another evil, for secrecy of hearings makes consistency in judicial practice unlikely. If a marriage is speedily proved to be irretrievably intolerable, better dissolve it before two or three children can be born to it, or very possibly children be born to an irregular connection formed by either spouse after marital cohabitation has ceased.

9. (Section 3 (2)). "On a petition for divorce presented by the wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent." For "may if it thinks fit" substitute "shall".

The old idea that the woman in the case was a mere figurehead of straw and that it is unfair to saddle her with any responsibility is well out-of-date by now. If she cannot in the end pay anything—well, she cannot. That is no reason why she should sink away unobserved. If she can pay then or later on, she may as well be in the proceedings just as the male co-respondent has to be.

10. (Section 8.) Add, "(e) that, notwithstanding any alleged agreement prior to marriage, the respondent since the marriage has wilfully and continuously used such contraceptive appliances, medications or the like, or has wilfully indulged in practices of *coitus interruptus* or the like, so that that spouse has prevented the possibility of conception of any child of the marriage, such prevention having been against the expressed will of the other spouse".

Baxter v. Baxter (1947) 2 All E.R. 386 (Affirmed [1948] A.C. 274) has left sexual indulgence as the only object of marriage. See *Medico-Legal Journal* 1949, Part 2, page 56, especially at the end of page 58 onwards. *N.B.*—Spouses who both like that position are not interfered with by the proposed amendment, nor does it make the use of contraceptives illegal. It would release from a marriage a man or woman wilfully deprived of issue to the marriage by the other party to the marriage.

11. (Section 30 (1)). For "A husband may . . . claim damages" substitute "A husband or a wife . . . may claim damages".

Damages are now supposed to be settled by the court upon the children of the dissolved marriage. Thus, the children in a marriage broken up by a man may become far better off than the children of a marriage broken up by a rich woman. This seems very unjust. The assessment of the wife's (or in future the husband's) economic, etc., value does not seem to differ in essence from the assessment of the economic value of the death of a breadwinner to bereaved dependants in accident cases. The loss of a father may become to children a more serious economic loss than the loss of a mother. In certain of the United States of America children may now sue for damages against the breaker-up of the home, by way of litigation collateral to divorce proceedings or quite separately from such proceedings.

C. Orders to maintain

12. Enforcement of these in both the High Court and courts of summary jurisdiction should be strengthened.

D. Nomenclature

13. A short new Act may be thought necessary. Notwithstanding the common law right for a wife either to retain her maiden surname or to assume the surname of a husband and the right of any person to change his

surname at will other than for purposes of fraud, it should not be legal for a single woman or a married woman living apart from her husband or a widow to assume a new surname without accompanying such change with a formal declaration that she is not doing so in connection with cohabitation with a man, and that she will not register any child born as a result of such cohabitation as legitimate, nor purport to exercise the common law agency of a wife for the purpose of purchasing goods without the written authority of the man with whom she is cohabiting. What are known as "foed office marriages" or "London Gazette marriages" should be rendered impracticable. Where men and women not married to each other are cohabiting, they should in all formal documents or proceedings be described as a cohabitor or a cohabitress. The term "unmarried wife" should never find any place in any legal or State document.

E. Courts of summary jurisdiction

14. Their functions should be quite distinctly divided into matrimonial, and criminal and other, by some suitable change of title, e.g., the Domestic Relations Court. The remedies available to wives greatly exceed in number those available to husbands. So far as may be practicable, this inequality should be remedied.

F. Domicil

15. It is recommended that:—

(1) Legislation should empower a wife to have a legal domicil separate from that of her husband so that an English court might grant relief in any petition in matrimonial causes where either the husband or the wife is resident in England.

(2) An English court should recognise the validity of a decree of a foreign court where the law of the country in which either spouse is domiciled recognises such decree.

(3) Every inequality relative to sex in presumption of domicil should be removed.

(4) The constituents of domicil by English law should otherwise remain unchanged.

G. Proposal for divorce after seven years' separation

16. The writer is opposed to the grant of divorce upon the petition of the deserting party and draws most serious attention to the grave economic disadvantages which would be inflicted upon the wife if such a retrograde measure should ever become law. There is also a grievous wrong inflicted upon the issue of the lawful marriage, in addition to the social and economic wrong inflicted by the infidelity of a deserting father. The principle also of the law favouring a wrongdoer at the expense of a "right-doer" is contrary to the whole spirit of justice.

PART II

ECONOMIC MATRIMONIAL REFORMS SUGGESTED

A. Economic reforms desirable

17. The celebration of a valid contract of marriage should legally imply:—

(1) Right to disclosure of assets and liabilities

Right to complete disclosure by each spouse to the other spouse of pre-nuptial liabilities and assets. Failure to do this within three calendar months shall give right of recourse to a court. This right shall be continuous throughout the marriage exercisable at agreed intervals.

(2) Joint, several and mutual responsibility for the upkeep of the marital home

(a) The husband is primarily liable to provide a home for the wife and children in reasonable proportion to his resources, whether such resources comprise assets, skill or manual labour, and shall maintain wife and children at the scale of living he decides upon for himself. The wife must contribute to the marital home a reasonable proportion from any separate funds over which she has control.

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Her personal work in running the home must be counted as, at least, a contribution equivalent to the sum the husband would otherwise have to pay for such services, although it can in no sense be equated with the spiritual value of all that she amounts to as wife and mother. But, in all cases where custody or guardianship of children is under consideration by any court (or by any State official, e.g., a passport officer) the part contribution of such home-making services by the mother must be computed as a definite partial maintenance of the child or children reared in the said home, and the father no longer be empowered to describe himself as having solely maintained the children of the marriage.

(b) The husband is primarily responsible for choosing the locality of the marital home, but unless he assume entire financial responsibility for its upkeep, which in consideration of (a) above would logically involve hiring a paid housekeeper to run the home, he must give reasonable consideration to the wife's access to work undertaken outside the home.

(c) Common law maintenance of the wife must include a reasonable proportion of the income for her common law personal allowance with full liberty to apply it to all proper purposes without accounting for such outlay to anyone. If and when a wife inculpates herself for performance of her duty in running the home by addiction to alcohol or drugs, the allocation of her common law personal allowance for remedial purposes shall be within the discretion of the court.

(d) The funds for which the wife becomes her husband's common law agent in order to provide for the running of the household shall be and remain his property and the wife be accountable for the same. Any surplus remaining from such household expenditure shall be returnable to the husband or remain his property as at present; and any savings shall to be and remain; unless there is evidence that the husband has given his consent to any other arrangement. Where the wife contributes labour or funds, there shall be due apportionment of any surplus in proportion to such labour or funds. Such division shall be at the discretion of the court when any decree for the dissolution of marriage, nullity or judicial separation has been made and regard shall be had to the conduct of each spouse during the marriage. (Vide also sub-paragraph (e) below.)

(e) Provision for contingencies or the future, whether made by invested or uninvested allocation of funds, insurance or the like, shall be equally divisible between the spouses, unless they have made a written agreement to other effect.

(f) If one spouse be willing to disclose to the other his or her testamentary arrangements, that shall impose upon the other spouse the duty to make a mutual and similar disclosure. (It is not supposed that this would be effectual other than as a reminder to make wills. But most intimacy is the result of negligence.)

(g) Unless there be a written contract to other effect, the marital home shall be the joint property of the spouses. If there be any attempt by one spouse at disposal of the whole or part of it without the consent of the other spouse, he or she shall have the right to obtain an immediate interim injunction to prevent unauthorised disposal. Disposal of the home immediately prior to desertion of one spouse of the other shall be invalid, and the deserted spouse shall have the right to follow and reclaim any chattels so disposed of; or, alternatively or additionally, to proceed against the other for breach of contract, or in tort according to the nature of the conduct of the spouse purporting to dispose of the chattels.

(h) Husbands and wives shall be enabled to institute proceedings in tort against each other even if living together.

(i) Each spouse shall have an equal voice in the exercise of hospitality within the home, and the wife and husband's relatives and friends shall have equal right to accept invitations to it, and unless good cause arise for the exclusion of any particular person from the home.

B

PAPER 105. MEMORANDUM SUBMITTED BY MRS. HELENA NORMANTON, Q.C.
 MRS. HELENA NORMANTON, Q.C.

24 November, 1952]

(j) (k) [These sub-paragraphs refer to the position on the death of one of the spouses and have not been reproduced as this is a matter expressly outside the terms of reference of the Commission.]

(l) Husbands and wives should be separately assessed for income tax and their taxable resources should not be aggregated.

(m) The reciprocal household responsibilities of a wife to a husband should be adequately enforced. Willfully negligent housekeeping should become amenable to law, whether by way of remedial training or penalty.

(n) Where the spouses have a business in which the wife runs the home and helps more or less in the business, the profits should be assessed at intervals and she should receive a due apportionment of such profits. The term "business" shall include book-keeping, and lodging or boarding-house keeping and the like.

(o) Wherever a husband would be destitute or is incapacitated by age or infirmity, a wife shall be deemed to owe reciprocal duties for his care and maintenance so far as her earning capacity and/or other resources may permit.

B. Legal remedies

18. For rapid disposal of minor cases, at every court of petty sessions there should be a Department of Domestic Relations, where advice, conciliation, arbitration and adjudication, interim injunctions, declarations and the like should be rapidly available. Appeals from such courts should lie to the local county court, and, if necessary, from thence to the High Court. There should be an entire separation in the staffing of such courts from the criminal side of its jurisdiction. Probation officers should be empowered to act solely in criminal matters and have nothing whatever to do with matrimonial matters. This is not meant to imply the slightest reflection upon probation

officers, who often do excellent work. The suggestion for separation is meant to enhance the dignity of marriage as an institution. It seems gravely incongruous to have that sacramental union kept in repair (so to speak) by a man or woman who may within the same hour of a call upon an unhappy couple be dealing with the little boy next door who has been tampering with a slot machine or stealing apples.

19. A totally different type of subordinate officer should be appointed to the domestic relations side. There might well be a number of legally qualified women stipendiary magistrates appointed to provide a suitable bench and the requirement of the law that stipendiary magistrates should have practised in the courts for seven years preceding appointment should be strictly adhered to. Such practice should always have included a large proportion of work in matrimonial courts.

20. The writer is profoundly imbued by the ideal of enhancing the dignity of marriage and is therefore opposed to the appointment of lay women assessors and the like. Conciliation and advisory officers should be specially trained for their important duty.

21. Domestic relations courts should have widely extended power to enforce maintenance orders by any and every appropriate and effective method, which might frequently include garnishment orders on the defaulting spouse's earnings at the place of earning, or a charge upon assets receivable at the defaulter's bank, or through trustees of any funds beneficial to the husband, or from any lump sum awarded by way of damages—on short, from any existing or future assets. Sentences of imprisonment should not extinguish defaulters' arrears of maintenance, other than for the exact period of the detention. All penalties and remedial treatments applicable to male spouses should be applicable to female spouses. Both alimony and permanent maintenance should be granted in suitable cases to male petitioners in divorce or male applicants in lower courts.

(Dated 30th April, 1952.)

EXAMINATION OF WITNESS

(MRS. HELENA NORMANTON, Q.C.: called and examined.)

8309. (Chairman): Mrs. Helena Normanton, you are a Queen's Counsel, and you set out some of your qualifications in paragraph 1 of your memorandum. Before we begin to ask you questions, are there any additional suggestions you would like to make?—(Mrs. Normanton): I think, my Lord, it would be helpful if I make a short preliminary statement. The most recent annual figure for divorce, from the latest statistics which have been compiled, is 28,200. To my mind, divorce has assumed most horrifying proportions in this country, and the whole aim I have in mind is that marriage should as far as possible be strengthened from the inside, and it is my great hope that everything will be done to build it up. In particular, I should like to place in the forefront of anything I might urge, most respectfully urge, upon this learned Commission, that there should be more economic justice in the ordinary household. At a time when even children who are maintained in State institutions at the expense of the taxpayers are allocated a definite amount of pocket-money every week, it is to me horrifying that the wife in the ordinary home has no claim to any independent spending money—I am setting aside, of course, anything she earns herself or has inherited, and so on, I mean from the money the husband brings into the home—unless she asks for it, gages for it, wheedles for it, cries or whines for it—although perhaps in the great majority of cases the husband is very much better than the common law of this country forces him to be. The common law should be extended so that no man can say, in court or anywhere else, that he has maintained his wife, until she has had a little money of her own to spend without asking him for it. If she wants to buy a present for him or her child, or her parent, she ought not to have to ask her husband for the money to buy it. At the same time, I would urge most respectfully that nothing whatever in the way of legislation should be placed upon the statute book which in

any way impairs the Married Women's Property Act. It is most important that they should be maintained. I am heartily in approval of the resolution just passed at the Eastbourne Conference of the National Council of Women, which goes elaborately into the question of what the wife should do for the accommodations or the aged husband, the husband in impaired health or disabled from any cause, or bankrupt even, that she should, if she has separate funds, be liable for his maintenance if and when he should need it. The last thing I would ever put myself behind would be anything unkind or unfair to the husband.

In the course of my experience at the Bar, one way or another, I advised or appeared in something approaching 2,600 matrimonial cases, and I know it is so true, women are not all angels, and very often a husband needs to a certain extent the protection of the law against a too-rapacious wife, or a wife with many other faults. But, at the same time, eighty per cent. of married women in this country do not go out to work—twenty per cent. do, roughly speaking, that is the last information published by the Ministry of Labour. I am thinking of the eighty per cent. of women in the ordinary houses of the country who have not got inherited or settled funds, and have no separate income from working. I believe that this Royal Commission could do more to build up happiness in marriage by making the wife happy in that respect, by giving her a little independence, than by almost any other stop they could take.

I alluded just now to the woman who goes out to work. Since my name became prominent in the Press last February, as advocating this extension of the common law, married women have been writing to me steadily ever since from all over the country. I have been amazed at the number who have written to me saying: "I do not want to go to work, but I do go out to work

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to get a little independent spending money". It very often works out that the net amount they have is exceedingly small, because they feel in honour bound to pay something by way of replacement of domestic service in the home, getting a woman in to do daily work, and so on, and to make some provision for the child being attended to and fetched backwards and forwards from school. Very often a woman is earning several pounds a week, and finding that she has not more than 10s. or 11 for herself, and deplores that she leaves her young children in the home.

As well as having experience in the matrimonial courts, I was for nearly seven years the administrative barrister to the barristers at the Old Bailey Bar Mess—they called it the junior, but it is really being a combination of treasurer, secretary, domestic servant, adviser, help and I know not what else. The effect was that I was a great deal of time in the building, and consequently when there was a dock brief popping up, or somebody wanted, I was constantly being sent for. I should not like to say the number of dock briefs I did during that seven years, when perhaps no other barrister was available. Any number of young men and women are tried there, and if you have a dock brief, my Lord—I am explaining this rather more for the lay members—you do not have a solicitor and you do all your talking to your lay clients yourself, and you have to see them very quickly, perhaps the case is coming on in ten minutes or a quarter of an hour. Almost the best thing to ask them first of all is: "Ever been in trouble with the police before?" and how often those young people say, "Yes". "How did you come to get into trouble?"—Oh, well, Mother was out working and I had to wait to get let into the house, and I met some bad boy friends"—or girl friends. Boys, of course, are the great majority of these young delinquents—and over and over again it was the absence of the mother from the child at an early stage, whether it be a divorced home, a broken home, a drunken home, a criminal home, a war-shattered home, there is no one reason, sometimes a combination of two or three of them. It is all most heart-rending, what the absence of the mother means in the juvenile delinquency statistics. I have sat in those cells at the Old Bailey, and the sessions too, and heard that tale so often that I have almost felt I could have written it out before the young person told it to me. We ought to do everything to keep mother and child together, everything to keep husband and wife together.

My Lord, I would say one further thing. That is that there has been an enormous advance both in medicine and surgery in recent years, which is of great importance in correcting marriages which are unhappy biologically or physically. There was a lecture delivered at the Medical-Legal Society by that very great gynaecologist, Dame Louise Mollison, showing how very much could now be done. I myself was electrified at hearing her describe how a woman who had married, and was proved to have no real physical vagina at all, had been surgically supplied with one made from the materials of her own body. That is a case where surgery has turned a wretched marriage into a good one. So much is going on so rapidly. The question of male infertility is now being dealt with very carefully. But what troubles me is, how is the knowledge that these things are now being done being got round to the ordinary populace, to the marriage guidance counsellors, perhaps, to the clergy, ministers, rabbis, or people associated with the guidance of the young, to those who are in charge of secondary schools, and all schools? How is this knowledge being broadcast, that the medical and surgical side of healing is advancing so rapidly that many and many a marriage which ten years ago would have been a wrecked marriage, because of the physiological difficulties of consummation, can now be remedied as it ought to be? I worry about the gap I see between a few people sitting in the Medical-Legal Society and hearing these things, and the vast bulk of the population which does not seem to get to know about them, and at the moment, my Lord, I see no bridge, or not much of a bridge. Much more could be done, and ought to be done.

I now want to emphasise a painful part of my evidence, my Lord. From my very earliest days at the Bar I found that some solicitors brought up, at the calling of the first woman, some really horrible cases. I think I had been less than twelve months at the Bar when I had to conduct a bestiality case, I have had to conduct sodomy cases

on behalf of wives. I have also had the really bitter and humiliating experience of sitting in my chambers and having had brought to me by solicitors their male clients to hear from my lips that if their wives were in unnatural sex relationship with other women they had so remedied, and after a while I formed the impression that these were brought to me deliberately in the hope that some day I would speak out about it. I do so now, with great respect. I submit that the grounds of divorce should be extended to equalise the position of unnatural vice, so that when a husband finds himself married to a wife who is what is frequently called a lesbian, he should have the same opportunity of getting free from that marriage as a woman does who finds that her husband is having an unnatural sexual relationship with another man.

8310. That is in your memorandum, is it not?—Yes, I want to emphasise it because, since the war, everything which came to me tended to prove that lesbianism is very greatly on the increase, and that the custom which, I understand, originated in Berlin and got through to Paris during the German occupation, is now in London, of lesbian exhibitions being arranged in private houses, and it is now being run as a paying racket. To my mind, that is most monstrous, but if you were to tell a policeman, the next one you met in the street, that at, we will say, an address in Grosvenor Square, something was going on, he would not have the smallest power under the law to interfere, and if you put it before the court in a divorce case it is no ground. Lately a certain amount of it is being got around by trying to bring it in as cruelty. A very monstrous and shocking example turned up some time ago in *The Times*—I forget the date, but it could easily be ascertained—of a husband wishing to divorce his wife, putting down her association with another woman as cruelty. The other woman was apparently not notified, but got to know, and apparently she wished to defend herself against this terrible charge. She asked for leave to intervene, and the registrar refused, but eventually the Court of Appeal gave her permission to intervene. That seems to demonstrate pretty clearly, my Lord, that had she not happened to hear about it before the case came on, had the case been heard, had the husband been believed, had she not been called in any way—and she could hardly be called to testify to her own wrongdoing—in that case her reputation could have been blasted for life, without any chance of her defending it. My Lord, I do submit most respectfully that the way to deal with these cases is not to drag them in in this very disgraceful way of calling them cruelty, but to call a spade a spade, and to give a husband who has a wife who acts in that way the same right as his wife would have had, had he acted unrespectably. I cannot see the justice to men of the present law.

I should like to conclude by saying that I have had the opportunity, through the great courtesy of the Bar Council, of which I was myself a member for four years, of reading the whole of their evidence, and I place myself unreservedly behind it, particularly at certain points. What the Bar Council has to say upon domicile is infinitely more learned and better than my little rough draft, which is merely a pointer and nothing more. I wish from my own experience to support everything that the Bar Council says against extending the grounds of divorce, except in the particular which I have mentioned, which is a mere piece of equalisation of what exists for one sex but not for the other. I think the Bar Council is most admirable when it deals with the question of drunkenness. I also do not think it would be at all right or wise or good to allow a wife to divorce a husband because he is serving a long criminal sentence. My Lord, the vast majority of people who get committed to prison get there because of some offence against property. I have dealt a great deal with the womenfolk of men criminals, and I think that, in nine cases out of ten, the wife knows perfectly well what is going on, and has been living to her own knowledge upon the proceeds of the crime. Therefore it would be a horrifying thing to let her turn round and use what she has been taking advantage of as a weapon to dissolve her marriage. It could not, my Lord, it seems to me, really be in accordance with public policy to do that.

Those are the main points I wish to emphasise, and I should be very pleased to do my best to answer any questions which you care to put to me.

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8311. With regard to the matters you have mentioned in your statement, first, as regards imprisonment of the husband, let us say (though it might be a wife), as a ground for divorce, would you agree with the suggestion that it should be a ground for divorce only in the case where a life sentence has been given for a crime? Of course, a life sentence may not mean imprisonment for life, but would you be in favour of divorce if a life sentence were given, or not?—The very most I should be in favour of in that respect would be that it might be within the discretion of the court. I would say this, it is not generally realised that in the commission of a crime, husband and wife are one. The wife may very well have conspired in that crime, but she cannot be indicted as a conspirator.

8312. I quite follow that, and your answer is that you object to it on the grounds that the wife might have been a participant. Supposing the law were this, that the judge should have power to refuse a divorce if the wife were in any way connected with the crime? I suppose you might say that perhaps that might not emerge in the case of the trial of the husband? With that limitation, you would still be against it, I gather?—I should not be strongly in favour of it, but I do not think I would die on the barricades against it.

8313. That would be a very limited ground. I had in mind the Report of the Royal Commission on Divorce and Matrimonial Causes in 1912, under the chairmanship of Lord Gorell. That Commission dealt with the matter of a committed death sentence. As regards the other matters mentioned in your opening statement, we have had suggestions from many witnesses that lunaticism should be a substantive ground for divorce. We have also had suggestions that the wife, where her means allowed, and the husband was in want, should be equally bound to contribute to his maintenance. That was one of the points you made. As to these I have no questions to ask, but as regards your other suggestion, that a wife should have an absolute right to a proportion of the husband's income to be her own spending allowance free from his control, I think you say that that should also be so in the case where the wife has money, and the husband has none?—Yes, my Lord.

8314. I want you to deal with the practical difficulties. If we recommended that, we have to think of some statutory provision which will put that obligation on the husband and the wife, respectively, and I would like to know how you think that statutory provision could be framed. Should it be some proportion of the total income, or some proportion of the net income after meeting such expenses as rent, and housekeeping, insurance, income tax, all the burdens which fall upon married people, and if so, what sort of proportion? I think we all appreciate the reason behind this suggestion, and indeed you have stated it with much force and clarity. But it would be a help to us if you would tell us just what you would put in the Act, or approximately the lines on which you suggest legislation should be framed.—My Lord, the husband's best liability is to the State, and he must first of all make provision for all taxes, and the like. We cannot avoid that. In that category, too, I would put the fact that he perhaps has a court order against him, an affiliation order in respect of an illegitimate child or children. Quite possibly, if he has married a second or third time, he has existing liabilities to children already born, legitimately. These come before his household, and when he has allocated the money for those liabilities, he has then to think what sort of a household he can afford. He must not, therefore, I suppose, take a house which would take ninety per cent. of the remainder, to put things very crudely. He must then plan his household in accordance with the new responsibility he has taken on, say of the new wife—she may be first wife, she may be second, third or fourth. If you imagine a sensible marriage, with people being fully in each other's confidence, they should tell each other everything about the existing liabilities, the wife may have a mother to keep, for example. Then they must work out their budget between themselves so that some proportion, whatever they like between themselves, shall be her independent spending money. But, if it becomes a case of a decisory amount, we will say 6d. a week from a well-to-do man, or an

absolute refusal, the wife should then have a right, it seems to me, to have a declaration made by some suitable court or arbitrator—there should be some mechanism in the Act to remedy the position. I believe, however, that it would work out very much like, say, the rationing system, the vast majority of people will obey and you will only have to go after the few recalcitrants.

8315. But my trouble is, obey what? I suppose you contemplate a statute which says in terms: "A man shall pay his wife as a spending allowance under her own control, something". How are you going to define that something?—Something which is mutually satisfactory.

8316. Something which is mutually satisfactory, but if you get to that stage then that is simply a matter of agreement, and that happens in the vast majority of households today. What extra liability are you imposing by statute?—It seems to me that you would have to give a wife, in the same way that she can obtain an order for maintenance when her husband refuses maintenance absolutely, or wanders off, you would have to give her a right to get the amount settled by a court, if the husband did not give her anything, or if he gave something, as I say, which was derisory.

8317. I quite follow that, but what I am dealing with is the initial stage. A husband should be bound to give to his wife, what? Unless you define the original obligation you cannot have subsequent provisions for going to a court to get it settled. If you say: "He shall give her ten per cent. of his free spending money", or something of that kind, I suppose you would go to the court and investigate the figures and determine what was ten per cent. of his spending money, but what is going to be the initial liability? That is the difficulty I feel in the suggestion of imposing a legal liability on a husband to do something—it is rather analogous to the ordinary maintenance, that is such a fluctuating thing.

8318. But then, you see, a husband is under a duty at common law to maintain his wife, and if he does not maintain his wife then the wife can go to the court and get a maintenance allowance fixed. My difficulty is, and still remains, what is the initial duty which you are going to impose on him? Define it in words.—That his common law maintenance must include some proportion of his income for her spending money, free from his control.

8319. But some proportion of his gross income, or his net income, or what? How do you define "proportion"? Or would you simply leave it as "some proportion"?—I think it could be left, and I think that the vast majority of married couples would work it out amicably, and in the case where it was not worked out amicably there would have to be recourse to some authority which would be stated.

8320. You realise that I am not seeking to put difficulties in the way, in the least. I am putting to you the difficulties which have been raised by other witnesses and which are very much in the minds of the Commission. However sympathetic we may be to the achieving of some end, we have got to consider the means by which it is to be achieved. However, I think I have your answer to that.—I think that if I were to be too definite, hundreds of objections would come up. Take the case of a taxi driver, who one week has a very good week, because the rain is coming down hard, next week he earns much less, how are you to say what percentage he is to give to his wife? In the good week he will give her more, and in the bad week he will give her less, perhaps.

8321. That is exactly the sort of instance which is put to support the proposition that is made, that such matters must be left, by reason of administrative difficulties, to arrangements between husband and wife, and are not matters for legislation. That is what has been put to us more than once.—I think, my Lord, that something could be done by way of legislation, but I think the courts would work out the details.

8322. Very well. Coming to your memorandum now, I have comparatively few questions. In paragraph 8 you propose the deletion of Section 2 of the Matrimonial Causes Act, 1950. That is the Section preventing a petition for divorce being presented to the court within

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the first three years of the marriage, subject to a proviso. I just want to put this to you: it is suggested that the reason behind that Section—and some witnesses suggest that it is a good one—is to give newly-married people a chance to settle down and get over their early difficulties by determining to make a success of the marriage, instead of rushing to the Divorce Court. What do you say about that?—I think that is quite good. I must say at once, and I would like to be quite honest with the Commission, my views have fluctuated all along about this three years' bar. I have seen it work out well and badly, and with almost any change one suggests that might be so, I know.

8323. You see the arguments both ways?—Yes.

8324. Would you pass to paragraph 13, under the heading "Nomenclature"? You suggest there:—

"Notwithstanding the common law right for a wife either to retain her maiden surname or to assume the surname of a husband and the right of any person to change his surname at will other than for purposes of fraud, it should not be legal for a single woman or a married woman living apart from her husband or a widow to assume a new surname without accompanying such change with a formal declaration that she is not doing so in connection with cohabitation with a man . . ."

I was not quite sure how you thought that came within our terms of reference, because for my own part I do not see that it does.—My Lord, I think quite possibly it does not. I perhaps misunderstood the terms of reference at the time. At the same time, I might just mention as a fact, that within my own knowledge, and indeed that of many others who practise in the Divorce Division, it is more and more frequent for the woman in the case to take the husband's surname by one of the recognised methods, and simply to pass herself off as the wife.

8325. That has been brought to our attention many times, especially in letters from wives, when the husband's mistress is taking the wife's name, and even the shopkeepers say, "Who is the real Mrs. Brown?" That must be excessively annoying for the wife. Yours is a suggestion with which we may have great sympathy, but I do not quite see that it comes within our terms of reference.—I have had one or two letters from tradesmen who have been defrauded, thinking they were dealing with the real wife.

8326. It might be a very good suggestion, I quite see the force of it. In paragraph 14, under the heading "Courts of summary jurisdiction", you say:—

"The remedies available to wives greatly exceed in number those available to husbands. So far as may be practicable, this inequality should be remedied."

I think you have in mind there the obligation of a husband to support his wife, and that there is no corresponding obligation on a wife to support her husband?—Partly.

8327. Which remedy, of course, is there being more remedies available to a wife?—And partly, my Lord, no real obligation on the wife, which I have ever been able to ascertain, to keep the home as a home should be kept. I am intensely sorry for the man, especially for the ordinary working man who goes home and finds the bed not made, the ashes in the grate, no meal on the table, and indescribable confusion, and the wife has been out at the pictures all day.

8328. Yes, I see what you have in mind. Turning now to Part II, you say in paragraph 17:—

"The celebration of a valid contract of marriage should legally imply . . . Right to complete disclosure by each spouse to the other spouse of pre-august liabilities and assets. Failure to do this within three calendar months shall give right of recourse to a court. This right shall be continuous throughout the marriage ascertainable at agreed intervals."

I quite see the logic of that, and I quite see the reason why you suggest it, but would it not perhaps cause more disharmony than harmony in married life if each party had that searching right at agreed intervals? Do you not think, on balance, that it might do more harm than good?—My Lord, it is rather like the Rent Restriction Acts, they have done good and they have done harm.

I cannot sit like some celestial being up on high, but I do know that a great deal of the mischief and misery in innumerable homes is caused by the wife having no idea, when she goes shopping, whether she is being extravagant or mean, doing right or doing wrong. There are enormous numbers of women who do not really know the resources of the home, and it is a very miserable position for a wife. I think also that a husband who is rather poor and has a rich wife is often in a wretched position. I hope you will take me quite seriously, my Lord, when I say that sometimes my heart really bleeds for the husbands, I think they are a shockingly treated class in some cases. I think the wife is well protected by the Married Women's Property Act, she has got a great wall round her which the husband has not, therefore she is perfectly safe in telling him, "I have £5,000 a year", because at present she need not give him 5d. I think that a lot of wives would not like this proposal, but I am not concerned with what women would like or what men would like, half so much as I am concerned with building up marriage on a sound foundation.

8329. Full disclosure of assets and liabilities on each side, I quite follow your reasoning. Would you now turn to paragraph 17 (2) (d), where you say:—

"The funds for which the wife becomes her husband's common law agent in order to provide for the running of the household shall be and remain his property and the wife be accountable for the same."

I do not think I have any question on that.—There has been such a lot of argument about it throughout what is called the women's movement that I thought it quite right to say firmly where I stood, namely, that any agent shall account for agency money to the person who has supplied it.

8330. Then you make a suggestion as to the division of the surplus, where the wife contributes labour or funds. I have no question on that. In sub-paragraph (2) you say:—

"Unless there be a written contract to other effect, the marital home shall be the joint property of the spouses. If there be any attempt by one spouse at disposal of the whole or part of it without the consent of the other spouse, he or she shall have the right to obtain an immediate interim injunction to prevent unauthorised disposal."

Now I come to this point:—

"Disposal of the home immediately prior to desertion of one spouse of the other shall be invalid, and the deserted spouse shall have the right to follow and recover any chattels so disposed of; or, alternatively or additionally, to proceed against the other for breach of contract, or in tort . . ."

That applies to disposal of a home. I was thinking of the position of a bona fide purchaser for value. It would be difficult for him to have any notice that one spouse intended to desert the other. And the same would apply, would it not, to disposal of the furniture to a bona fide purchaser for value?—My Lord, it was the furniture dealer I had my eye upon. I think that none of these secondhand furniture shops should ever buy the property from a home without making quite sure that they have the consent of the husband and the wife. The number of men who came back from the war to find that the wife had sold up the home was really awful, one met it over and over again, and I felt strongly that a wife ought not to sell up the home.

8331. I think that answers my question very fully. The answer is this, that no dealer in secondhand furniture should ever buy without enquiring, firstly, "Are you married?" and secondly, "If so, have you got your spouse's consent?"—Exactly. That is the person I have my eye on. If he were reluctant to buy, in many cases the home would not be snatched away by a deserting partner.

8332. Turning to sub-paragraph (7), you say:—

"Husbands and wives should be separately assessed for income tax and their taxable resources should not be aggregated."

As I have said before, that might be very welcome to married couples, but I am not sure that it is a matter for the Commission. I suppose it might be suggested to be within the words, "the property rights of husband and

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wife". However, we note the suggestion. In sub-paragraph (a) you say:—

"Where the spouses have a business in which the wife runs the home and helps more or less in the business, the profits should be assessed at intervals and she should receive a due apportionment of such profits. The term 'business' shall include hotel-keeping, and lodging or boarding-house keeping and the like."

The difficulty which I feel there is again a practical difficulty. Do you not think that most wives who help in the business can speak for themselves, and say: "You are saving the employment of another assistant and I want to be paid something"? And if they have not got the intelligence or the energy to claim it, do you think that there should be a law to enforce it? There also seems to be another difficulty, the same administrative difficulty—how much? Is not that essentially a matter for bargain between husband and wife, as to how much the wife who helps in the business should get for doing it?—Yes, but at present the wife has nothing whatever to stand upon when she says it. The husband says to her, "You go to your solicitor". The solicitor will say: "You have got nothing to stand upon, it is all right if your husband agrees, but otherwise I suppose you can withdraw your extra labour and simply run the home". But since the Catering Wages Act came into force, so I am informed by a good many letters from wives helping in hotels, there has been a tendency to reduce staff, because small hotels and boarding-houses simply do not know how to keep their heads above water, and the wives are doing more. One such wife said to me: "I am now doing the work for which we paid two chamber-maids, daily women, to come in, and I put it to my husband that he might make me an allowance for it, and he said: 'You have got a good home, what are you grumbling about?'". It is not good enough, my Lord.

8333. The answer is that she should say: "I am not going to help you in your business unless you treat me properly and pay me for it". I see a difficulty in the State stepping in with legislation to cover that sort of thing, which is really a matter for bargaining between the person who wants services and the person willing to give services.—But if the husband dies suddenly, and the wife knows that she ought to inherit something out of that £3 a week the business should have paid her, I do not know how far she would get in trying to get that out of the executors.

8334. But she should have made the bargain before she entered into the employment, like any other person who works for another. However, I think I have your answer. Would you now turn to paragraph 21, where you say:—

"Sentences of imprisonment should not extinguish defaulters' arrears of maintenance, other than for the exact period of the detention."

In this case I am suggesting that perhaps you have not gone quite far enough. Why should it extinguish anything? It might be much more likely to frighten a man into paying if he knew that the debt, far from being cancelled, was piling up during his imprisonment. Why should he get off anything because of imprisonment?—I think it is another instance, my Lord, of my tenderness towards husbands.

8335. (Lord Keith): Mrs. Normanton, let us come back for a moment to the case of a wife and husband who are working together, running a small hotel or a small business. Is not the commonest case that when the two of them are working together and putting the profits into a joint account, or investing them in some way?—If the wife were well protected in the strictest meaning of the word "joint", and the survivor had the right to whatever was left in that particular fund, any method like that would no doubt be extremely good and helpful. She, of course, would have to convince the husband's executors or trustees of exactly what the footing was, and it does not quite cover her not having the income running along as it is earned.

8336. I quite see that, but take the position of the husband-partner. The husband in such a case is not really taking an income out of the business, he is not taking a share of the profits of the business. So far as there is profit, he is investing it all, along with his wife, is he not? I am trying to look at the normal way in which married people run a business of that kind. They do not divide each year the profits of the little business,

whether it is a hotel or something else, and then go away and spend that money upon personal expenditures. Generally, they try to accumulate profits and put them aside perhaps for a rainy day, or for their retirement, invest them, in other words. They aim to have a fund which they may ultimately live on, or which they may ultimately die possessed of. That is the way I am trying to look at it, and I wonder if that is not the normal case of a married couple running a business together?—May I get that a little clearer, my Lord? Do you mean invest it in both their names?

8337. Yes, I am prepared to look at it in that way, or I think it might very often be the case that the husband invests it in his wife's name.—Better still, that man is really an angel—I do not think he is a frequent angel.

8338. You do not think that often happens?—No. I think it does happen now and then.

8339. You think it more often happens that the husband uses his wife to help him to earn the profits, and she invests all the profits in his own name?—Sometimes, my Lord, he is trying to dodge anything which might happen in the way of bankruptcy; it is not a very fortunate way, but it does happen. Very often in marriage one is an acquisitive type and one more a spending type, and it is better if the spender will give it to the acquirer and say: "You look after that, my dear". It is better for the children.

8340. That is very often the way it works out?—Yes.

8341. Let me ask you this: do I understand that in England a wife is not liable for an indigent husband?—Yes, at the point when he becomes chargeable to public funds. But that is a very mean moment, if I may say so, for it to arise, and it seems so me that the poor husband who has to go and throw himself as an indigent upon public funds is unnecessarily, and I think rather wickedly, humiliated, and I think his rights should arise before that happens.

8342. I see. It was just to clear up my difficulty upon the legal proposition which you state in sub-paragraph (a) of paragraph 17 (2):—

"Whenever a husband would be destitute or is incapacitated by age or infirmity, a wife shall be deemed to owe reciprocal duties for his care and maintenance so far as her earning capacity and/or other resources may permit."

I thought the suggestion there was that she was not at present liable under the law, but she is, is she? I know what the position is in Scotland, but I wanted to know what the position is in England.—The unfortunate husband has to go to law, does he not?

8343. Let me put it this way: if a husband has to fall back on national assistance because he has no means at all of his own and his wife has got a substantial fortune, is she not liable to relieve the national assistance? (Mr. Maddock): Yes, she is. (Lord Keith): At English law?—I am very sorry. I have not quite understood the question.

8344. I understand that the answer is, "Yes". However, I will pass from that.—On that question, I should very much like the Commission to look at some of the cases which arose a few years ago, especially one—I cannot remember the name of the case—in the Chancery Division, where a rich wife married a poor husband who was a civil servant. She got him to resign his job, and they spent their time travelling, and she thereby evaded her income tax payments. She died first, and left all her money to her own relations, leaving him destitute, and he was faced with paying up her income tax for several years. The man had to pay thousands of pounds, he had lost his job and he had very little money. That is the sort of thing which can arise. I do want to stress that I am not speaking solely for women. As I say, husbands are often a shockingly treated class.

8345. Now would you turn to section B of Part I, where you deal with proposed amendments to the Matrimonial Causes Act? You suggest in paragraph 5 that Section 1 (1) (b) should be amended by substituting two years' desertion for three years.—Yes. At the time I drafted this I was very much impressed with what I felt had been the relative clarity and superiority of the law before the 1937 Act amended it to three years. I am still none too happy about the whole affair.

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[Continued]

8346. What you are doing is not only substituting two years for three years. You go on to suggest the deletion of the words, "immediately preceding the presentation of the petition"—Yes, to get back to the position before the 1937 Act.

8347. That means you are giving a vested right to divorce in respect of a fixed period of desertion?—Yes, it was so before, and it worked out well and clearly.

8348. And you wish to restore that position?—Not quite.

8349. I thought you said so.—There might be certain advantages. The present position on desertion is very muddled and difficult and also makes it very difficult indeed for any attempt at reconciliation. If people come together for a week or two to have another try, very well, they have to start all over again from the beginning and establish three years' desertion once again, and I think that is difficult. I do not like the 1937 change very much.

8350. What I do not understand, and you will not be able to help me on it, is this. How did the position arise at all prior to 1937? There was no divorce for desertion before 1937. What do you mean by, "Until the 1937 Act 'two years' desertion at any time prior to the petition" was the ground"? Of what was it the ground? Was it judicial separation?—Yes. And also in the old days, when I first came to the Bar, the wife could not get divorce for adultery alone. She had to have an additional offence such as desertion.

8351. I understand that, but you are really referring here to judicial separation before 1937?—That is what it amounts to. What I really do wish to suggest, if I may put it with a little more clarity now, is that something should be done so that when there is a desertion and the couple come together for an attempt at reconciliation, it should not throw them right back if the attempt fails. It makes them frightened to come together now.

8352. We have had a good deal of evidence about that, and I quite appreciate that point of view. You support that?—I would do anything to help them to become reconciled and there is nothing in the law at present to help them to become reconciled.

8353. (Sheriff Walker.) In paragraph 16, in the proposal for divorce after seven years' separation, you say:—

"The writer is opposed to the grant of divorce upon the petition of the deserting party. . . ."

Does the opposition extend also to the case where there is no deserting party, where the spouses have separated by consent? Or do you distinguish between separation with desertion, and separation taking place by consent?—I am totally and utterly opposed to dissolution of marriage by consent, however that may be considered to have arisen, because I can see so clearly that the period will be shortened and shortened again, until you have divorce by consent at once.

8354. Then I take it that the opposition is not solely on the ground of economic disadvantage. That is merely one aspect of it which you point out?—It is merely something I point out which generally would militate against the wife, and here I am very strong on the hardship to the wife. I think it is bad. You would get a good deal of this sort of thing arising. A man would say, "I have not seen my wife for four years and in another three I shall be free, come along and live with me and at the end of the time I will marry you as soon as I am clear". That would sometimes be said truthfully; also no doubt it would be said untruthfully and it would put a great weapon into the hands of the man who intended to lead a dissolute life.

8355. I want you to consider, not the case of a separation which has occurred through the desertion by one party of the other, but the case of separation which occurs by mutual consent. A husband and wife either have expressly consented to separation or tacitly consented and simply lived apart. Would you agree that in such cases of separation no matrimonial offence is involved?—No.

8356. What matrimonial offence is involved?—A breach by both parties of what ought to be the most solemn contract in their lives.

8357. You regard it as a breach?—They have both been equally guilty on your footing. I look on marriage as a most solemn contract and it should be like the British Constitution, which works because the British people intend it to work. Marriage should be made to work, and the

fact that parties have so casually separated is a disgrace to both of them.

8358. Would you differentiate that case, that is to say, separation by consent, from the case where one of the parties has become incurably insane?—That is a misfortune which probably the person who became insane had no means of averting, and, I suppose, would never have chosen had it been offered to him on a plea.

8359. One finds under the present law two classes of ground upon which divorce may proceed; one class is the matrimonial offence and the other, of which incurable insanity is the only example, is simply that the marriage is frustrated; is that right?—I have never been happy about that ground. I had the terrible experience of getting a divorce for a husband on the ground of his wife's insanity. I never saw stronger medical affidavits in my life. After ten years, in spite of what the doctors believed was her incurability, she came out. The husband had re-married. They had the child of the first marriage with them and that child thought that the new wife was his real mother. This unfortunate woman recovered and came out, a woman of considerable means, entitled to about £20,000 when she was released by the Lunacy Commissioners. She went back to the court and said, "I want my child". She had committed no fault whatever. The judge who heard the case was so impressed and worried that he had the whole records searched to see if there were instances of any other insane persons of that type being divorced. It turned out to be the first. I was still counsel for the husband, and my whole heart was with the mother and all she had was right of access to her own child. The child was brought to court. His distress at finding that he had two mothers, one he believed to be his mother, and the other a total stranger who turned up suddenly, I shall never forget to my dying day. It was a terrible situation and it made me wonder, when I had stood up in 1936 at the Conference in Edinburgh of the National Council of Married Women, had I done right or wrong? I do not know. I am inclined to think I did not do the right thing. That is what can occur.

8360. Does it come to this, that you are against the idea of divorce except where there has been some matrimonial wrong and on the ground of a matrimonial offence? Broadly speaking, is that right?—I think one sees one's way much more clearly, and in accordance with the whole course of English law, when the remedy is against the wrongdoer. We have a remedy in the case of insanity and I think it is pregnant with difficulty. I do not think it is a clear case. On the other hand, I am full of sympathy with a man or woman whose life is frustrated by the compulsory absence, perhaps for ever, of the other partner. If anybody knows absolutely clearly that the whole right lies one way or the other, that person is far more far-sighted and more clever than I am.

8361. It boils down to this in short, that you favour divorce being granted only where there is a matrimonial offence?—Favour is not my word. What I mean is this, where there is a really serious matrimonial offence, I think it is right that the person gravely offended against should have a remedy. But where it is a different principle, midwife to the other partner—which insanity is—there I think we are not so sure that we are doing absolutely right. But on the whole, I would retain it.

8362. Once one takes a stand on the matrimonial offence as the only legitimate ground for a divorce, do not you think that one gets on to a slippery slope and that one is very liable to want to extend the range of offences which justify divorce?—If I apprehend the drift of your argument, we probably got on to the slope the very first time divorce was ever granted. That was the top of the slope, and, broadly speaking, that was about the time of what we call the Reformation in this country. Whether this country is happier on the whole for divorce being allowed at all is a moot point which I am not qualified to answer, but your question drives me back logically to that point.

8363. Would you agree that at present the marriage vow includes the promise to adhere to the other spouse for life to the exclusion of all others for better or worse? But if you were to take account of the various grounds of divorce, that promise would look rather odd if it were written out in full—I promise to accept you so long as you do not commit adultery to me, so long as you do not

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[Continued]

commit sodomy, and so on. In that sense it would look rather an odd promise, would it not?—Very odd, indeed. When I got married I did not mean it in that way. I meant to stick to my man whatever he did. That is all I can say personally and I wish everybody had the same sort of feeling. On the other hand, all breakage of matrimony must be regarded, I think, as a concession to the weakness of human nature.

8364. There have been certain suggestions that in register offices there should at some stage be handed to the parties a full statement of what they have really undertaken. Would you suggest that a wife should have handed to her something to say that she undertakes not to commit lesbianism?—If every matrimonial offence were set out and if everyone undertook not to commit any of them, it would be like the clergyman who got his children to promise never to commit sin. People do commit sin and there are sins, but I regard all these offences as exceedingly grave. I never thought when I appeared in a divorce case that it was anything other than a tragic affair. But it is the tragedy of human nature that people do go wrong, and the law makes, to some extent, provision for it, in the hope that they will rectify their lives and perhaps make a better start at the second marriage, but I do not regard any of it as commendable.

8365. Since you raised it, I want to ask one final question about lesbianism. In the case of a mother who has a family of children, say boys and girls at school, would it not be a very shocking thing for the children to know, and for their companions to know, that their mother had been divorced for lesbianism?—Of course it would, but it would be a very shocking thing that it should happen. It is the thing itself which is shocking, not what people know afterwards.

8366. Is it not a balance between two evils, whether it is better that the marriage should remain, or whether it is better that it should be dissolved, and the children perhaps involved in a dreadful scandal?—They have that scandal now if the mother divorces the husband for his unnatural vice. That is as bad; it is neither better nor worse.

8367. (Mr. Flecker): You quoted at the beginning of your evidence the figures for divorce. I do not think that we are in a position to say how many marriages occur which never come near the Divorce Court, and which are, as far as one can tell, happy and successful marriages. But there must be a great many more, you would agree, than those that end unhappily?—I do think so.

8368. You make certain proposals about the apportionment of income to the wife and the question of the exercise of hospitality, and so on. Do you not think that people who intend to be happily married, and are happily married, might resent that sort of thing as a reflection on the normal liberty of the subject? They have every intention of behaving well to each other. Is it not fair to say, possibly, that by making laws for the one marriage in fifteen or twenty that is going wrong, you are giving far more offence to those with whom things are going right?—I think you can say that of everything. If I were to send all my friends as a Christmas present a copy of the 1916 Larceny Act, they would not like it, but it is on the Statute Book and it is very good for those who need it. This law would not engage the attention of two people who are in love very much, but when they are beginning to behave very badly, one can say to the other, "You are under an obligation to me to do so-and-so".

8369. You are of the view that if by legislation it were possible to provide that hospitality must be given by the husband to the wife's relatives, and by the wife to the husband's relatives, the issue would not arise unless the wife came to the court and said, "My husband will not have my mother in the house", and then the court should have power to say, "You must"—I do not think so. If I were a magistrate, and such a thing came before me, I should say, "To come to tea or come to dinner and be treated pleasantly from time to time, yes; live with you, no". I have in mind cases where people are excluded unreasonably; for instance, you might want to have a younger brother home from school for a short period.

(Chairman): Thank you for your memorandum and coming to help us today.

(The witness withdrew.)

(NOTE.—Notification was subsequently received from the Council of Married Women that the Council had adopted both the written and oral evidence submitted to the Commission by Mrs. Helena Normanton, Q.C.)

(Adjourned to Tuesday, 25th November, 1952, at 10.30 a.m.)

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MINUTES OF EVIDENCE **35**
TAKEN BEFORE THE
ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

THIRTY-FIFTH DAY

Tuesday, 25th November, 1952

WITNESSES

Mr. A. J. CHISLETT

Mr. C. C. C. LEWIS

THE VISCOUNT ST. DAVIDS



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Tuesday, 25th November, 1952

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PAPER No. 107

LETTER FROM MR. A. J. CHISLETT

Dear Sir,

I recently subjected to a close analysis the last one hundred maintenance orders made at this court. The results are shown in the attached statement, paragraphs 1 to 7. There would appear to be nothing exceptional in these cases, and it might well be that my results are typical of such cases in the country as a whole. The percentage of conceptions before marriage, for example, is approximately the same as that returned by the Registrar General.

The analysis is based on fact, not theory, and I have full details of every single case of the one hundred analysed.

I am deeply concerned about a number of aspects of matrimonial law, but I shall confine myself to one only, namely, the economic. Paragraphs 8 and 9 of the statement show the probable result in the country as a whole, based on the figures in this Division. Paragraph 9 in particular, relates, it must be emphasised, to a period of three years only. My annual receipts as collecting officer exceed £33,000 and this Division is but one of over 1,000 throughout the country. The total sum collected annually by collecting officers has never been made the subject of official returns. I suggest that it is not less than £15,000,000. Payments made by the National Assistance Board to wives who cannot subsist on their maintenance allowances is locally a substantial figure, nationally it must be very large. Some wives are in receipt of permanent assistance and in seventeen cases I pay their maintenance direct to the Assistance Board with their authority. In addition, there is the heavy cost of clerical assistance in collecting offices—some justices' clerks have as many as six to eight clerks doing nothing else.

I therefore urge that the economic effects of separation are a burden the country can ill afford, and every effort should be made, so long as injustice is not perpetrated, to make the obtaining of orders more difficult. This would apply economic pressure on many parties to try and compose their differences, rather than fly to court before conciliation has been attempted. There would have to be safeguards for the genuine cases, of course. I have little doubt that a similar plea will be made on other grounds. The making, rather than the breaking, of marriages should become a prime concern of the community. I have set out in the second enclosure some suggestions based on my twenty-two years' experience as a clerk.

I venture to send you these views in the hope that they may be of assistance to the Royal Commission.

Yours faithfully,

(Sgd.) A. J. CHISLETT

The Secretary,
Royal Commission on Marriage and Divorce.

(Dated 13th December, 1951.)

APPENDIX A

AN ANALYSIS OF 100 ORDERS MADE UNDER THE
SUMMARY JURISDICTION (SEPARATION AND
MAINTENANCE) ACTS, 1895 TO 1949

1. Grounds on which orders were obtained

Desertion	67
Wilful neglect	25
Persistent cruelty	7
Adultery	1

100

Couples reconciled since orders made ... 11

2. Period of duration of marriage

Under 5 years	29
5 and under 10 years	22
10 " " 20 "	30
20 " " 30 "	15
30 " " 40 "	3
Over 40 years	1

100

3. Causes of breakdown of marriage as revealed by
evidence (may not in every case be the prime cause)

Another woman	42
Incompatibility	36
Money troubles	5
Sex troubles	3
Excessive drink	3
Gambling	2
Nagging wife	1
Unknown	8

100

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4. Children

(a) Couples with children	78
Childless couples	22
	100

(b) Child conceived before marriage ... 15

5. Occupation of husband

Unskilled	41
Artisan	46
Professional and clerical	13
	100

6. Wages of husband

£5-£10 per week	78
Over £10	13
Unemployed or disabled	9
	100

7. Amount of order

Under £1 per week	5
£1 and under £2 per week	25
£2 " " £3 " "	34
£3 " " £4 " "	28
£4 " " £5 " "	4
£5 " " £6 " "	1
£6 " " £7 " "	1
£7 " " £8 " "	1
£8 " " £9 " "	1
£9 " " £10 " "	1
	100

Total of orders per week ... £246 18. 0d.
Average weekly order ... £2 9s. 3d.

8. Orders made in England and Wales, 1948 to 1950
(Criminal Statistics, 1950)

1948	17,934
1949	16,417
1950	16,035

9. Annual receipts by collecting officers from orders made, 1948 to 1950 (estimate)
Average weekly order, £2 10s. 0d. (see para. 7 above).
50,386 orders produce £125,965 weekly or £6,550,180 per annum.

APPENDIX B

SUGGESTED ALTERATIONS IN LAW AND PRACTICE

1. It should be mandatory that a domestic court shall include a woman justice.

2. Domestic courts should be held in places not ordinarily used for criminal work.

3. A woman should not, except in exceptional cases, be permitted to apply for an order within three years of the date of marriage.

4. The law expounded in *Wheatley v. Wheatley* (1949) 2 All E.R. 428, should be changed to permit of a wife enforcing a maintenance order although living under the same roof as her husband. As the law stands a woman may obtain an order on the ground of desertion while living under the same roof as her husband (*Powell v. Powell* (1922) P. 278 and many other cases) but the order is unenforceable until he or she leaves the house.

5. Section 4 of the Summary Procedure (Domestic Proceedings) Act, 1937, should be repealed. The procedure there detailed (statement of allegations) is impracticable and is in fact not used.

EXAMINATION OF WITNESS

(MR. A. J. CHISLETT; called and examined.)

8370. (Chairman): Mr. Chislett, you are Clerk to the Justices, Wallington Petty Sessions Division, and you have been kind enough to send us an explanatory letter together with an analysis of maintenance orders and certain suggested alterations in law and practice. How long have you been Clerk to the Justices?—(Mr. Chislett): Five years at Wallington and eighteen years in London.

8371. Would you like to add anything before I ask you questions on this document?—If I may, Sir, I would like to elaborate on the third of my suggested alterations.

8372. That is:—

"A woman should not, except in exceptional cases, be permitted to apply for an order within three years of the date of marriage."

That is an order for maintenance?—An order in a magistrate's court.

8373. Separation and maintenance?—Yes. In my experience, too many women who have only been married a few years take orders. The analysis that I have made shows that twenty-nine per cent. of the orders were obtained by women who had been married less than five years. The suggestion that I am making is this: that no woman should be permitted to apply for an order within three years of marriage unless she has made use of existing conciliation machinery, or the ground of the application is adultery by the husband, or she has been subjected to physical violence. I suggest that, if that were adopted, no genuine case would suffer. Every woman can make use of the conciliation machinery and if it does not succeed she will still get her order, and I feel that a large number of broken marriages could thus be healed.

8374. I am very glad you made that addition, because I was going to ask if your suggestion did not involve

great hardship to a woman, for instance, who was suffering physical cruelty, or whose husband had committed adultery and was living with a woman?—I entirely agree.

8375. And the way you have qualified it makes it a suggestion which I can much more easily appreciate. Is there anything else you wish to add?—Am I permitted to add something that is not in the memorandum at all?

8376. So long as it is within our terms of reference, yes—it is, Sir. It is our experience in the courts that the vast majority of women who obtain orders—and one must bear in mind that most of them who come to the magistrates' court are not of very high education—go away quite firmly convinced that they have got a separation order although in fact they may only have a maintenance order. The result is that the husband, who also thinks the same, makes no effort to return home in many cases where he has every right to return home. In some cases the husband does return home, and enquiries I have made indicate that if the wife ejects him, frequently the police are called in because there is a row. The policeman asks the wife if she has an order and if she says, "Yes", then he assists in throwing the husband out, whether or not the order is a separation order. I feel that a duty should be placed on courts to explain to the parties the meaning of the order in much the same way as there is a duty on the court today to explain the meaning of a probation order. It may not be easy, but I think it is possible.

The second point arising out of the same thing is the variation of orders. For too many men go to prison for non-payment of maintenance; far too many men do not realise that they have a right to apply to the court to get their orders reduced, and in not every court is that made clear to them. At any court we do serve a form of notice on the parties giving them full information as to how to get the orders increased or decreased according to the change of circumstances, and we find it works very well. (I did bring these forms with me if they are

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Mr. A. J. CHESLEY

[Continued]

of interest.) In short, Sir, I feel that matters would be improved after the making of an order if there were a duty placed on the court to explain at the time of making the order, firstly, what the order means, and, secondly, how that order may be varied.

8377. Thank you, that is a very interesting suggestion and I think the Commission would be glad to have the forms which you have brought with you. Turning to your letter, you say, in the fourth paragraph:—

"I therefore urge that the economic effects of separation are a burden the country can ill afford, and every effort should be made, so long as injustice is not perpetuated, to make the obtaining of orders more difficult."

What concrete suggestion do you make for that beyond what is set out in your suggested alteration in the law and practice? Is there anything more that can be done?—Yes, Sir, with respect. It may sound outside your terms of reference, but I do not think it is. The National Assistance Act, 1948, Section 51, makes it an offence for a husband—who are dealing with a husband so I will limit it to that—persistently to neglect to maintain his family so that they become chargeable, that is, they receive national assistance. In the old days, where a husband failed to maintain his wife and his family became chargeable, all guardians and poor law authorities without any hesitation obtained a warrant for his arrest and he was prosecuted. Today, the National Assistance Board, I am told, because of the word, "persistently", in that Section, takes little or no action against husbands who do so believe but advises the wives to come to the court and obtain an order. The effect of that is, I think, that a wedge is driven between husband and wife, because by advising the wife to take action against the husband the issue is made one between husband and wife, whereas previously it was an issue between the State and the husband. When I say, "that the economic effects of separation are a burden the country can ill afford", I also have this in mind: that at the same time as the National Assistance Board is maintaining that family, the husband is getting away scot-free. I have a case in mind where a man in receipt of an income in excess of £3,000 a year left his family. His wife was sent to the court to obtain an order and she was paid £4 10s. a week maintenance by the National Assistance Board for many weeks until her husband was found, and no action was taken against him. That is not a case where conciliation could have effect, I do not suggest that, but I do think that in many cases where there might be a chance of conciliation, stronger action by the Assistance Board, rather than putting a burden on the wife, might have some good result.

8378. Do you suggest that the Assistance Board itself should take up the task of tracing the husband?—Yes, through the criminal process of the court; in other words, the police would trace the husband. (Chairman): I follow that suggestion, it is a very interesting one, and it is on the lines of other suggestions that have been made to us, that the National Assistance Board does pay out money to the wife without any effort being made to find the man who really should pay the money.

8379. (Lord Keville): Does that really mean, Mr. Chesley, prosecuting him for failure to maintain his wife?—Yes, Sir.

8380. That means he might be imprisoned, I suppose?—Yes.

8381. It does not mean that the Assistance Board is going to claim the recovery of the sums it has paid to the wife, does it?—There is nothing to prevent them, Sir, as far as I understand it, but it is not frequently done.

8382. (Chairman): Then, in your letter you say:—

"This would apply economic pressure on many parties to try and compose their differences, rather than fly to court before conciliation has been attempted. There would have to be safeguards for the genuine cases, of course. I have little doubt that a similar plea will be made on other grounds. The making, rather than the breaking, of marriages should become a prime concern of the community. I have set out in the second enclosure some suggestions based on my twenty-two years' experience as a clerk."

Is there anything which you would like to say in support of that view, "The making, rather than the breaking, of marriages should become a prime concern of the community"?—

marriages should become a prime concern of the community", or is it covered by your suggestions at the end?—It is really, Sir, I had intended, and perhaps that is the right moment to mention it, to put in a very strong plea for research into these matters. The small effort that I have attempted here is quite trivial and superficial, but I cannot help feeling that if research into these matters were conducted on a proper, scientific basis some good would come of it.

8383. (Mr. Justice Pearce): Do you think that the present position, whereby a maintenance order is unenforceable while the wife is still residing with the husband and ceases to have effect after three months' continued residence, is satisfactory?—No.

8384. Do you think it is desirable that a maintenance order should be unenforceable while the parties are cohabiting? It may entail that the wife would rather have her order than her husband, or it may be that where the husband has deserted the wife he will come back solely in order to terminate the order. Against that, there is the undesirability of having an order running while the parties are living together as husband and wife. What do you think about it?—It is extremely difficult, Sir. I have in mind an actual case where a woman obtained an order against her husband, he having then left her. He made enquiries and found he could cancel the order by returning, and he returned forthwith and thereafter paid her £1 a week on which to keep herself and two children. Unless she leaves him with her two children, and that she cannot do, she has got to live on £1 a week. She came back to me in great distress. I have seen him and I cannot think of any solution to the problem other than the enforceability of the order whilst they are living together.

8385. The Divisional Court from time to time emphasises to parties that an order is only temporary and that as soon as reasonable amends are made by one side or a deserter returns, it will end. But I expect you are right when you say that this is not always explained by the justices. It may be that the justices feel in this difficulty, that if they explain the matter too clearly, it may be that the husband who is deserting and intends really to go on deserting will think it worth while to come back for a week in order to break the order?—I must concede that.

8386. And I wondered whether possibly magistrates are rather silent on the effect of that, because they do not think that the man will be genuinely trying to make the marriage work again, and the more that is said about it to the man, the more it will encourage him to break the order without mending the marriage?—With the exception of those cases where husband and wife would in fact become reconciled by the husband's return.

8387. Yes. I wondered whether it would be the lesser of two evils if you allowed all orders where there is no non-cohabitation clause to continue to run until discharge while the parties are cohabiting. The result of that would be that the parties might live together for a year with the husband under a liability to the court to pay his wife a certain amount every week. And, of course, if they were really reconciled, they would treat the order as a dead letter. But you could allow them to come back to the court if the husband objected that as he was behaving he did not see why the order should still be running. What do you think of that?—If I may say so, I think it is a very good, practical suggestion. The effect of that, I am certain, would be to put an end to a lot of orders by the very fact of the people living together again and getting used to each other and deciding to make a permanent job of it. At the same time, it would safeguard the ones who at the end of the year are still unreconciled.

8388. This has nothing to do with conciliation. I am not bringing that in at all. It is merely a matter of convenience to keep a maintenance order existing although the parties are cohabiting. You would be in favour?—I would be in favour.

8389. And would you be in favour of not limiting it to any period, but of letting either party apply to the court if, under the circumstances, it seemed reasonable to discharge it?—I would, Sir.

8390. (Chairman): That is very interesting because I confess, as one unfamiliar with that particular topic, I have never been able to see any strong reason for the order being unenforceable when they are living together. What is the reason at the back of it?—Until the decision is

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Wheatley and so forth, the courts used to enforce the orders whilst the parties were living under the same roof although living separately and apart.

8391. I mean cohabiting?—Living as man and wife; the statute says so, of course.

8392. (Lord Keith): Is not the reason that if they are cohabiting, the presumption is that the husband is maintaining his wife and therefore there is no reason for enforcing an order for maintenance?—That is probably right. (Lord Keith): In fact, I would go to the length of saying that in Scotland no one could obtain an order for maintenance or the equivalent if the husband was cohabiting with the wife. I think that must be the reason. (Chairman): Perhaps another reason is that the State should not interfere with husband and wife who are cohabiting.

8393. (Lord Keith): For the information of the Commission, Mr. Chillet, would you tell me what Section 4 of the Summary Procedure (Domestic Proceedings) Act provides? You want it repeated, that is your last suggestion.—That is a procedure which I have never known followed anywhere. Under this procedure, the probation officer gets a statement from the wife of her complaint against her husband and puts it to the husband. He gives his reply and, with the consent of both parties, that document may then be put before the court. It is rather on the lines of High Court procedure as between solicitor, rather than probation officer, and parties. Perhaps I should not have included it, but it struck me as being something which was merely a dead letter.

8394. Might it not in some cases serve a useful purpose? It may not be normally used, but might there not be the odd case? It seems on the face of it that it is not an unreasonable procedure that the probation officer should get the complaints from the wife, submit them to the husband and get the husband's reply?—Yes, but it puts a very high responsibility on the probation officer's shoulders. As I mentioned earlier, the type of people who come to the magistrates' courts are not frequently educated people, and the probation officer will have to put the statement into his language and, having regard to all the traps in the legal procedure and to facts, he might well put down something which might not be accurate.

8395. But if he confined himself to statements of fact or at least alleged fact by the husband and wife, would it not be rather useful for the court to have before it the views of the two spouses on questions of fact? I am not suggesting that it should be accepted as evidence necessarily. The court may want to call the wife and get her testimony, and the husband's testimony if he chooses to appear, but would it not be useful for the court to have the case of both sides? Would it not enable the court to examine the wife perhaps a little more closely, if it had before it what the answers of the husband were?—But this Section was introduced into the 1937 Act primarily to enable the probation officer to effect reconciliation between the parties. Experience has shown that probation officers have not found it necessary to use this procedure, and, in my experience, I have never known the court directly to use it, except possibly the South Western Court, and I see no need for maintaining it. Perhaps I am making a point I should not.

8396. It is of no use if it is not used, but it does not seem to do any harm, and perhaps somebody might waken up some day to think it was of some value. Would you turn to your analysis of the 100 orders? Itake heading 1, the grounds on which orders were obtained. I have nothing to ask you about the grounds, but I see you have a very interesting addendum—couples reconciled since orders made, 11. That is, in roughly 10 per cent. of the cases the couples were subsequently reconciled. Would you say that that was a reasonable percentage to assume out of the total orders obtained in your court?—It is very hard to say, I should say that that is slightly high.

8397. You think that the reconciliations are rather less than 10 per cent.?—Rather less than this particular 100 cases has shown.

8398. It really comes to this, that it is difficult to draw any general conclusions from your analysis?—I agree entirely. If I may follow that up, I did not find in that particular one hundred a single case where the separation was attributable to housing problems, but we do get many such cases.

8399. What I really was trying to get at was to discover, if possible, whether one could apply that figure as a rough estimate of the number of cases that might be reconciled out of the total number of orders made throughout the country. But it would be impossible, you think, to draw any inference of any kind from your figures?—I would not go quite as far as that. Eleven cases of reconciliation is, I think, high, but I should say that any figure between seven and nine would be about right.

8400. You give us the total number of orders made in England and Wales, for 1948, 1949 and 1950, as being all 50,386. A proportion of those, I take it, will be cases of couples who have subsequently been reconciled?—Unquestionably.

8401. And you think it might be seven to nine per cent.?—It could be that figure.

8402. I suppose that in some cases either the wife or the husband has died?—Yes.

8403. I do not suppose that you have any idea at all of what allowance should be made for that?—My one hundred were cases taken over a period of only about eight or nine months, and none of those has died.

8404. I was just wondering whether one could, by a survey of the total number of orders made over, say, a period of fifteen or twenty years arrive at any conclusion as to the total number of separated couples or permanently broken marriages in the country. Have you any views on that?—I have no doubt at all that the individual courts could give the figures for their own people, of orders in force, how many have died and how many have been reconciled. (Lord Keith): But that would be a very laborious process. I was wondering whether one could arrive at a rough figure of any kind from the judicial statistics. (Chairman): Might I just say this? I hear from the Secretary that we are making a preliminary enquiry into this matter through the Home Office.

8405. (Lord Keith): Yes. I do not think I need pursue that matter further. Looking at the second group of your analysis, "Period of duration of marriage", the only thing that occurs to me, and I wonder if you can confirm it, is that it looks as if the dangerous period was the first twenty years of marriage. Is that a fair inference to take from your figures?—Quite apart from my figures I would confirm that from my own general experience.

8406. That is what I wanted to know. It looks fairly obvious that the longer the marriage continues the more stable it seems to become?—Yes.

8407. (Mrs. Jones-Roberts): You say that you want to make the obtaining of orders more difficult, but that you would make special exceptions in the cases of adultery and physical violence. I notice from your figures that 92 out of 100 orders have been made on the ground of desertion or of wilful neglect to maintain. What is the wife to do in those cases if she is left without resources?—Of course, that is where figures do not tell the whole truth, because very many of the desertion cases are, in fact, cases that could have been brought on the ground of adultery, only the wife chose to go on the ground of desertion.

8408. What really impels the woman usually to come to the court is that she has no resources?—Quite.

8409. And the reconciliation procedure might take a little time even if it were to end successfully?—Yes.

8410. Would that not be a case for an interim order?—I would not oppose that.

8411. After all, the wife, if she has small children, must be protected. You are suggesting really that there is a good deal of abuse?—Yes.

8412. I wondered, for instance, whether you thought that in the first years of marriage a woman might be expected to go out to work, or whether you have some other idea in your mind? I am exploring your idea that it should be made more difficult to obtain an order.—Only more difficult in the sense that I explained to the Chairman, by restricting the applications within the first three years of marriage to the cases that I outlined. The question of wives working is unquestionably involved, because naturally, or at any rate in practice, the amount of money going into the house does affect the house generally. I am not quite sure whether you are getting

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at this point, but as to whether the fact of the wife working has any bearing on matrimonial discord, I do not wish to express any view.

8413. What I had in mind was that you might feel wives ought to go to work and not run to the court?—I had not that in mind.

8414. Can you help me with regard to the National Assistance Board? You say that some wives are in receipt of permanent assistance. Do you mean supplementary assistance over and above what the husband is paying, or that they are entirely maintained by the Assistance Board and yet they have a defaulting husband?—I am not very familiar with National Assistance Board language, when you say "supplementary assistance". A woman in respect of her needs is allowed £3 a week by the Assistance Board. If it so happens that she has a maintenance order of £2 10s., the Assistance Board will recover from me £2 10s. a week and pay her £3.

8415. That answers my question then, the 10s. the Board pays is supplementary to what the husband pays and the Board is not entirely maintaining the wife.—I think it is irrespective of what the husband pays, and the Board recovers what it can from the husband.

8416. I see. I think you implied that the Assistance Board does not force the wife to come into court to apply for an order. Would you agree that the Board will not go on paying indefinitely unless the wife does come forward to apply for an order?—I cannot answer for the Board. In my experience the Assistance Board pays so long as there is need and is unable to avoid paying, whether the wife comes to the court or not.

8417. I think that is a point that must be explored through the Assistance Board, but I do not want it to pass without an observation. My experience is that the Board will bring a little pressure to bear on the wife, that it will not go on paying indefinitely and without exploring the case, but that has not been your experience?—No. May I be allowed to read a letter arising on that? This is a letter from a wife who is in receipt of national assistance to her husband who is due to pay under a court order:—

"Please turn this Henry.

Henry,

I am rushing this letter to tell you, if you haven't already sent on the £3 don't send it, as the Public Assistance will take it off me, by not giving me any money, so just send the 12s. 6d. and 2s. 6d. of what you owe, tell them you will send 2s. 6d. a week of what you owe, as the weather has been bad for your work. I don't see the sense in you giving it for them to take off me again. Save it.

Eve and Sandra Bernice."

(Chairman): That is a very interesting letter. (Mrs. Jones-Roberts): I think it is something we should explore with the Assistance Board.

8418. (Mr. More): I want you to help the Commission on three points. The first is your suggestion that the domestic court should be held in places not ordinarily used for criminal work. Are you thinking there of the requirement that criminal proceedings have to be held in premises which have been appointed as courts?—Only in part, Sir.

8419. Do you want a private room?—Yes.

8420. That is what is at the back of your mind, so that when the Commission is considering your recommendation, we have not got to worry very much about expense, you do not want this private room fitted out elaborately as a court?—Indeed not, Sir, table and chairs.

8421. The next point is this: have you had an opportunity of seeing the memorandum submitted to us by the Justices' Clerks' Society?—Twelve months ago, and I have completely forgotten what was in it.

8422. When you read it twelve months ago did you agree with it?—In principle, yes.

8423. My third point—I hope this does not embarrass you, but I think you can give us a very valuable opinion here. You have spent a great many years acting as clerk to metropolitan magistrates when they have been trying matrimonial cases. You have now spent five years sitting as clerk to lay magistrates when they have been trying cases. I know comparison is difficult, but would you

give the Commission the benefit of your opinion? Which is the better tribunal?—I cannot say which is the better tribunal. I would rather put it this way and I think, more fairly. In my days, in the metropolitan courts we had sometimes as many as twenty matrimonial cases to dispose of in a matter of two or three hours, and the very pressure of work made it necessary to go through them very quickly, so it is possible that full justice was not always done. But, if that is the case, I attribute it solely and entirely to the pressure of work. The difference between the two tribunals as tribunals is non-existent.

8424. (Chairman): You mean that one is as good as the other if they get the right amount of time?—Yes.

8425. (Mr. More): You think that the individual trained lawyer is just as good as three lay magistrates?—On the whole, yes.

8426. (Mr. Maddocks): Would you explain to the Commission what you said about the National Assistance Act, and prosecutions? The difficulty is, is it not, that it is the wording of the Section that is the trouble? Before the National Assistance Board can succeed in a prosecution they have to establish to the satisfaction of the magistrate that the man could have paid and did not?—And acted so, persistently.

8427. Yes. Is this the difficulty they meet? They arrest in Newcastle someone from Bermondsey, say, and bring him before the London court, and all the man says is, "I have been out of work all the time", and they cannot convict him.—Quite.

8428. And that is the reason why so many of their prosecutions fail, because they cannot prove their case?—I imagine so. Of course, they do prove in many cases that the man was fit and able to work and would not, and the fact that he is not working does not help him. (Mr. Maddocks): Then there is a difference of opinion between metropolitan magistrates, because some think they can convict the man on that evidence and some think they cannot.

8429. (Mr. Young): In your court, when a wife applies for a summons to be issued, is she always sent to the probation officer first?—Let me say, nearly always.

8430. And is that the usual procedure in magistrates' courts generally?—I am afraid I cannot answer that. It is the procedure in the metropolitan courts normally for the applicant to see the probation officer either before or after seeing the magistrate, but as to the petty sessions divisions, I cannot answer generally. I can only say they do in my court.

8431. Do you know of any court where that is not carried out?—Yes. One must remember that some courts only sit once a month, and what can be done in a court that sits daily is not practicable in such a court.

8432. Could you not have the same practice in the court which sits only once a month by a clerk referring the wife to the probation officer?—Yes, I see no reason why that should not be done.

8433. So that under the procedure as it is today you have a conciliation procedure running?—Unquestionably.

8434. (Mr. Seloe): Would you look at heading 2 of your statistical table, in which you give 29 cases where the marriage was of less than five years' duration? Is it possible to say how many of those 29 were in respect of desertion, wilful neglect to maintain, and so on?—Yes, Sir, I did work that out. There were 21 in respect of desertion, 7 wilful neglect and 1 persistent cruelty.

8435. I was just a little concerned that under your suggested prohibition a wife would possibly not have a remedy when she really needed one?—But, with respect, my suggestion would not deprive her of any remedy, because all she has to do, whatever her complaint, is to use the conciliation machinery first. If there is no reconciliation, she can apply for her order.

8436. I see, but you are then making her come first of all to somebody who is not a justice?—I do not mind whether she goes straight to the probation officer or to the probation officer from the justice, I do not think it matters

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—the lighted end of the cigarette was put into the child's mouth first—

19. That on the evening of 15th October, 1949, the respondent refused to go and fetch a nurse although requested to do so by your petitioner, who was then expecting a child.

20. That whilst your petitioner was pregnant with the child mentioned in paragraph 19 hereof, and again whilst she was pregnant with her child, J—A—, the respondent insisted on your petitioner helping him to move furniture and, on one occasion, insisted on her carrying large and heavy drainpipes.

22. That on or about 22nd June, 1951, the respondent kicked your petitioner's leg."

After all these incidents, Sir, an attempt was made to persuade this wife that it was her duty, from a religious point of view, and from the point of view of being a good citizen, to return to her husband and to forgive this cruelty. I may say that this wife, at the time this was done, was under twenty-one, that she was living with her parents, who were extremely respectable people, and it does seem very wrong indeed that any person, whatever their motives, should persuade the wife to return to a brute beast like this. It was, Sir, the most monstrous case I have ever experienced of this particular kind, and the person who persuaded her to go back to her husband did it in complete ignorance of the facts which were at that time on the record in the High Court for her petition. I may add, my Lord, that she subsequently returned to her husband again, and became pregnant again, and the cruelty started worse than ever, and she subsequently obtained a divorce. Therefore the allegations I have been reading out to you have been found by the judge in the High Court to be true, because he granted the divorce.

In the other cases which I mentioned, I have got the petitions and could read them out, but I do not think I need, they are all the same sort of thing. In one case, which is not mentioned in the memorandum, which is against a Polish boatman on a ship, a new factor entered into the proceedings, namely, the welfare officer of the merchant seamen's hostel. He persuaded the wife to go back to her husband, though there is on record a charge of sodomy.

3458. Is that all you wish to add to your memorandum?

—Yes, Sir.

3459. Do you go as far as to say that in no case of cruelty should anyone endeavour to get the wife to go back to her husband, or is there some limitation on that?—I think a certain amount of discretion should be allowed to solicitors. No solicitor who cares for his profession wishes to do other than have the parties become reconciled, but if he is satisfied in his own mind that there are grounds of cruelty and has got medical evidence, and the petition has been filed, I say that there is nothing in any religion which justifies a person telling the wife, especially if she is under twenty-one, that she should submit herself to a life of hell, as in so many of these cases it is.

3460. Thank you. Then may I take it that the three cases you mention are not reported cases but cases within your experience?—They are not reported cases, because none of the cases proceeding from the district registry is reported.

3461. I see. Then, is there anything you wish to add on paragraph 27—Yes, may I say a little more about that? The position of women married to Servicemen is really very bad, because they cannot recover their costs in divorce proceedings—I am not talking about legal aid cases at the present moment. Such a debt is regarded as a private debt, and under the Navy Act of 1866, and also under the relevant Acts dealing with the Army and the Air Force, you cannot recover a private debt from a Serviceman by bringing him up on a judgment summons or by putting him under a stoppage of pay. That does seem rather hard. There is no reason at all why such a debt should be treated as a private debt. I do not see why members of the Services should get preferential treatment, if they treat their wives sufficiently badly to warrant a judge granting an order for costs against them. Surely the wife should be entitled to put those costs somehow. May I say, my Lord, that I got a specific case up to the Lords Commissioners of the Admiralty, and I understand that they have obtained the views of the other two Services on this

particular point? The Admiralty do co-operate in every possible way they can. If I may continue, the same thing applies to cases under the Legal Aid and Advice Act, which the majority of one's cases are at the present time. If a serving soldier, for example, can be put under a stoppage of pay for barrack room damage, surely he can be put under stoppage of pay for that which is paid to me by H.M. Treasury. In a legal aid case the Treasury pays me, nobody else, and you cannot even recover that. Surely that cannot be a private debt, my Lord, if the Treasury pays me. It is not the wife who pays me.

There is another type of difficulty, which I can illustrate by giving you a concrete case which I put up to the National Assistance Board. In this case the husband had £6 16s. per week, which was his net pay as a bus driver. When he was living with his wife, they were able to manage on £6 16s. per week. He treated her cruelly, and she divorced him. After the divorce had been made absolute, I applied on her behalf for permanent maintenance for herself and for the two children. The husband proved that it cost him so much to live, and she got an order for £1 per week for herself and two children, that being because the district registrar took into account the fact that she could go straight to the National Assistance Board and get assistance from them. Thus that husband is far better off than he was before. The £6 16s. was sufficient money for him to keep his wife and the two children. There is a divorce, in which the wife was the innocent party, and she gets £1 a week, and the National Assistance Board make up that £1 to £2 6s. a week.

3462. But was not the answer to that that the registrar was quite wrong to take into account national assistance?—No, Sir, as the law stands at present he could not be said to be wrong in doing so. (Chairman): I cannot myself go into that with personal knowledge, but it strikes me as a very odd position, if it is so. (Mr. Justice Pearce): It strikes me as a very odd position, too. I cannot say I have met it. It is urged sometimes that in the case of a rich husband, if the wife is given as extra few hundreds a year it will mean nothing to him, since it would have been taken from him in taxation anyway. I have always understood the practice was to disregard that as being a matter which the court was not entitled to consider.

3463. (Chairman): Similarly, I cannot at the moment see why you should take into account that if the man does not pay, let us say, £3 a week, but only pays £1, the wife will get the balance from the National Assistance Board. It strikes me as very curious, but you say that is the law?—That is a particular case, I think it is the first case mentioned in my memorandum, a particular case which I put up through the local officer of the National Assistance Board to his head office, but what has happened now I do not know.

3464. As regards the third paragraph, you say that the fundamental reason for the breaking up of marriages in your part of the country is the housing shortage. I think we all appreciate that there would be fewer broken marriages if the husband and wife could start married life in a home of their own. Do you wish to add anything to that?—No, my Lord. I do not know if I am permitted to comment on one or two things which I happened to hear Mr. Chalfett, the previous witness, say?

3465. Yes, if you have any comments on Mr. Chalfett's evidence, I am sure we should be glad to hear them.—The question was asked whether the trained lawyer or the lay magistrate was the better. I am afraid that my view is not the same as that of Mr. Chalfett. I think that the trained lawyer is fully able to understand those cases in which it would be unfair to one of the spouses to attempt to bring about a reconciliation, whereas the lay magistrates, for most praiseworthy reasons, are always trying to bring about a settlement.

3466. It was really on the question of attempts at reconciliation?—Yes.

3467. I see. Is there anything else you wish to say?—There is one last thing, which again is on behalf of wives. It would be a very great help if wives who had been deserted by their husbands and against whom they had actually got maintenance orders from the local police court, could obtain facilities from either the police or the Ministry of Food in tracing their husbands, if they

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run away. You can do nothing at all, at the present moment, you can get no assistance from anyone, neither from the clerk to the justices—because it is not his job to go chasing after errant husbands—nor from the police, nor the Ministry of Pold. If a husband disappears, the wife has lost him, and she has to go to the National Assistance Board for assistance.

8468. (Lord Keith): Mr. Lewis, I want to clear my mind about this question of national assistance being taken into account. You are of the view that the district registrar had to take that into account. Can you tell me why?—He had before him an affidavit of the husband in which he admitted that his pay was £5 16s., and he then proceeded to give a list of the expenses to which he was put because he was living as a bachelor, in other words, because his wife had divorced him. Those expenses came to £4 18s. per week, out of £5 16s. The registrar came to the conclusion that it would not be proper to expect him to pay more than just 50 per cent. of the balance left to him as spending money after he had paid all the essentials of life. At the same time, the fact that the district registrar must have come to that conclusion is proof that no wife could possibly be expected to keep herself and two children on £1 a week.

8469. I quite see that, but I thought you were putting it that the fact that a wife could get national assistance was a factor which the registrar should take into account in fixing the amount of maintenance which the husband should pay?—May I put it this way, Sir, that the solicitor for the husband advanced that argument before the registrar, and the registrar made an order for £1 a week?

8470. So you think he accepted the argument?—He could not have failed to do so.

8471. (Chairman): But I understood you to say, in effect, that he should not have accepted that argument, is that right?—No, Sir, I think he should, in law. (Mr. Maddocks): May I point out that if the district registrar made the man pay £1 a week, on those figures, he was making him pay all he could make him pay? If the man had £5 16s. per week, and his expenses were proved to be £4 18s., the man had got £1 18s. left, and no magistrate would take all of that amount from him.

8472. (Lord Keith): On the question of reconciliation in cruelty cases, is it your view that nobody who does not know the facts of the case should intervene to try to bring about a reconciliation? Is that the point you are making?—Very nearly, Sir, with one modification. In nine cases out of ten, these young girls who are under twenty-one have the benefit of the advice of their father and mother. I think that it is very wrong for a stranger, whom they have never seen before, to go and tell them something which is not true. I do hold the view, if I may put it this way, that I dislike persons, whether they are exponents of the creed which comes from Canterbury or Rome, from Mexico or Benares, who clothe their dogmas in divine raiment and then refuse to produce the evidence for the raiment. I think no one even in a democracy, who is a complete stranger and knows nothing about the circumstances of the case, should have the audacity to go and tell a young girl to go back, to drive her back to a life of hell. Of the one hundred cases I have had in Plymouth, there have been two reconciliations; one was a case where a husband brought a divorce against his wife on the ground of cruelty, the husband being a policeman of 16½ stone and the wife being 4 feet 11 inches high. The other was a case, also by a husband on the ground of cruelty, where the wife had galloping consumption, from which she died about six months after the case was over. But it is a great responsibility for any person to interfere—and I have the authority of the lady probation officer of the court at Plymouth to say that those are her views, and that she will not do it in cases of cruelty.

8473. (Mr. Maddocks): I have only one question to ask you, Mr. Lewis, arising out of what you told the Chairman, namely, that if a woman has got a maintenance order against her husband, and her husband does not pay, nobody will help her to find him. That is wrong, is it not? If the woman goes to a magistrate's court and says, "My husband has not paid me, and he owes me so much (and it is a fairly substantial sum) and I cannot find him", all she has got to do is to swear an information, and the magistrate can grant a warrant and the police will find him if he can be found.—First, I should point out that

of course it is the clerk to the magistrates who is the collecting officer; he knows, and he alone knows whether the husband is paying, because the money has to be paid to him.

8474. Of course.—And in that case, Sir, I applied to him to know if I could be told the address of the husband, because, incidentally, the wife had just been granted a legal aid certificate for proceedings for divorce. His reply was that it was not his business to tell me. He could tell me the address at which the husband had last been, but he could not take any further steps to find out where he was.

8475. The court will not tell you the address of any of the parties who appear before the court, if you want it for your own purpose, but if it is a matter of enforcing the order of that court, and the husband disappears, all the wife has to do is to swear an information and the magistrates will grant a warrant. As soon as the police get the warrant, the district will be circulated, and if he is anywhere about he will be arrested.—I am very much obliged to you, if I may say so, for that information. I shall go straight back to Plymouth and set the law in motion. (Chairman): I understood, Mr. Maddocks, that if the necessary procedure had been gone through, the police would have been looking for the man?

8476. (Mr. Maddocks): In the case cited by Mr. Lewis, he did not want the address for the purpose of enforcing the order, he wanted the address for the purpose of serving a divorce petition.—That is not the fact at all.

8477. (Chairman): I thought at an earlier stage I understood Mr. Lewis to say he did want it for the purpose of enforcing the payments.—Yes. (Mr. Maddocks): Then if he went to the court and said, "The man is missing and he has not paid", the clerk would say, "Bring the lady in"—"You have to have the wife there"—let her swear the information. She swears the information, the warrant is granted, and the police circulate particulars of the man all over the district, sometimes all over the country.

8478. (Dr. Robertson): We have been told by S.S.A.F.A. that the Navy does not make the same use of their organisation as the other two Services. Do you also find that the Admiralty do their own welfare work, to a large extent?—Yes, that is so, but of course the Admiralty are bound by the Act of 1866, which forbids a serving sailor from being put to stoppage of pay for a private debt, and the ruling at present is that any matrimonial debt, other than maintenance, is a private debt.

8479. Then is it your experience that the naval arrangements, particularly with regard to the care and provision of children, are just as good as for the other two Services, which use S.S.A.F.A. and similar organisations?—I think so.

8480. You are satisfied with the way the Navy deals with such matters?—With the wives of sailors, any woman whose husband is overseas, I think they are admirable, I have heard of many cases.

8481. (Mr. Young): You say in paragraph 2 of your memorandum, Mr. Lewis, that your costs are paid by the Treasury under the Legal Aid Scheme. Of course, if the wife is paying a contribution, to that extent your costs are not being paid by the Treasury, are they?—The number of cases in which the wives pay a contribution is very small.

8482. That is not true in all cases?—The costs are still paid by the Treasury.

8483. They may be paid as a matter of machinery by the Treasury, but as a matter of fact they are really paid by your client?—They may be, in part, but it is the Treasury who pay me, and if they do not recover from the client it is no concern of mine.

8484. I just wanted to get the facts right. The implication in this paragraph is that the Treasury always pay all the costs, but that is not correct, they only pay them as a matter of machinery?—Yes.

8485. And if your client is paying a contribution, which might be the whole of the costs, it would be your client who would be paying the costs?—That is so.

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MR. C. C. C. LEWIS
 PAPER No. 109—LETTER FROM THE VISCOUNT ST. DAVIDS
 THE VISCOUNT ST. DAVIDS

[Continued]

8485. (Mr. Beloe): Just one question about the Navy, Mr. Lewis, in order that we may go a little further with Dr. Robertson's question. It is true, is it not, that the Navy have their own port or command welfare officers based on Plymouth, Chatham and Portsmouth?—That is so.

8487. And that is why they do not use S.S.A.F.A.?—That is so, and I have always found them extremely helpful in Devon—I have only been concerned with them in Devon, of course. They always help everybody, and after they have considered the case they do send a certificate to the parties, if they are satisfied that it is not a case for reconciliation.

8488. Is it your experience that the sailors and their wives trust their men?—I think so. I have never found it otherwise, they always go to them first, and they always get what they consider has been good advice, which is obviously so.

protection of children in divorce. Their Report is largely should say attempt be made to reconcile a couple when there is a charge of cruelty by the woman? That is really what it comes to, is it not?—Yes.

(The witness withdrew.)

PAPER No. 109

LETTER FROM THE VISCOUNT ST. DAVIDS

My Lord,

I was the original proposer, in a speech in the Lords, of the Denning Committee's recommendations on the protection of children in divorce. Their Report is largely in my words when I gave evidence before them.

The points I wish to make surround the proposition that the children of a marriage are far more deeply affected by a divorce than the parents are. From this I wish to argue before the Commission the following points:—

(1) That the repair of the marriage is more important and better than the best divorce settlement, and that therefore it is more in the public interest to aid and finance marriage guidance organisations and legal advice than to spend large sums on legal aid in the Divorce Court.

(2) That the welfare officer whose services have been engaged to protect children in divorce cases should be more widely used, and more such officers appointed even in such times of financial strain.

8490. Are you satisfied with the present definition of cruelty? I think this is it: "conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger".—I think the judges always construe that in a way which could not be bettered. My experience has been that if a judge has granted a divorce on the ground of cruelty, the cruelty has been proved to be within the definition, and if he does not grant it then apparently he has come to the conclusion that it is not a genuine fear in the wife's mind.

8491. You do not want it to be any wider?—I do not think it need be. That is only my own personal experience. There are perhaps some occasions when it is construed a little more harshly by judges than on other occasions. It seems to come in waves. At the present moment the word "cruelty" is being interpreted rather strictly—I am not presuming to express any opinion on it—but it is a well-known fact among barristers that there has been a tightening up in the last six months in the granting of divorces on the ground of cruelty.

8492. But you feel happy about the definition?—Yes.

(Chairman): Thank you, Mr. Lewis, for your memorandum and for coming to help us this morning.

(3) That parents in divorce cases are often unconscious on the disposal of the children as a result of a collective bargain which is not in the best interest of the children, and that to make such bargains more difficult the court should have the power to refuse to grant a divorce unless the children were looked after according to the stipulations of the court, and to order the welfare officer to investigate where it suspects such a bargain to exist to the detriment of the children.

I will willingly attend to give such evidence whenever you see fit.

Yours,

(Sgd.) ST. DAVIDS

The Rt. Hon. Lord Morton of Henryton, M.C.,
 The Chairman,
 Royal Commission on Marriage and Divorce.

(Dated 25th May, 1952.)

EXAMINATION OF WITNESS

(THE VISCOUNT ST. DAVIDS: called and examined.)

8493. (Chairman): Lord St. Davids, we have your letter of the 25th May and we note that you were the original proposer, in a speech in the House of Lords, of the Denning Committee's recommendations on the protection of children in divorce. You say that their Report is largely in your words when you gave evidence before them. You state three points, which you wish to argue before the Commission. We have noted those three points and now invite you to develop them as you think fit. After you have done that we may or may not wish to ask you questions.—(Lord St. Davids): Thank you. First, as to the repair of marriage. The point here seems to me that divorce is still a rising flood, and from every point of view it is more important to stem the flood and reverse that tendency than merely to finance the litigation which that flood brings. Therefore I am strongly in favour of switching more of the available finance on to the marriage guidance side, and, if necessary, for that purpose reducing it on the legal aid side. Naturally, if one could do everything, and if Treasury funds were unlimited, one would like to do both. But it seems to me that prevention of divorce is so much more important than merely subsidising litigation arising in the courts; that if there is a set limit

to the funds—and we really must realise there is a set limit—then more should be spent on the prevention side and less on the legal aid side. I admit that I personally do not believe that there should be such a thing as divorce. I am not a Catholic, but through looking at this subject I have come to the conclusion that the fact that there is a door open does definitely increase the breaking up of marriages. I have a feeling that any army which knew that there was not only a possibility of its running away, but also had a fleet of fast cars provided for it to run away in, would be more inclined to run away than one which knew it had to stand and fight. And I think the same is true of marriage. As long as people know that there is cheap and easy divorce, they will tend to run away rather than fight it out. But these views apart, if we have to have divorce I would be amongst those who would vote for financing legal aid for it.

8494. That is under point (1). Perhaps it would be convenient to have your observations on all the points first.—They are rather different subjects. I thought you might care to take them separately.

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8495. I am content to take them separately. I will ask you one or two questions that occur to me on your first point and will see whether the Commission wish to ask any more. It is true to say that divorce has recently become a rising flood; there has been, I think, a slight recession lately, but it is still a very large flood.—Much too large.

8496. You say:—

“... it is more in the public interest to aid and finance marriage guidance organisations and legal advice than to spend large sums on legal aid in the Divorce Court.”

Had you any concrete idea in your mind other than this, that some of the money which is spent on legal aid should be diverted to finance marriage guidance organisations and legal advice or, if it can be spared, more money should be provided out of the public purse and devoted to both purposes? Have you any wider scheme than that?—That is the extent of what I had in mind. There have been cases recently of reductions in the sum of money provided for these marriage guidance organisations. That I believe to be a very grave mistake. We all know that we have to have cuts in our modern economy in order to keep going, but it would be far better to have cuts even in our food or cuts somewhere else rather than cuts in this, which is really a moral cut, not only a present but a future moral cut. You are damaging not only the lives of present people but the lives of future people, the children, and possibly, as is the way with such things, the third and fourth generations may also suffer.

8497. (Mr. Young): I should like to ask you how you would propose to divert money from legal aid to marriage guidance?—It is necessarily a Budget matter. In the last Budget the sum available for marriage guidance organisations was reduced. It would be possible in the next one to increase it, if necessary by cutting down the allocation for legal aid.

8498. If you had to reduce the amount to be spent on legal aid, you would have to refuse some applications for legal aid?—Or else you would have to reduce the amount of money granted against each application. You could say, “We will not give one hundred per cent. subsidy, we will have eighty per cent. subsidy, or ninety per cent. subsidy”.

8499. Would your proposal be this? You would give all the legal aid that was practicable to actions other than divorce actions, but so far as divorce actions were concerned, you would either give no legal aid at all or you would only give a percentage of help?—I imagine that as a matter of fairness, you would have to give a percentage of help.

8500. That is, you would allow all applications for divorce to go through but only give them a percentage of help?—Yes. I am not, of course, in favour of reducing the sum just as a pure reduction. I am in favour of it solely as a method of finding the money which I should like to see given to the marriage guidance organisations.

8501. (Chairman): You would like to see money set aside for marriage guidance and legal advice, but you are afraid that may not be possible without encroaching upon that which is given for legal aid; if this is so you think it is better to do that than let marriage guidance and legal advice go short?—Yes if one or the other must be cut.

8502. (Mr. Young): I want to know how you would do it from a practical point of view?—That is my practical suggestion. The proper method would be to cut down the expenditure by giving a percentage subsidy instead of one hundred per cent. subsidy.

8503. That is as regards divorce only?—That is as regards divorce only.

8504. So that you would make a distinction between applications for legal aid other than for divorce and applications for divorce?—That is what it would come to. I am merely trying to suggest some method by which the cash can be found; I do not like to suggest spending more from the national Treasury without suggesting also where the money may be found. Perhaps something else could be cut entirely outside the legal field. I am merely suggesting that marriage guidance and legal advice are more important than legal aid, and if cuts have to be made they should fall on the less important of the two.

8505. Is it not cutting across the principle of legal aid to draw a distinction between one type of litigation and another? Is not the principle of legal aid that all people shall have access to the courts irrespective of their financial position?—But we already make such a distinction, I believe I am right, in respect of libel and slander cases. I think there is no legal aid in such cases.

8506. There are certain exclusions. That is why I want to test your proposal. You want to exclude divorce to the extent of a percentage of help?—Yes, in order to find the money for these other purposes.

8507. (Mrs. Jones-Roberts): I want to put one question arising out of your answer to Mr. Young. You say that you would not give one hundred per cent. subsidy to legal aid but, say, eighty or ninety per cent., but would you agree that legal aid does not at present mean free divorce? That is clear?—It is a most expensive business going through the law courts, whether you have legal aid or not, because there are so many items that do not qualify for legal aid.

8508. That is what I want to establish. Legal aid is only granted after a very searching income test?—Yes.

8509. I do not quite follow the percentage subsidy. For instance, a man may find after the income test has been applied that he has to pay £40, let us say, according to the present scale. Is it your idea that he should be required to pay more?—That is what it would mean in fact. I am by no means enamoured of cutting into legal aid. I am merely saying that legal aid is less important than marriage guidance.

8510. You are using it as a convenient comparison?—I am using it as a convenient comparison. I can think of a lot of other things, perhaps less important than legal aid, but you would be here all day if we went into what else could be cut.

8511. (Lord Keith): Supposing that in spite of the best efforts to mend broken marriages one found the number of broken marriages steadily increasing, I suppose that some solution would have to be found for that situation?—We have to find every possible solution to it.

8512. You did say that you were against divorce while recognising, I suppose, that at the present time it is not practicable to dispense with it. But it is quite conceivable, in spite of the very best efforts to mend broken marriages, that one may find the number of broken marriages is not decreasing but is increasing. Some solution would have to be found for that, would it not?—Yes, indeed it would.

8513. Is there any but divorce?—My solution would be the opposite. I believe that the proper method is to stop all divorce in the case of a genuine marriage.

8514. What I gather you are saying is that if all divorce were stopped, the number of broken marriages would decrease?—Yes.

8515. That, of course, is a matter which would not be very easy to ascertain without experiment. It is a matter of opinion?—It is a matter of opinion, and a matter upon which you can get practically no statistics, I imagine. But any lessening in the permanency of marriage certainly does cause people to think marriage less valuable and they tend to rush in knowing they can rush out.

8516. (Chairman): You think that, if there were no divorce, a number of marriages that today might be described as broken marriages would be mended by the people themselves?—Yes, I think a great many would. I must say that if I was a dictator arranging everything to my own satisfaction in the country, one of the things I would do would be to make marriage more difficult, but that has really nothing to do with anything I have submitted to you.

8517. Will you say anything further you want to say on your second point?—

“That the welfare officer whose services have been engaged to protect children in divorce cases should be more widely used, and more such officers appointed even in such times of financial strain.”

Are you familiar with the extent to which the welfare officer at the High Court of Justice is used?—I have no exact up-to-date knowledge because there has been some vagueness in Question and Answer in the House on the matter. I know that when the officer was appointed Her Majesty's judges were naturally a little bit cautious in

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using him at first. I believe that in the first year they used him in about seventeen out of a possible 150 cases, but I understand that he is being used a great deal more now. Unfortunately, there are apparently no statistics available, because when I asked the present Lord Chancellor for the figures in the House of Lords some months ago, he was unable to give any.

8518. (Your suggestion falls under two heads, first, that the welfare officer should be more widely used, and secondly, that more of such officers should be appointed. I shall ask Mr. Justice Pearce to tell you to what extent the welfare officer is being used now, and then I shall ask you how far you think he should be more widely used.—I should be very glad indeed to have such information.

8519. (Mr. Justice Pearce): You say you have no up-to-date information. It is very difficult to get up-to-date information in such a matter, where there is a constantly increasing use of the welfare officer. You wrote to the Commission in May and you may fairly say that since then there has been an increase. There has been a very large increase since two years ago and there have been two more people appointed to assist the welfare officer in the last few months. I think you may take it that judges are fully cognisant of the usefulness of the help of the welfare officer and that the increase in using him will continue. That, I would say, is a fair description of the present situation.—May I ask one question? I know I am supposed to be a witness, but is this officer being used in the provinces as well as in London? (Mr. Justice Pearce): No. But he may get in touch with probation officers in the provinces. To a certain extent, the welfare officer covers the country so far as is reasonably possible, but there have been suggestions that there ought to be more local help in dealing with matters, say, at assizes. At present in cases at assizes one can sometimes call on the help of the local probation officers—which has been given very gladly. I think you might take it that a good deal is being done in that direction.

8520. (Chairman): In view of that, will you add anything you wish under your second heading?—I am very glad to have that information. It is what I imagined would happen and I am very glad to hear it is so. One of the points I did want to make was that there should be such officers with powers to act locally. That you have already mentioned.

8521. (Mr. Justice Pearce): I am not suggesting that there are. There have been suggestions that there should be. At present the only help available is the probation officer attached to the local police court, but, strictly speaking, he is under no obligation to the High Court. I do not think I can put it higher than that.—That is one of the suggestions I came here to make, that there should be officers appointed locally.

8522. I think that point should be made by you because I am not saying that that ground has been covered.—That is one of the points I had in mind to bring here today.

8523. (Chairman): You think that there should be locally appointed welfare officers spread all over the country?—Now that we have discovered that in London the welfare officer is valuable and that his use is increasing, it seems to me that the time has come for such officers to be appointed to large provincial centres as well as in London.

8524. Is there anything else you want to add under point (2)?—I would just like to say that in my opinion this, again, is not the sort of thing that should be cut down in the course of winding a Budget axe. It is very much better to cut down on the bodily comforts of this country and do our best to provide every possible penny for this very much more important side of life.

8525. (Mr. Justice Pearce): I should like to know whether you have any detailed suggestions about the appointment of welfare officers in the provinces. You see, at present there is no welfare officer attached to the High Court in the provinces. If an officer were attached there would not be enough work. I think, on contested custody cases to keep him employed whole-time.—As to the figures which would show whether he would be

employed whole-time, these, of course, are not within my reach. I imagine that it would be only the largest provincial centres which could support such an officer at the moment.

8526. You appreciate that I am talking about contested custody cases?—Yes.

8527. And that there are a large number of cases where there is no defence on the question of custody and where the judge never intervenes because he has no reason to think that intervention is necessary. Have you any views about those cases?—I have very strong views about those cases. I put them before the Denning Committee and I have argued them before the Lord Chancellor in private.

8528. Can you give your views on that in a sentence?—Yes. It partly comes under point (3) of my letter.

8529. Perhaps I am out of order in asking questions about that. We shall come to point (3) later.—Just as you wish.

8530. (Lady Bragg): When you speak of the welfare officer, I am not quite certain if you intend the welfare officer in deal only with cases of custody. Did you hope that he would also attempt reconciliation, where possible?—My original idea was that he would be guardian ad litem.

8531. (Chairman): I am not sure that that is a very appropriate phrase for the purpose.—Guardian ad litem is not an exact parallel, I know, but it is after that nature. The point is this—the two parents are the natural guardians of the child. But here you have them fighting each other in the law courts, and by so doing, they have thus disabled themselves from being guardians at that moment. What I originally asked for before the Denning Committee, and indeed in the House of Lords, was an officer of the court who would step in and act as a temporary guardian of the children and who would look after the children's side of the case in all possible ways—which, of course, would include, if he can, getting a reconciliation. Of course, that would be the best solution of all, if he could do that.

8532. (Lady Bragg): Your emphasis is really on the children?—Yes. The point is that the children have nobody to defend them for the simple reason that their natural guardians are at loggerheads.

8533. (Chairman): Now we come to the third point, which is:—

"That parents in divorce cases are often unanimous on the disposal of the children as a result of a collusive bargain which is not in the best interest of the children, and that to make such bargains more difficult the court should have the power to refuse to grant a divorce unless the children were looked after according to the stipulations of the court, and to order the welfare officer to investigate where it appears such a bargain to exist to the detriment of the children."

I have one or two questions to ask on that. First, are you a member of the legal profession?—I am not.

8534. Would you like to elaborate that paragraph at all, or does it speak for itself?—It partly speaks for itself. The fact is that one has heard amongst friends and acquaintances of cases where children have been used as a blackmailing instrument by one party in a divorce against the other. One parent may say, "I will not divorce you unless you first of all make a settlement giving me this, that and the other power over the children". Or, alternatively, in actual collusion cases, one party says, "I will give you grounds for a divorce if you will make a settlement giving me certain powers over the children". Thus, the children are very definitely used as an instrument, in some cases, by one party in the divorce against the other. I believe that the court should look at an existing marriage as it would at a trust. A trust is dissoluble by agreement if all the interested parties are of age and sane and all the rest of it. But if there are young children in a trust, then in order to dissolve the trust, the matter has to be brought before the court and the most stringent examination made of the whole matter, because the children are parties to the trust. They are as much parties as the parents are in a matter like divorce. What is more, of course, it is possible for parents to go marrying and divorcing as much as they like, as indeed they seem to do in some cases, but you cannot give a child another childhood. It either has a good childhood

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or it has not. You cannot replace its natural childhood with anything quite as good. So the children are very much more interested in the matter than the parents are, and that is why I would like the court to be so very strict in this sort of matter.

8535. I see. I want to ask you a question or two about what you contemplate. Let me take an undefended divorce case, where the question of custody may not be raised before the court at all. The petition may be simply for a divorce. Is it your suggestion that in every undefended case the court should enquire, first, whether there is a child or children of the marriage; secondly, what arrangements have been made for their care and custody; and thirdly, before granting a divorce, should satisfy itself in every case, through the welfare officer or some other appropriate official, that these arrangements are in the best interests of the children?—I would like to see that done in every case because it is my belief that an undefended case is not really undefended. The children are parties in the matter. I personally would like to see the children down on the paper as parties in the case. At the moment the case is down as "Smith v. Smith", but there may well be a number of other Smiths (the children) engaged in the same case and they are not on the paper. These cases are not really undefended. What I should like to see would be an officer, whose business it was to protect the children, investigate the case before the divorce came into court, and then if the position of the children was in fact satisfactory and the best had been done for them, it really would be an undefended case.

8536. Do you mean, then, that if the officer in question had investigated before the trial and reported that in his opinion the arrangements made for the children were suitable, then that obstacle to divorce would be removed, and the judge would not enquire any further?—Yes, of course.

8537. Then, in defended divorce cases, if there was a contest about custody, would you leave it to the discretion of the judge whether to call in the assistance of the welfare officer, or to decide it himself without such assistance? You see, both parties are there, he can see the parents and can ask them questions. In these cases, should the judge do as he thinks fit as to further enquire, or would you say it should be compulsory even on the judge to employ the welfare officer?—I personally have a liking for perfection, and I would like to see the welfare officer protecting children in all cases, but I must admit that where the judge has both parents in front of him and the whole case spread out before him in court, there seems to be much less need for the officer. Nevertheless, I personally would like to see such an official used, but I recognise that it might very considerably add to the cost of litigation and that it might be a very difficult thing to do.

8538. At the end of paragraph (3), you say:—

"... and to order the welfare officer to investigate where it suspects such a bargain to exist to the detriment of the children."

I should have thought that from your point of view, that is too narrow, because it is difficult for the court to form these suspicions unless it knows something of the facts. In undefended cases you say that there should be such an investigation in every case?—I should like there to be an investigation in every case but at the same time I realise that there is a matter of £ s. d. which might hinder the perfect state of affairs I would like to see. For that reason, I limit my request to rather smaller size.

8539. (Lord Keith): Have you any special interest in children or connections with children's associations?—No. My only special interest with children is that I have a son and four daughters, but I have no connection with any sort of organisation at all. I became bundled into this sort of affair largely by accident. I have a habit of hanging around a debate in the House of Lords and speaking at the end of a long list of speakers, doing the *Ps* and crossing the *Ps*. So in a debate on the Denning Report I discovered that the whole debate had gone through without one mention of the protection of children and it seemed to me that something had been left out. I just made a three-minute speech at what is considered a late hour in the House of Lords, when everybody had started to stir uneasily in their seats and

the Lord Chancellor was hoping to get on with the debate. I made a three-minute speech and this has arisen from it.

8540. It is by a happy chance you have become interested in this subject?—Yes. I simply followed my nose from that point.

8541. (Mr. Justice Pearce): You talk of having a guardian of *litam*. Now what you want would really be best achieved, would it not, if the court had power to call in the Official Solicitor to present a case from the child's point of view if the court thought it desirable? I am putting to you that the provision of a guardian of *litam* is nothing in itself, the point is that there should be somebody to present the children's point of view, independently, to the judge?—That is it.

8542. It would satisfy you if there were a responsible person like the Official Solicitor to put forward the children's point of view in necessary cases, with whatever weight he thought was required, either going himself in chambers or sending counsel if he thought that desirable?—That is what I would like. I want somebody representing the children.

8543. Where the welfare officer thought it was necessary?—Yes.

8544. One would not want to have it in every case, because it is adding a good deal of expense. You may go on the assumption that once the court saw that there was a different point of view, the court itself would start following up that point of view. Do you follow?—Yes, I do.

8545. So you would be content if the court had power to direct the Official Solicitor to act separately on behalf of the child, where necessary?—That is in the defended cases, of course.

8546. With defended cases. That deals with cases where the court has thought such representation necessary—in other words, where the court has found that there is something wrong. Now with regard to the other cases, I think you have to face this. You can either investigate all of the large number of cases that go through or you can leave them and hope for the best. But the only way of finding out the wrong ones is to investigate them all, is it not?—I think it is.

8547. And once an investigation has revealed that there is something wrong, then you can leave it to the judge to deal with that, with the help of the welfare officer, and so on. But finding out if something is wrong can only be done if you investigate all the cases?—Yes.

8548. That is a very large expense and trouble, and the question whether it is justified would depend, I suppose, on the likelihood of finding anything wrong. Have you got any idea in your mind as to how often there are cases where children's lives are wrongly planned owing to bargains between the parties?—I have no idea, but, of course, there is always a certain amount of bitterness around a divorce. At least one person is in the wrong, and quite often two, and not necessarily the guilty party in the strictly legal sense. I personally think it would be very much better if cases were investigated simply so that justice might be seen to be done.

8549. You think that there is enough possibility of children's lives being wrongly planned to justify intervention in every case, even where parents are agreed on the planning of the child's life?—Yes, I do. Besides which, in such a case, where the right thing was clearly being done, it would not require a great deal of investigation. The necessary official, wherever he might come from, the Official Solicitor or whoever it might be, would have a comparatively easy task.

8550. I was not suggesting the Official Solicitor at that stage, because all that is needed is some person who can talk about children?—Yes.

8551. To put the judge on his guard if there is anything wrong?—Yes.

8552. One other question about the welfare officer. You would like him to look into every case?—That has always been my view. It is not what I have succeeded in getting, so far, because the argument has always been that it would not be justified because of the expense. But at the same time, I do not think that this is one of those points where one ought to chess-pare about expense. I am not in favour of saving expense when it comes to the lives and happiness of children.

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[Continued]

8553. In defended cases you think that, whatever material the judge has, he should also get the additional help of the welfare officer?—Personally, I should like to see him used in all cases.

8554. He does see the children having tea and coming in from school—which the judge does not?—Yes.

8555. (Mr. Maddocks): As a practical matter, what else can he see? What can a welfare officer, or a probation officer, see in addition to that? He goes to the house, sees the child come in, hears what the child says. Can he find out anything more that is of use to the judge? He could say it was a dirty home, but is there anything else?—There are things which can be got by personal contact which cannot be got in any other way. One of the reasons why I am in favour of some official actually going to the home is that in that way he gets the atmosphere, and the court cannot get that in any other way.

8556. Supposing he comes back and says to the judge, "I do not like that home. The woman is dirty, it is a bad neighbourhood". The husband does not want the child at all, but he is well-off and has a nice home. Is the court then to say, "Right, we will take the child away from the mother and give it to the father", though the mother wants it and the father does not?—No, it would hardly be as simple as that.

8557. What is he going to do with the child?—There are the wishes of the child. There is the child's natural affection. There is the matter of where the child's friends are, of the activity the child likes engaging in, a thousand little things. The welfare officer is trying to act as the representative of the child he has to consider everything.

8558. What is the judge or the magistrate to do, he cannot give the child to the parent who does not want it, can he?—He cannot give a child to a parent who does not want it, no. On the other hand, there are very often more than two people to whom the child may be given. There may be other relatives, grandparents or "aunts". There may be all sorts of people. What is more, it might even be of benefit to remove the child from both parents in certain cases. There are a lot of things he can do. Such an official can also exercise a certain amount of persuasion.

8559. (Sherriff Walker): Following up Mr. Maddocks' questions, I am interested in your proposal to give the court power to refuse divorce unless the children are looked after according to its stipulations. I was wondering how that would work out. I want to put a concrete case to you just to see. Suppose that a wife is suing her husband for a divorce and he is defending the case. He does not want the divorce. It is bitterly contested litigation, but they have agreed that, should a divorce be granted, the wife would be allowed to have the custody of the children. Suppose that at the end of the day the court holds that the petitioner has established her case on a matrimonial offence, but thinks in the circumstances

that she is not a proper custodian for the children and that the custody ought to be with the father. Your proposal would result, would it not, in rather an odd situation, because the husband, who had lost his case on the merits, could then prevent his wife from getting a divorce, by saying, "I will not take the children"? How would you deal with that? The court has power to refuse a divorce unless the children are looked after according to its stipulations. How would you get round that deadlock?—In that particular case, the stipulation would not be much use to the court, but it would be a lot of use to it in other cases. I admit in that case it would not.

8560. If the court came very clearly to the view that, so far as custody was concerned, the children should be with the father, there would then be rather a deadlock if he refuses to take custody, or could he be compelled?—I am trying to put an extra weapon into the hands of the court with which it can make its decisions work. I admit that weapon would not be of use in every case, but it would be in some cases. That is why I should like the court to have it.

8561. You say that the power of the court to refuse divorce might be effective in many cases?—In many cases, it might not have to be used at all. It would be a weapon held in *terrorem*.

8562. (Mr. Beloe): I think I have your views quite clearly, except what you want to happen after the judge has decided who shall have the custody of the children. Take the case which Mr. Maddocks put, where the father would not have the children and the mother was really unsuitable to have them, though she was prepared to have them would you give the court any power to continue its interest in the children?—I suppose that that could be done by making the child a Ward of Chancery, or something like that.

8563. I am not really conversant with that procedure, but I imagine it would be quite a job to do that?—I do not think it would be such a job to do it. After all, many children are made Wards in Chancery.

8564. (Mr. Justice Pearce): I do not think that that would be any help at all. They are wholly different things. The Court of Chancery looks after its Wards; the Divorce Court looks after those for whom application for custody is made. If you want continuing care, the Divorce Court is perfectly able to deal with the situation and the machinery need not trouble you.—I am sorry that I am using the wrong words. I believe that there are methods of carrying on such continuing care.

8565. (Mr. Beloe): Would you like that?—Where it is necessary, I would like it, certainly. After all, what we want is to give our children continuous care, if not by the parents, then by somebody. Somebody has to do it.

(Chairman): Thank you for your letter and for coming to help us this afternoon.

(The witness withdrew.)

(Adjourned to Wednesday, 26th November, 1952, at 10.30 a.m.)

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ROYAL COMMISSION ON MARRIAGE AND DIVORCE
MINUTES OF EVIDENCE : THIRTY-FIFTH DAY

ERRATUM

Page 882, Question 8488, 6th line:

Substitute "8489. *Thank you. I gather you feel that very rarely*"
for "*protection of children in divorce. Their Report is largely*"

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ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

THIRTY-SIXTH DAY

Wednesday, 26th November, 1952

WITNESSES

SER THOMAS BARNES, G.C.B., C.B.E., the Queen's Proctor.

MR. WALDO BRIGGS } representing the Society of Stipendiary Magistrates of England
MR. F. BANCROFT TURNER } and Wales.

MR. E. R. GUEST

MR. A. CRAIG representing the Progressive League.



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THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE

THIRTY-SIXTH DAY

Wednesday, 26th November, 1952

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DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELLO, M.A.
LADY BRAGG
MR. WALTER RUSSELL BRAIN, D.M., F.R.C.P.
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MISS M. W. DENNIEHY, C.B.E., (*Secretary*)
MR. D. R. L. HOLLOWAY (*Assistant Secretary*)

EXAMINATION OF WITNESS

(*Sir THOMAS BARNES, G.C.B., C.B.E., the Queen's Proctor; called and examined.*)

8566. (*Chairman*): Sir Thomas James Barnes, I will not embarrass you by reading out the very distinguished initials after your name, but you were appointed King's Proctor in 1933?—(*Sir Thomas Barnes*): Yes.

8567. And you are now Queen's Proctor. I think I am right in saying that you are the first solicitor to be appointed to this post?—Yes, I think that is so, my Lord. I was appointed Treasury Solicitor, of course, and both offices are held by the same person. I was the first solicitor, I think, to be Treasury Solicitor, since some time in the eighteenth century.

8568. I think your functions as Queen's Proctor arise under Sections 4 and 10 of the Matrimonial Causes Act, 1950?—Yes, my Lord.

8569. Section 4 (1) provides:—

"On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any countercharge which is made against the petitioner."

Section 10 describes the duties of His Majesty's Proctor, and I need not read it. You have, in the course of the last twenty years, had a great deal to do with divorce matters in various capacities, including, I think, a certain amount of drafting work?—Yes, on the 1937 Act, my Lord.

8570. I seem to remember that in a book of Mr. A. P. Herbert's which I read—I think it was called *The Ayer Hare*—he suggested that there would never have been a Herbert Act but for Sir Thomas Barnes. He was too kind.

8571. You have kindly supplied us with some purely informative memoranda, on which I have no questions, but I think you have been warned that you would be asked questions as to certain suggested new grounds for divorce, and also on a suggestion which has been made, namely, that the decree nisi should be abolished in England—it does not exist in Scotland. I want now to put to you seven suggested new grounds. I should explain to the Commission that the Secretary thought it wise that Sir Thomas should have before him the summary of the evidence which has been given on these particular points, so that he might see the arguments for and against each proposal, which have already been put before the Commission. I will tell you what the seven suggestions are about which I am going to ask you, and then take them

separately. The first is divorce by consent. The second is divorce at the instance of either party after a period of separation; for instance, the Bill that Mrs. Birrell White brought forward in the House of Commons, and variants upon that. The third is divorce on the ground which is generally described as that the marriage has irrevocably broken down. I think some witnesses said that that should be at the instance of either party, and others only where both parties agreed, which, I suppose, would be divorce by consent again. The fourth is imprisonment. The fifth is habitual drunkenness. The sixth is cruelty to the children of the marriage. The seventh is a suggestion that, for the purpose of equality between the sexes, since sodomy is a ground for divorce in the case of a man, so lesbianism should be a ground for divorce in the case of a woman. I will take these seven one by one, and if you have formed any views on them I would be very glad if you would express them. First, will you take divorce by consent?—May I first say, my Lord, that, as I understand it, the present principle upon which divorce is permitted is that one of the parties has suffered an intolerable matrimonial wrong—I think it has been described as an intolerable wrong in some cases? I think it would be extremely dangerous to depart from that principle. Obviously divorce by consent does depart from that principle, because it would permit divorce at the will of the parties. I think that Mrs. White's Bill also departs from that principle, perhaps not to the same extent. If you depart from that principle I think you get on to what I may call a slippery slope, and before you know where you are, you do get to divorce by consent, which I think is wrong.

8572. Before you leave divorce by consent, have you any views as to the results which would be likely to follow if it were introduced?—I was going to say, my Lord, that I think it would be a bad thing that people should get married, knowing that if they did not like it, they could get out of it. If that were the case—and I think it would be the case if there were divorce by consent—it seems to me that all the ups and downs of married life, instead of being adjusted as they ought to be adjusted, and so adjusted in many cases, would be looked at by the parties through divorce spectacles. It seems to me that there are certain things—I think it has been called the rough and tumble of married life—to which people have got to adjust themselves, and it would be wrong that they should treat everything as though it were a possible ground for divorce. I think it would be a bad thing, therefore, to relax the present rule.

8573. Yes. Now we come to the second, which is divorce at the instance of either party after a period of separation. That is, in effect, the proposal embodied in Mrs. White's

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[Continued]

Bill.—Of course, that really is divorce by consent, is it not, and it may be that you have your five or seven years . . .

8574. Forgive me, the difference is this, that under Mrs. White's Bill either party, whether guilty of a matrimonial offence or not, or if neither of them has been guilty of a matrimonial offence, can divorce the other against the will of the other. That is the distinguishing feature between Mrs. White's Bill and divorce by consent.—The separation being by consent?

8575. Not necessarily. I will read what she proposed:—

"A petition for divorce may be presented to the court either by the husband or the wife on the ground that—

(a) the parties have lived separately for a period of not less than seven years immediately preceding the presentation of the petition; and

(b) there is no reasonable prospect that cohabitation will be resumed."

That period of seven years, Mrs. White said in evidence, she personally would like to shorten, but she put it in that form before Parliament because she thought it more likely of acceptance. So if I may take, for simplicity, the case of a wife whose husband has deserted her, or committed adultery, or been guilty of cruelty, if the parties have been separated for seven years, as the Bill stands, or three years as other witnesses, including Mrs. White, suggested, and if the court is satisfied that there is no reasonable prospect that cohabitation will be resumed, a divorce may be granted to either party. But I should add to that that there are certain financial provisions which are in a proviso.—Then, my Lord, the guilty party would be entitled to relief?

8576. Yes, even though the innocent party—to use that convenient phrase—did not desire it. Of course, "innocent party" and "guilty party" are phrases which have been objected to in the course of the evidence on the ground that very often there are faults on both sides, but I mean by that the party who has committed no matrimonial offence.—Yes, I see. This does depart from the principle, I think. I should not like to think that the guilty party would be entitled to relief. I suppose the court would merely consider the question of separation, would it? It would not deal with the matrimonial offence, if there were one?

8577. As far as I can see from the Bill, as I understand it, the only facts that have to be established—apart from the fact that the husband has so far discharged his financial obligations to pay maintenance—are two: first, that the parties have lived separately for a period of not less than seven years immediately preceding the presentation of the petition, and, secondly, that there is no reasonable prospect that cohabitation will be resumed. I cannot find any other limitation on it.—Of course, you have seven years in the Bill. You would find people saying, "There are some very hard cases, five years" and so on, and before long you whittle the thing down to a very short period. I do not like the suggestion myself. All I can say is that it seems to me to depart from the principle which exists today, and I think it much wiser to maintain that principle.

8578. Then I will come to the third suggestion. It has been suggested in divers terms and by several witnesses, that instead of having a list of matrimonial offences or, I think in some cases, perhaps, in addition to having it, it should be a ground for divorce that the marriage has irrevocably broken down. What would you say about that?—I should think it very difficult to know what tests the judge ought to apply in a case like that. I assume that the ground could not be defined; if it were defined it would be defined by reference to some overt act, such as adultery or desertion, and then you get back to where you are at the present time. I should think that whether a marriage has broken down or not, to a great extent is in the minds of the parties. I do not think it is capable of proof satisfactorily before a judge. I really do not know what the judge would do.

8579. Of course, it has been put in both ways, namely, if both parties come before the court and say that their marriage has broken down irrevocably, and also if one party comes and says that same thing. It has been suggested that it is not easy to distinguish the first position from divorce by consent, and the second position possibly from divorce after a period of separation. What would you say

about that?—Of course, if they both come and say that the marriage has broken down, that is divorce by consent and there is no test.

8580. Unless, of course, the court required some standard of proof, which you think is difficult?—I cannot imagine what standard of proof could be required. What would you say to the parties?

8581. (Mr. Justice Pearce): You challenge me, Sir Thomas, and I should have thought that what a judge would want to do would be to find out if the parties had intended to make their marriage work or not, there being no human relationship which will work if the parties do not intend to make it work. It would be a question of intention rather than anything else.—It would be a question of intention, yes.

8582. (Chairman): Now we come to the fourth suggestion. It is suggested that there should be a divorce open to a petitioner if the other party is imprisoned. There again the suggestions vary very much, ranging from the suggestion which, I think, is found in the Gorell Report, the case where a capital sentence has been committed to imprisonment for life, down to a much shorter period.—I think one suggestion which was made recently was an aggregate of sentences amounting to five years. What do you say generally to divorce on the ground of imprisonment?—I do not hold any strong view about it, my Lord. We had it, my recollection is, in the Herbert Bill, and it was defeated in the House of Commons. The difficulty, of course, is to fix the period, is it not? You might take seven years, or five years. Insanity is five years, and I doubt whether you could have less, for imprisonment.

8583. Of course, insanity is incurable insanity, and care and treatment for five years, that is not quite the same.—Yes. Do you mean that as regards imprisonment, the ground of divorce would be the conviction, and not the fact that the man or woman is away from the other spouse for a specific time?

8584. I think the intention is, the absence for a specific time, but the suggestions have varied and some of them have not been quite clear on that point. The general idea behind them is that it should be open to a spouse to get a divorce if there is long separation by reason of imprisonment, and of course, *ex hypothesi*, the party in prison has committed a crime. I cannot specify the suggestion exactly because it ranges, as I say, over a very wide field. I wanted to know if you could give us any general views on it, and, if you were in favour of it, what limitation, if any, you would put on it, but I think you opened by saying that you had no very strong views on it?—I have no very strong views on it. I do not know if there are any cases where there is any strong public feeling about it. I think it certainly ought to be a sentence of at least five years, if it is introduced as a ground of divorce.

8585. And you have no strong views as to whether it should be introduced or not?—No, I have not.

8586. Then we come to habitual drunkenness, as a suggested ground of divorce. What do you say about that?—The difficulty I feel about that is to define "habitual". Does it include the man who makes a habit, when he gets his wages on Saturday night, of getting drunk, but otherwise is a hardworking man and looks after the family? Does it include the man who has periodical bouts, but who might be all right for months between bouts? I think that is the difficulty. Of course, there is a definition in the Habitual Drunkards Act of 1879, but that is a very rigid definition. I think it is that the person be a danger to himself or others or unable to look after himself and his affairs. On the whole, I am against it as a ground of divorce, my Lord.

8587. I do not know if you noticed the arguments in the information that was sent to you, but as far as I remember they are these: first, if drunkenness is accompanied by cruelty, or by such conduct as would justify the other spouse in going away and alleging constructive desertion, the spouse should put up with it. That is one side. The other side is that a spouse can be reduced to a state of very great misery, without actual damage to health, and that that should be taken into account. I hope that is a fair summary.—Of course, there are many cases of drunkenness and cruelty. I suppose that cases of drunkenness *per se*. If I may use that

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[Continued]

expression, are comparatively rare, but of course the case which would be covered by the definition in the Act of 1879 might be accepted as a ground.

8588. Yes, I see. May I pass on to the next suggestion, cruelty to the children of the marriage? It has been suggested that if the husband is cruel to the children of the marriage, although not actually in any other way cruel to the wife, that should be a ground for divorce. What do you say about that?—I think on the whole I am against that, my Lord. I think it is the duty of the other spouse to stop the cruelty, and not to rely upon it as a ground for divorce. I should have thought that if it was a bad case it was one of the cases in which the doctrine of constructive desertion might be applied. We have heard a lot about constructive desertion in the courts recently—as one judge said, it has rather run wild—but I should have thought that cruelty to the children was one case where constructive desertion could be permitted.

8589. The wife would be justified in leaving?—Taking the children away, yes.

8590. The last suggestion is of what has been called equalising the position of the sexes, by making lesbianism a ground for divorce, just as sodomy is in the case of the husband. Have you any views about that?—No, my Lord, I do not think I have.

8591. Then I shall not press you for them, Sir Thomas. The only other thing I want to ask you is this: it has been suggested, though not, I think, to any great extent, that the decree nisi should be abolished, and that the court should grant a decree absolute straightaway. I should be glad to hear your views about that.—The decree nisi is really an essential part of the machinery of the present system in England. There are positive obligations placed upon the judge, there are duties imposed upon the Queen's Proctor, and to a great extent these can only be effectively carried out if the decree nisi remains. Frequently no one knows anything about the facts of a particular case until it has been publicly heard in court, and it is after the public knowledge that the Queen's Proctor has information sent saying that the evidence was untrue, or putting forward matters which the court ought to have had before it. If there is no decree nisi that part of the Queen's Proctor's functions would certainly be seriously affected. Again, when a judge is not quite happy about the case—and you will remember that he has positive obligations laid on him to satisfy himself about certain matters—he can grant the decree and refer the matter to the Queen's Proctor for enquiry before the decree becomes absolute. If there is no decree nisi it seems to me that what the judge would have to do would be to adjourn the case, refer the matter to the Queen's Proctor, and then get the parties back before him at some later stage, all of which would mean considerable expense. Whereas, so long as the decree nisi exists, if the Queen's Proctor's enquiries are satisfactory he merely informs the parties and the decree absolute is made automatically. It seems to me to be an essential feature of our system.

8592. You see a difficulty, from the judge's point of view, in satisfying himself completely whether there has been connivance, condonation or collusion, unless there is some interval in which the attention of the court can be called to certain facts which did not come out in the evidence?—Yes. You see, it is not until the evidence is given that one can really make enquiries. One of the first things I do is to get the shorthand note and see what has been said.

8593. There is one other question which I have been asked to put by a member of the Commission. It has been suggested that, just as a co-respondent can be made liable for damages in a divorce suit, so also the woman named should be made liable for damages in appropriate cases. Have you formed any views about that?—No, I have not. I do not see any reason why she should not, as a matter of fact, but I have not thought about it. There is one other thing I should like to say about the decree nisi. Of course, I should like to see the present period of six weeks extended to three months, because six weeks is a very short time.

8594. It was recently reduced, was it not?—It used to be six months. It can be reduced by an order of court, I think, and it was reduced to six weeks. You see, when

a judge refers a case to me, very often it takes ten days to get the shorthand note, and that leaves a very short time for enquiry.

8595. You think three months would be enough?—I think three months would be enough. After all, if there is any particular reason why the period should be shortened, it is always open to the petitioner to ask for expedition, and expedition is frequently granted. One of our functions is to examine the expedition cases, and they are done quite quickly, so I do not think there would be any great hardship.

8596. These are all my questions, Sir Thomas. Is there anything else you wish to say before I ask the members of the Commission to put their questions?—I would just like to say, about the decree nisi, that the Act of 1857, which transferred divorce to the civil court, had no provision for a decree nisi. By 1860 it was found that the court could not get on without some assistance, and an Act was passed in 1860, which introduced the decree nisi, and added the Queen's Proctor with the duties which are the duties he now has.

8597. (Lord Keith): Was it to meet the possibility of collusion that the Queen's Proctor was given these duties in 1860?—He was given these duties, as I understand it—I have read the debates of the 1860 Bill—because the judges said they found it extremely difficult to carry out their functions of satisfying themselves as to certain matters, mainly as to the question of collusion.

8598. Can you tell me what was thought to be collusion, in 1860?—No, I cannot.

8599. Could you tell me whether the concept of collusion, or the definition of collusion, has been developed since 1860 by judge-made law?—I should think it probably has. I think there were some definitions of collusion before 1860.

8600. That I understand. You did say one thing which rather interested me, namely, that if the judge thought there was something wrong about the case before him, the Queen's Proctor was a necessary part of the machinery for investigation—am I putting it correctly?—Yes.

8601. In Scotland, you know, it does happen on occasions that the judge is not satisfied with the evidence he has heard; he thinks possibly that there may have been perjury, or that there are some other matters which need enquiry, and what he does then is to report the case to the Lord Advocate—I do not know whether you know that?—No, I did not know that.

8602. That is done without any office of Queen's Proctor at all, and it is quite a simple thing. The matter is reported to the Lord Advocate, enquiries are made, and if the Lord Advocate is satisfied that there is no need to intervene he does not intervene, and then the judge pronounces decree. Of course, if the Lord Advocate does think there is cause to intervene, then he intervenes and the court hears what he has to say. That is procedure which to some extent corresponds with the procedure that you yourself would follow, I understand?—That to some extent is the procedure in England, the court refers the matter to the Queen's Proctor, who is an officer of the court.

8603. (Chairman): I suppose the difference lies in this, does it not, that in England the court pronounces a decree nisi, and if the investigations produce nothing it is made absolute, whereas in Scotland I suppose the judge would have to adjourn the case? (Lord Keith): Yes, he just continues the case until he gets the reply of the Lord Advocate.—So the Lord Advocate acts as the Queen's Proctor? (Lord Keith): In effect, in that particular type of case he does.

8604. (Lord Keith): And, of course, there is the other possibility in Scotland: without any request from the judge, if a member of the public or one of the parties thinks that something is wrong, he sometimes reports the matter to the Lord Advocate, and the Lord Advocate can then intervene of his own initiative. That, again, is rather similar, is it not, to the functions of the Queen's Proctor?—Yes.

8605. I just wanted to see how far there were any differences in practice, and apart from the question of what amounts to collusion in Scotland, which I will not take you into, it looks as if, for practical purposes, the

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PAPER No. 110.

SIR THOMAS BARNES, G.C.B., C.B.E.
MEMORANDUM SUBMITTED BY THE SOCIETY OF STIPENDIARY
MAGISTRATES OF ENGLAND AND WALES

[Continued]

only difference is that in England the court pronounces a decree *nut* and in Scotland it does not do anything of the kind, but it may continue the proceedings?—Yes.

8606. I do not want to put to you, Sir Thomas, the pros and cons of divorce by consent and divorce after a period of separation, we have heard all these, but there is just one matter which surprised me a little. I cannot see any very great difficulty in a judge deciding on factual evidence—which may, of course, include the evidence of parties of intention—as to whether the marriage has irrevocably broken down. I do not say a judge cannot make a mistake, a judge can make a mistake on fact in many cases, but you seemed to think that there is some grave difficulty in a judge deciding that question, which is fundamentally a question of fact?—It is very difficult, if you take that view, my Lord, for me to controvert it. I should have thought myself that it is, and must be, a question of the intentions and feelings of the parties—because when we talk about the marriage breaking down, it does not mean that somebody has broken up the home or done something of that sort. It really is a question of intention, and from my experience in other spheres, intentions are very difficult to prove.

8607. I quite see that it is very difficult to prove what exactly is in a person's mind, but it is not very difficult, is it, to ascertain in many cases what is in a person's mind, from what he or she has done? That is really the way I would look at it. You look at what has happened in order to ascertain from that the minds of the parties, and to that extent one is really dealing with the matter objectively rather than subjectively; but I think I see what is in your mind, you are really taking into account what the parties are thinking of?—Yes. Of course, if you say that the marriage has broken down by reason of desertion, adultery, and so on, there you get the objective test which you have mentioned, but as I understand it you do not say that, you leave it at large.

8608. Yes. I quite see that one may be introducing other causes of breakdown than the present recognised matrimonial offences. There is only one other point you referred, I think, to what you call the 1879 definition of drunkenness. Is that the definition in the Licensing statute?—No, it appears in the Habitual Drunkards Act of 1879—it is referred to in the Licensing Act of 1902.

8609. Then I know what you mean, and I need not trouble you any further about that—the Licensing Act refers back to the 1879 Act?—Exactly.

8610. (Mr. Justice Pearce): I have only one question, on Lord Keith's problem about whether a judge could not decide if a marriage has irrevocably broken down.

(The witness withdrew.)

PAPER No. 110

MEMORANDUM SUBMITTED BY THE SOCIETY OF STIPENDIARY MAGISTRATES OF ENGLAND AND WALES

1. This Society was formed on the 29th April, 1939, and the present fifteen stipendiary magistrates are members of the Society. Stipendiary magistrates are appointed for the following areas: Birmingham; Cardiff; East Ham and West Ham; Huddersfield; Kingston-upon-Hull; Leeds; Liverpool; Manchester; Merthyr Tydfil (Circuit); Middlesex; Pontypriod (Circuit); Salford; Stafford Poteries (Circuit); South Staffordshire (Circuit); Swansea.

2. The memorandum of the Magistrates' Association (para. 38) states:—

"Constitution of the court. We consider the existing legal provisions by which a single stipendiary or metropolitan magistrate is empowered to hear and decide domestic cases alone is most unsatisfactory. We are of opinion that all domestic proceedings in magistrates' courts should be brought before a bench of not less than two justices and preferably three, and constituted to include so far as practicable both a man and a

I think possibly the difficulty you see is that if the parties do not intend the marriage to work then it will not work from the beginning. In that case I suppose it has irrevocably broken down, if neither intends to make it work, in which case I do not know what a judge is supposed to do with that test. Is that one of the difficulties you are thinking of?—That is the sort of difficulty, my Lord.

8611. And, I suppose, the problem the judge is faced with might be this: are they going to try? Can they try? Ought they to try? If they are incapable of trying, then the marriage has irrevocably broken down. If they are capable of trying, or if they will try, then it cannot be said to have broken down. Those are the sorts of difficulties you are envisaging, when you say it might not be a light problem for a judge?—Yes.

8612. (Sheriff Walker): When a decree of divorce is made absolute, is it too late to challenge it on the ground, say, of a fraud on the court?—Of course, an appeal within six weeks from a decree absolute is allowed in certain circumstances, but subject to that, after the decree has been made absolute, nothing can be done.

8613. I am thinking of the great mass of undefended cases. Am I right that once the decree is made absolute in England it is too late to have it set aside, even if a fraud on the court is later discovered?—I think so, subject to what I have said about an appeal.

8614. So the real position is, is it not, that in the six weeks between the decree *nut* and the decree absolute the decree is open to challenge if a fraud is discovered, but after decree absolute it is too late, so that you get a complete finality for all practical purposes?—Yes.

8615. (Chairman): I was asking Lord Keith, because I am not an expert on Scottish law, what the position is in Scotland, and I understand from him that the decree can be reduced if it is an undefended case. Was that what you had in mind? (Sheriff Walker): Yes, my Lord. I did not assume that Sir Thomas knew Scots law.—No, I am not sure that I understand what "reduced" means. (Chairman): It means set aside.

8616. (Sheriff Walker): That was really at the back of my question, that in the great mass of undefended cases it is very desirable to know finally whether the marriage has been dissolved or whether it can be revived by setting aside the decree.—Yes.

(Chairman): Thank you, Sir Thomas, for the assistance you have given us in the past, and for the assistance you have given us this morning.

woman. Such a proposal should present no difficulties in practice in as much as there is an adequate number of lay magistrates available to assist in this work."

3. This Society respectfully desires to place on record its disagreement with the above views in so far as they seek to place a statutory limit on the existing statutory power of a stipendiary magistrate to sit alone for the hearing of matrimonial cases.

4. Stipendiary magistrates are, by statute, entitled to sit alone and have, as such, all the powers of a court of summary jurisdiction. Although in some courts lay magistrates do from time to time sit with the stipendiary magistrate, the recognised and normal practice is for stipendiary magistrates to exercise their jurisdiction whilst sitting alone.

5. In matrimonial cases, as in all other cases, the duty of the court is to decide the rights of the parties upon the evidence and according to law, and the members of this Society are of the opinion that there is no justification

PAPER No. 110. MEMORANDUM SUBMITTED BY THE SOCIETY OF STIPENDIARY
MAGISTRATES OF ENGLAND AND WALESPAPER No. 111. SUPPORTING STATEMENT SUBMITTED BY THE SOCIETY OF
STIPENDIARY MAGISTRATES OF ENGLAND AND WALES

for treating matrimonial cases as different from other cases, as regards mode of trial, or for taking away from a stipendiary magistrate, in respect of matrimonial cases, the right to constitute a court of summary jurisdiction.

6. Under the present practice, there is opportunity for securing the attendance of lay magistrates in matrimonial as well as in other types of cases when such course seems convenient and advantageous.

7. It is perhaps relevant to point out that in the Divorce Court, where the issues are almost identical with those of matrimonial cases in magistrates' courts, the normal practice is for trial before a judge or commissioner sitting alone.

8. The population in the areas covered by the courts to which stipendiary magistrates are appointed varies greatly, with corresponding variations respecting the length of the lists and opportunities for organisation. In most courts the inability of a stipendiary magistrate to hear a matrimonial case without the presence of a lay magistrate would lead to considerable inconvenience. It would, in practice, make it very difficult for a stipendiary magistrate,

when he had finished his normal list of prisoners, to help a matrimonial court which was faced with a long and protracted list.

9. If it should be suggested that the presence of a lay magistrate would help in the giving of advice or in effecting reconciliation, the members of the Society wish to point out that they fully realise that every encouragement and every facility should be given towards reconciliation, but in their opinion it is preferable (without laying down any inflexible rule) that this work should be done by the probation service or some outside body and not by the court. If the court takes an active part in giving advice or effecting reconciliation, (a) the party not taking the advice may think the court is not, therefore, impartial; (b) statements will be made at a round-table conference which are not evidence or which should be "without prejudice"; (c) the advice will appear to carry the authority of the court and the parties will not feel that complete freedom of choice which is essential to effective reconciliation.

(Dated 22nd August, 1952.)

PAPER No. 111

SUPPORTING STATEMENT SUBMITTED BY THE SOCIETY OF STIPENDIARY
MAGISTRATES OF ENGLAND AND WALES

1. Provincial stipendiary magistrates preside over their own courts and these are not covered by the justices' rotn system. The recognised practice is for them to sit alone and this has been found to be the more efficient and convenient. Most stipendiary magistrates do, however, have lay justices sitting with them from time to time. Eight stipendiary magistrates have considerable experience in sitting with lay justices and two report that they have no such experience.

2. Stipendiary magistrates, when in practice at the Bar, appeared for both husbands and wives; as many of the parties who appear before them are unrepresented they have exceptional experience in getting evidence from witnesses; they also have experience in dealing with the evidence of women and girls in such cases as incest, rape, indecent assault and bastardy.

3. It is also felt that one magistrate is able to get on more intimate terms with a witness—man or woman—than is a bench of even two magistrates. Witnesses may be more willing to confide in a stipendiary magistrate, when they know merely as a professional magistrate presiding in the local court, rather than in someone they may know as residing in the district or by reason of their business, political or social activities.

4. The practice of stipendiary magistrates sitting alone approximates to the model of the Divorce Court.

5. When wives are legally represented they are normally represented by men solicitors and/or counsel and, presumably, they are able to instruct them adequately and are satisfied with the presentation of their point of view. All stipendiary magistrates report that they find no exceptional difficulty in dealing with women witnesses and getting the evidence in domestic cases; they do not feel that the compulsory presence of a woman magistrate would be of particular assistance in this class of case.

6. Only one stipendiary magistrate prefers to sit with lay justices on domestic cases. All are content with the

present arrangement under which a stipendiary magistrate can sit with lay justices, if either desire it. All are opposed to the taking away of the right of a stipendiary magistrate to sit alone on domestic cases.

7. It is not known upon what evidence the Magistrates' Association regards the taking of domestic cases before a single stipendiary magistrate as "most unsatisfactory". It has not come to the notice of any stipendiary magistrate that any of the parties who have appeared before them regards the practice as unsatisfactory or embarrassing. Nor have their lay colleagues expressed any desire or feeling that the present system should be altered.

8. In 1946 eight stipendiary magistrates were on record as sitting with lay justices on domestic cases.

9. Stipendiary magistrates take only a small proportion of the domestic cases in the areas to which they are appointed and it would be impossible to have one domestic court presided over by a stipendiary magistrate taking all the cases. The first claims on a stipendiary magistrate's time are criminal cases and summonses issued by official bodies, and the amount of time he can give to domestic cases varies from court to court and from day to day. Three stipendiary magistrates can fix special domestic courts with organised rotns of lay magistrates. Three have domestic cases in their ordinary list but taken after their ordinary work and eight are only able to assist the domestic courts if cases are still waiting for trial when they have completed their ordinary list—often in the afternoon. In those eleven courts no rotns of lay justices are organised and the stipendiary magistrates report that it would not be reasonably practicable to do so, owing to the uncertainty as to the time at which they take domestic cases. It would, in addition, impose extra duties on lay justices at a time when it is difficult for them to add to their normal duties, particularly in the afternoon.

(Dated 24th November, 1952.)

PAPER NO. 112. SCHEDULE OF DOMESTIC COURTS SUBMITTED BY THE SOCIETY OF
STIPENDIARY MAGISTRATES OF ENGLAND AND WALES
MR. WALDO BRIGGS AND MR. F. BANCROFT TURNER

26 November, 1952]

PAPER NO. 112

SCHEDULE OF DOMESTIC COURTS SUBMITTED BY THE SOCIETY OF STIPENDIARY MAGISTRATES OF ENGLAND AND WALES

	Special domestic courts	Domestic cases set down in list but taken after ordinary list	Relieves domestic courts when ordinary list permits	Sits alone or with magistrates (?)	Rota of magistrates	Rota considered practicable
1. BIRMINGHAM ...			Yes	Alone		No
2. CARDIFF ...			Yes	Alone		No
3. EAST HAM; WEST HAM		Yes		Alone		?
4. Huddersfield ...			Yes	Generally alone	Sometimes available (less than 50 per cent.)	No
5. Hull ...			Yes	Alone		No
6. Leeds ...			Yes	Alone		No
7. LIVERPOOL (?) ...						
8. MANCHESTER ...			Yes	Alone		No
9. MERTHYR TYDFIL (Circuit)	Yes (?)			Generally with magistrates	Rota	
10. MIDDLESBROUGH ...	Yes			About 50 per cent. with magistrates	Rota	
11. PORTSWORTH (Circuit)			Yes	Alone		No
12. SALFORD ...		Yes		Alone		No
13. STAFFS; POTTERIES (Circuit)			Yes	Alone		No
14. SOUTH STAFFORD (Circuit)		Yes		Alone		No
15. SWANSEA ...	Yes			About 50 per cent. with magistrates	Rota	

Cases of difficulty are normally set down for trial by the stipendiary magistrate.

(?) Stipendiary magistrate only takes cases referred to him by Divisional Court.

(?) Domestic cases are put in ordinary list, but it is more in the nature of a special court.

(?) "Alone" means no organised arrangement under which lay magistrates sit with the stipendiary.

(Received 26th November, 1952.)

EXAMINATION OF WITNESSES

(Mr. WALDO BRIGGS and Mr. F. BANCROFT TURNER, representing the Society of Stipendiary Magistrates of England and Wales; called and examined.)

8617. (Chairman): We have before us, as representing the Society of Stipendiary Magistrates, Mr. Waldo Briggs, the Chairman, and Mr. Bancroft Turner, the Honorary Secretary. I see from the memorandum that the Society was formed on 29th April, 1939, and the present fifteen stipendiary magistrates are members of the Society. You then set out the areas for which stipendiary magistrates have been appointed. Your memorandum deals only with one point. Do you wish to enlarge upon it, or to add any other?—(Mr. Briggs): We have come here, my Lord, to resist the suggestion of the Magistrates' Association that we should no longer sit alone in matrimonial cases. That is really the only point we wish to make.

8618. I noted that, but you do not wish to add any other point now?—May I just make one or two points in support of our view? First, for over a hundred years stipendiary magistrates have sat alone in courts of summary jurisdiction, and their right to do so has always been carefully

preserved. For example, Rule 13 of the Juvenile Courts (Constitution) Rules, 1933, states:—

"Provided that if at any sitting of the juvenile court the only member of the panel present is a Stipendiary Magistrate and he thinks it inexpedient in the interests of justice to adjourn the proceedings, he may sit alone."

And Section 9 (6) of the Summary Proceedings (Domestic Proceedings) Act, 1937, provides:—

"Nothing in this Act shall prevent the hearing . . . by a stipendiary magistrate, or by a metropolitan police magistrate, when sitting alone."

That Act has been repealed and re-enacted by the Magistrates' Courts Act, 1952, Section 121 (2) of which preserves the right of stipendiary magistrates to sit alone for the trial of domestic proceedings. Further, the Metropolitan Police Courts (Domestic Proceedings) Order, 1952, which sets up a special court to deal with domestic proceedings in part of the metropolitan area, has a proviso to Clause 2 in similar terms to Rule 13 of the Juvenile Courts

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(Constitution) Rules. The Report of the Royal Commission on Justices of the Peace, published in 1948, after expressing the opinion in general terms that it should be the usual practice for lay justices to sit with a stipendiary, goes on to say: "We do not recommend any alteration in the law giving stipendiaries power to sit alone"—that is in paragraph 247 of the Report.

The next point is this: by the time the case comes into court to be tried, the time for conciliation is usually past, and the case has to be tried according to law, and effect given to the legal rights of the parties. Of course, if at that stage there appears to be any chance of reconciliation the case can be adjourned to see what the probation officer can do. But, in our view, justices should not take any part in attempts at reconciliation, or, if they do, they should take no further part in the case judicially.

Another point is that if it were always necessary to have a lay justice present, difficulties would arise when it became necessary to adjourn the proceedings. Also it would be difficult for the stipendiary magistrate to help by taking cases from the domestic court when he has finished his ordinary list. While we welcome the presence of our lay brethren, we think that to make their attendance compulsory would give rise to many difficulties.

Then, again, we do not think that the presence of a woman on the bench helps women to discuss intimate matters. In our experience they are ready to speak quite frankly and freely to a professional magistrate, and, of course, they are frequently represented by male solicitors or counsel, to whom they must already have related these intimate matters. The only other point I wish to make is that one wonders whether the Magistrates' Association would suggest that the Judges of the Divorce Court should have a woman sitting with them when they try cases.

8618. Yes. The suggestion with which you are dealing is in the memorandum of the Magistrates' Association, paragraph 38, and it is:—

"We consider the existing legal provisions by which a single stipendiary or metropolitan magistrate is empowered to hear and decide domestic cases alone is most unsatisfactory. We are of opinion that all domestic proceedings in magistrates' courts should be brought before a bench of not less than two justices and preferably three, and constituted to include so far as practicable both a man and a woman. Such a proposal should present no difficulties in practice, in as much as there is an adequate number of lay magistrates available to assist in this work."

I follow your reasons, which appear partly in your memorandum and partly in your statement. We have had handed to us two documents this morning: one is headed, "Supporting Statement" [Paper No. 111]—I suppose that contains a summary of certain matters which you wish to bring to the attention of the Commission, and which we can have an opportunity of reading at our leisure?—Yes, my Lord.

8620. Will you explain the other document (Paper No. 112) to us?—Will you allow Mr. Bancroft Turner to explain it? He has prepared the schedule and, I think, will do it much better than I can. (Mr. Bancroft Turner): The first column, "Special domestic courts", means that the stipendiary magistrate for that area has his domestic court list and takes that and nothing else that day or morning. There are only three of them. (In Merthyr Tydfil the magistrate does some preliminary work first, but it is more in the nature of a special court.) In the second column, there are three courts which have matrimonial cases set down in the stipendiary magistrate's list but they are taken after the ordinary work. As soon as he can get through his ordinary work he starts with his domestic cases. In the third column eight courts are mentioned. In these courts the stipendiary magistrate does not have domestic cases set down in his list. We get through our ordinary work, that is, the criminal work and official summonses, then if the other courts have work left over, we send across and the cases are passed to us. This very often happens in the afternoon. The amount of relief we can give varies tremendously from court to court. Mr. Briggs can relieve the domestic courts practically every week. With myself at Manchester it is very intermittent, perhaps two or three times a month, and that generally in the afternoon because of the work.

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8621. Will you tell us for what areas you and Mr. Briggs respectively sit?—(Mr. Briggs sits for Huddersfield. I was for thirteen years at Salford, now I am at Manchester.

8622. Mr. Briggs mentioned that if it was compulsory on the stipendiary to sit with lay magistrates, it would be difficult for him to relieve the domestic court. At present he can simply say, "I am free to take cases", whereas in the other event, I suppose, he would have to look around for a lay magistrate to sit with him?—That is so, and the times of starting would be very irregular. Moreover, if there are cases left over, it does mean that the lay magistrates in the domestic courts are all occupied.

8623. Then will you go on to the next column?—You will see that we nearly all sit alone. Merthyr Tydfil, Middlesbrough and Swansea have rotas. In Merthyr Tydfil the stipendiary generally sits with lay magistrates, but in Middlesbrough and Swansea the experience is that lay magistrates attend for only about fifty per cent. of the time.

8624. That is in domestic cases?—This schedule deals only with domestic cases. At Huddersfield, where Mr. Briggs generally sits alone, if there is a spare woman magistrate from the lay magistrates' court, then she sits with him on domestic cases. It is rather less than fifty per cent. of the time. Then as to the last column, "Rota considered impracticable", of course that would be very much better answered by magistrates' clerks. But most stipendiary magistrates—I asked this specific question of them—do refer to their clerks and of course, "considered impracticable", covers a variety of reasons. In one or two courts it would be very inconvenient and it could not be guaranteed that there would regularly be a lay magistrate, and particularly a woman, available. In Manchester it would be really an impossibility to get a woman magistrate to sit with me when I go on to domestic work, except on the off-chance that there was a woman magistrate on the premises for some other purpose. (Chairman): I think you have explained that fully, and I have no more questions.

8625. (Mr. Mace): I understand that the column showing where the stipendiary sits with a lay magistrate refers to domestic cases?—(Mr. Briggs): Yes.

8626. But those stipendiaries, when sitting on criminal cases, sit alone?—Sometimes, sometimes not.

8627. Let me make clear that anything I am going to say is not necessarily an expression of my own personal views. I only want to ask questions to clarify the position. Is it the practice, when the stipendiary is dealing with matrimonial work, to use probation officers to try to effect reconciliation?—Yes, certainly.

8628. And to get reports on the home?—Yes.

8629. With great respect to a stipendiary magistrate, he is a trained lawyer and looks through the eyes of a lawyer on the facts of a case. He cannot avoid that, can he?—I suppose not. After all it is a legal problem. It is a question of the rights of the parties.

8630. Where there is a dispute on the very delicate issues affecting husband and wife, where perhaps a husband has told his wife to get out, go back to mother and stop there, the fact that he said it is easily determinable. He probably admits that he said it, but is it not rather the knowledge of those parties, the knowledge of the life that these parties lead, which is of advantage to the court?—I do not think so, but of course we have that knowledge. We sit there day to day, week to week, year to year. I have sat for nearly twenty-two years, and one does get to know something about the domestic conditions of the people.

8631. You do not think that a lay magistrate, and, in particular, a woman lay magistrate, drawn from that local area and obviously appointed to the bench because of some qualification, would be more suitable for the general run of domestic cases that come to the magistrates' courts?—I venture to think that local knowledge is a disadvantage to some extent, because people may tend to let their outside knowledge influence them, instead of deciding the case on the evidence.

8632. You see, that is the point that I am putting to you, which is the problem for this Commission. As I put to you, you as trained lawyers, with all the skill that you have, and knowledge of social conditions of the area, cannot help looking at the case as a legal problem. Yet many of these domestic disputes are not really legal

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[Continued]

problems, they depend on a knowledge of the living conditions of a class of person who comes before the bench?—I am afraid I do not agree. It is a legal problem. The complaint says that her husband has deserted her or has been guilty of cruelty, and the facts have to be ascertained and effect given to the legal rights of the parties arising from those facts.

8633. Before I leave that point may I refer to the Metropolitan Police Courts (Domestic Proceedings) Order, 1932? The idea behind the Order is that, although the metropolitan magistrates have in the past been trying these domestic cases alone, they are now to sit in domestic courts where they will have the assistance of two lay magistrates. Would you like to comment upon that?—There is this comment I would make upon that, that it is quite impracticable in the provinces. I understand that the Chairman of the Metropolitan Domestic Court is selected from among the metropolitan magistrates by the Chief Magistrate, who has what you might call a pool of metropolitan magistrates from whom he can choose, I think some twenty-six. We have only one stipendiary magistrate in each place. If some sort of organisation like the metropolitan domestic courts were to be set up in the provinces it would mean that the stipendiary magistrates would do practically nothing else but matrimonial cases.

8634. But, as I interpret this Order, it means this, that where in the past a metropolitan magistrate sitting alone has been a good and sufficient court, it is now proposed that he should have the assistance of lay magistrates in trying these cases. He has been deprived of the right to sit alone?—No, he has not been deprived of it because he can sit alone if he thinks necessary and the others are not present.

8635. Are the stipendiary magistrates as a whole able to try domestic cases apart from, out of the atmosphere of, their criminal courts?—I do not quite know what you mean by "out of the atmosphere of their criminal courts".

8636. Let me explain. We have had evidence of this before the Commission. You as a magistrate go into court, you must probably take some routine applications first in connection with non-payment of fines or something like that, or the demands on criminal cases. You then take your urgent criminal work. That is the normal procedure of your courts, is it not?—We take the criminal cases first because we have to clear the court to hear matrimonial cases, and we cannot keep on clearing the court and then bringing people back, that is very inconvenient.

8637. So sitting outside waiting for you to finish your criminal work are a husband and wife and perhaps some children?—They are waiting at the lay matrimonial court as a rule.

8638. I am looking at your suggestion that the stipendiary magistrates should do matrimonial work. Where a stipendiary magistrate takes domestic work, is not the delay to the parties going to be longer because he has his primary duty to clear his criminal work in the morning?—That is true. We do not want to alter the system.

8639. Have the stipendiary magistrates sufficient time to sit aside complete periods to hold domestic courts, so that the parties would not be brought into court immediately after a man has been sentenced to six months?—I do not quite follow.

8640. The suggestion put is this, that it is not right that a husband and wife should have to occupy the same places in the court which have just been occupied by criminals, and that the same policeman who has been in charge of criminals, say, a man who has just been convicted of street betting or something like that, should now be telling the spouses where to sit or stand.—That is a matter of arrangement. It does not affect the jurisdiction of the stipendiary magistrate to try the case. (Mr. Bancroft Turner): I do think that these are academic difficulties. We have no petalial premises and husband and wife are bound to mix with the people going into the other court. It is impossible to keep them absolutely separate. At Manchester, for instance, they are all in a common hall, or waiting outside the courts, and they are sent across when we are ready to deal with them. I do not think that the witness box is contaminated by the people who have been in before, and the police officers are very human. They have not got one tone of voice for a prisoner and one for a husband. It is the same tone of voice for the whole lot. You really would not know whether you were a prisoner or a husband.

8641. That may be. But this is the complaint of witnesses who have given evidence before us. Would you express a view that all domestic proceedings, whether before a stipendiary or before lay magistrates, should be conducted in a private room round a table without the elevation of a bench?—(Mr. Bridges): I should say definitely, no. (Mr. Bancroft Turner): Very definitely no. Might I just add this in regard to the special domestic court which has just been set up as an experiment in the metropolitan area? Whether it will be possible to supply a stipendiary magistrate to sit in additional domestic courts should the idea be extended to the whole of the metropolitan area is doubtful. We have had these domestic courts in the provinces for some fifteen years. We started after the 1936 Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction. Whereas in 1946 there were eight such courts, there are now only three. They have not proved the success in the provinces it is now hoped they will be in London. Since 1936 we have got marriage guidance clinics established generally, we have the probation service thoroughly organised for conciliation, and there do not seem to be, in my respectful submission, any different considerations in the trial of a domestic case from an ordinary case.

8642. (Mr. Maddocks): Would you explain this to me? Does your domestic court sit in the same building as you sit in?—There is a building across the road which is a juvenile court building, and on non-juvenile court days, if necessary, we borrow the two courtrooms there and use those for matrimonial cases. Four times a year we have three courtrooms taken by the assizes and four times a year we have two courtrooms taken by the sessions, so we have toeke out our accommodation as far as we are able.

8643. As far as Manchester is concerned, whether a domestic case is being tried by a stipendiary or by a domestic court, the difficulty about the unfortunate parties having to wait where they may see a policeman is quite insuperable?—(Mr. Bridges): It is so in Huddersfield also. There is no accommodation for witnesses waiting in the Huddersfield court at all, none whatever. They have to wait in court or else outside but in the building. There are no waiting rooms for witnesses at all.

8644. As a matter of interest, do you use your jallors to deal with the people in domestic cases, when they come in?—We have no jallors.

8645. In my court in London, our jailor looks after the prisoners and our warrant officer looks after the parties in a matrimonial case.—I have only two warrant officers. (Mr. Bancroft Turner): The dock officers does not look after the matrimonial cases.

8646. (Mr. Young): Mr. Bancroft Turner, you said that since 1936 the probation service and the marriage guidance clinics had been developed. I did not appreciate the significance of that remark. Do you think that that has reduced the number of cases?—I think it has. In 1936 there was something to be said for the fact that a magistrates' court would talk to the parties and advise them to get together. But since the introduction of marriage guidance clinics and the probation officers to do reconciliation work, by the time that the case gets into court it has been thoroughly sifted. The cases likely to be reconciled have been referred for reconciliation, so that we can get on and deal with the legal issues, subject to taking advantage of any sign of willingness to be reconciled on the part of the parties when they give their evidence. Or at the end of the case for the complainant, you may think there is a little hope of reconciliation and may suggest the case should be adjourned in order to see what the probation officer can do.

8647. (Chairman): I think I heard you say that in those circumstances, as a rule, the court would concentrate on trying the issues?—Yes.

8648. (Mr. Young): So it would be putting it fairly to say that the result of your own experience, since the development of marriage guidance councils and the probation service, is that the cases you have to try now are nearly all cases where reconciliation is difficult?—By and large, yes.

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8649. Is that just your impression or have you figures to prove that?—We have no figures.

8650. But you have a definite impression that that is so?—Yes, I started in 1938. (Mr. Briggs): I go back to 1931.

8651. How do you get this impression?—(Mr. Bancroft Turner): It is rather difficult for me to answer that. In my experience at Salford, where I did everything, starting with the applications, the parties were interviewed very carefully when the application was made and in those cases in which there seemed the slightest chance of reconciliation they were advised to see the probation officer and if a reconciliation was not possible to come back and renew their application. One has to be very careful about reconciliation. I have had so many people come before me applying for a summons and explaining that they had had a previous summons but had been ordered to be reconciled.

8652. Ordered to be?—Yes. You have to make it clear that it is entirely voluntary.

8653. Have you many cases of parties being reconciled more than once?—Yes, lots. Some of them make a habit of it.

8654. (Mrs. Allen): You expressed very definite opposition to the suggestion that it might be desirable that these matrimonial cases should be conducted in a private room round a table. Will you give us your reasons for that view?—(Mr. Briggs): One reason is that it is a court of law, it is not an informal talk round the table, a sort of family council. The parties have come to the court to have their rights decided. (Mr. Bancroft Turner): You do tend to hear things that are irrelevant if you sit round a table.

8655. (Chairman): I think I heard you say, Mr. Briggs, that if you once had the informal chat it was difficult for you to try the case?—(Mr. Briggs): That is so.

8656. Because you had heard too much in confidence from the parties?—Yes.

8657. (Mrs. Allen): Secondly, I am not quite clear yet as to what is your main objection to lay magistrates sitting with you on these domestic cases. I rather gathered that you implied there might be difficulties as to the availability of lay magistrates, that I should like to know what your main objection is?—(Mr. Bancroft Turner): It does not help very much. One is so anxious not to say anything that would in any way appear to belittle what lay magistrates do, but our general experience is that it does not help very much. I put the specific question to all our members, "Do you find the presence of a women magistrate (a) puts a woman witness more at ease; (b) assists you in finding the facts?", and they all replied that they had not found that that was the case at all. It is an ill-balanced court, a professional with many years of experience, taking thousands of cases a year, and the lay magistrate with a very limited experience. I have always found lay magistrates very conscious of the fact that their experience is very limited. It becomes a stipendiary's decision in the end. The lay magistrates cannot help on legal principles, cannot help with what is relevant or irrelevant, cannot help in the conduct of the case in bringing out the facts, and it seems rather unfair to compel him or her to be there to take such a very small part in the proceedings. If they come I am always very glad to see them. Then there is this, you are always having to make a conscious effort to bring your lay colleagues into the case, to see that they are following it and to see how their minds are working. That is rather a distraction. Our experience is that the presence of lay magistrates does not help sufficiently to justify it.

8658. You say their presence does not help: has it any detrimental effect?—No, I should not say so, except that you have one eye on the witness and one on your lay colleague. You are not sitting with a person with similar training to yourself who listens to the case and discusses it afterwards. You are keeping them in the picture the whole time.

8659. On the other hand, the person you are sitting with might have a very wide experience in other directions and could assist in assessing what has been put forward. Do you agree?—You cannot pick your lay colleague. You have to run through the rota.

8660. (Chairman): I wonder if I might perhaps help. I have had experience of sitting, first, as a judge of first instance all by myself; secondly, in the Court of Appeal with two colleagues; thirdly, in the House of Lords with four colleagues. In appellate tribunals it is a very great help of course to have other persons sitting with you, because the witnesses have been heard in the court below and you are applying your mind to what is the right answer on the appeal; but if you are sitting as a judge by yourself, simply, for instance, to find facts, you must concentrate on the evidence, and you have to put the questions that you think will clear things up. I can appreciate, without any disrespect to anyone who might sit with one, that to some extent finding facts is a common job. I have no experience of magistrates' courts and I should not presume to offer any opinion on whether a lay colleague is a help there. I spoke by way of comment on what I understand to be Mr. Bancroft Turner's difficulty.—(Mr. Briggs): I think we should accept that point of view. It is very helpful. It does state our view. Moreover, in the Court of Appeal work you have colleagues who are all professional.

8661. (Lord Keith): Do you ever say to a lay magistrate, "What do you think of that witness"?—Oh, yes.

8662. (Mrs. Allen): A lay magistrate might have a very wide experience, not only in regard to matrimonial problems, but of the social background of the parties, and that experience might assist in the assessment of facts, because in these matrimonial cases there are often aspects other than purely legal ones. Would you feel even then that a lay colleague is really of no assistance to you?—(Mr. Bancroft Turner): I am not sure how the fact that you have had a very wide social experience—which some stipendiary magistrates have as well—would help you in determining whether A has committed adultery, or whether he has struck his wife, and so on. It may lead you to draw very far-fetched inferences from your own experience rather than sticking to the evidence. I do not think that it is an unmitigated blessing.

8663. (Mr. Bole): Can you tell me how the procedure in Bradford differs from the procedure in Huddersfield?—(Mr. Briggs): They have no stipendiary magistrates in Bradford now and I am afraid I could not answer for the procedure there.

8664. The Bradford domestic cases all come before lay magistrates?—Yes, all the cases come before lay magistrates at Bradford, criminal and domestic, because they have no stipendiary magistrates.

8665. Do I understand that the twelve places which have not got a "Yes" against them in column 1 of the schedule you have given us, do not have domestic courts?—No, they do not have special days for domestic cases.

8666. Are there in those twelve places lay magistrates as well as a stipendiary?—Yes.

8667. What do the lay magistrates do?—They try cases which the stipendiary magistrate does not try.

8668. Do they then mostly try the domestic cases, or are the domestic cases just shared between the lay magistrates and the stipendiary sitting alone?—Speaking for my own court, all the cases are put into the list, then we divide this up when we go into court. Generally the matrimonial cases go to the lay justices, except cases of adultery or cases which are known to be of special difficulty, which are left with me. When I have finished my ordinary list, if they have any cases left over, I take those cases.

8669. On what occasions do lay magistrates sit with you, just when there is one available?—We have a daily rota and if there are more than enough to form a second court, those that are left over sit with me. Sometimes they go away at twelve o'clock.

8670. If you were not there they would not be able to go away at twelve o'clock?—No, they would not.

8671. (Lady Bragg): Might you have a case where you had both spouses present, a defended case, and no solicitors, and you had really to decide which of two people you believed?—Yes, that does happen.

8672. Would you feel then, when it was really a case of assessing human nature, that you might be the richer for having a lay magistrate present, so that you would

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have the opinion of someone whom one would suppose had been appointed to his job for commencement?—It is our training to sit alone.

8673. Yes. Would you feel the value of another opinion in those cases?—It depends whose the other opinion was.

8674. If you could choose your lay magistrates would that suit you?—That cannot be done.

8675. I know it cannot, but I am asking you that?—Yes, if I could choose my lay magistrate it might make a difference.

8676. I think you said that you had asked your fellow stipendiary magistrates whether they would feel that a wife witness would be put more at ease if a woman was sitting on the bench with you, and they said, "No"?—Yes.

8677. How did they know?—Because wives display no reluctance in telling the facts, that is how we know. They speak quite freely. The men are much more reticent than the women.

8678. I was coming to that. People have said to me that perhaps the husband would be more at his ease if there was a woman on the bench. It has been put to me, that the woman lay justice does appreciate a husband's point of view. What do you think?—Of course, it is not a question of appreciating a point of view. It is a question of administering the law as it is.

8679. Finally, one of your reasons for not having lay magistrates sitting with you lies in the actual mechanics of the thing, does it not? I think you said that it could not be guaranteed you could always get a woman magistrate to sit in Manchester?—(Mr. Bancroft Turner): Yes, that is so, but my personal feeling on the matter is not limited to the mechanics. At Salford I had a rota of women justices to sit with me on domestic cases. I forget whether it lasted twelve months or eighteen months, but it was allowed to die because all of us felt it was rather a waste of time.

8680. I have not quite understood that. Did you allow it to die?—Neither myself nor my women colleagues thought it was worth their while attending the domestic court in order to sit with me.

8681. I was going to suggest that if the mechanics are the difficulty, more magistrates could possibly be appointed. That would not be a real difficulty, if stipendiary magistrates supported this and wanted it?—That is a matter for the Lord Chancellor. If there are more magistrates it means they sit fewer times. They only sit about twenty days a year now. That is one of the difficulties, they sit for a week and then they have several months off, with other business and concerns they must forget a lot of what they have learned in that week, before they sit next time. It is becoming more and more difficult to get magistrates in the provinces to give additional time to their court work.

8682. You are speaking of Manchester?—And the industrial North, which is the only part I know. (Mr. Mace): Perhaps for clarity I might say that in Liverpool our lay magistrates do not sit for a week. They sit on a rota which varies. It means that a magistrate does not come on for two or three weeks. (Lady Bragg): I think benches vary very much.

8683. (Mr. Brown): You said that you had some reconciliation machinery at work in your court. Would you for my benefit explain the mechanics of your reconciliation machinery?—I have no experience of the arrangements in Manchester, but, at Salford, people knew they could go to the probation officer to ask his advice if they were in any domestic trouble. That is how a lot started. A lot more was started by the magistrate, who was myself in those days, when the woman applied for a summons, saying, "Is there anything really between you and your husband, is it not a matter you might talk over?", and they were simply referred to the probation officer. Then the probation officer fixed up a meeting with the husband and wife, and if he could effect a reconciliation that was the end of it as far as the court was concerned. One never got a report as to what had happened.

8684. So you have no figures as to how many cases ended at that stage?—No, I have not now.

8685. You could not make an approximation?—No. It would be a wild guess.

8686. (Chairman): Would there be any figures available of the number of times a person applied for a summons, saw the probation officer and subsequently did not carry on with the case? Would those figures be available in Salford?—I doubt it. (Mr. Bridges): I should doubt very much whether any figures are available. (Mr. Bancroft Turner): Not distinguished like that. Some of the returns I remember had "Number of cases where conciliation successful" but whether conciliation was started before or after the summons I could not say.

8687. (Sir Frederick Burrows): The sole purpose of your memorandum and your evidence today, I take it, is to refute the evidence given by the Magistrates' Association. It is for no other reason, is it?—I do not think so.

8688. Would you agree that seventy-five per cent. of all matrimonial cases in England and Wales are dealt with by lay magistrates?—I would not be surprised, I have no idea.

8689. Does it follow from your evidence that you think that that course is wrong and that all matrimonial cases should be tried by a stipendiary magistrate?—(Mr. Bridges): The answer to that is it is not possible. There are only fifteen stipendiary magistrates in the whole country. It would be better if it were possible. (Mr. Bancroft Turner): My own personal view is that if it could be done, you should have a lawyer to try domestic cases which may result in a separation or maintenance order, just as you do for trying cases that may result in a divorce decree. There is a lot of law in all these cases.

8690. I gather from your evidence that you do not seem very enamoured of the idea of having lay magistrates sitting with you, especially women lay magistrates?—I have a tremendous number of it with me.

8691. I am afraid I gathered from your answers to questions that it took you nearly as much time to deal with your lay magistrate as it did with the evidence of the applicant?—Then I have given a wrong impression there.

8692. (Chairman): I confess I did not get that impression from you—it is not the time, it is purely the distraction. (Chairman): I gathered that sometimes it would be a distraction from your concentration on the case to bring in another by way of consultation, but I do not remember your making such a statement as that referred to by Sir Frederick, that it took you as long to deal with your colleague as it did to deal with the applicant.

8693. (Sir Frederick Burrows): That is the general impression I gathered. I did not say the witness said it.—Do not think for one moment that we are at arm's length with our lay colleagues. We work in the complete harmony and friendship with our lay magistrates and these difficulties sort themselves out automatically and naturally. (Mr. Bridges): I should like to endorse that. My relations with my lay colleagues have been most harmonious in the whole of the time I have been in Huddersfield. (Mr. Bancroft Turner): We have the greatest admiration for them. I hope nothing I have said will lead anyone to think I have anything for them but the greatest respect.

8694. (Mr. Flecker): Am I right in thinking that occasionally you get children of fourteen years and under as witnesses in domestic cases before you?—(Mr. Bridges): Children appear as witnesses very rarely in domestic cases. It does not often happen.

8695. (Lord Keith): Might I just ask one question? Would you be relieved if domestic proceedings were all dealt with by lay magistrates?—I do not know whether we should, but I do not think they would.

8696. I just wondered whether you would be quite happy to see all domestic proceedings passed to lay magistrates to deal with, leaving you free to deal exclusively with the other matters that come under your jurisdiction?—I do not think it would be wise.

8697. But I wondered whether you would feel happier to be relieved of domestic proceedings?—No, I do not think so. I do not take the majority of them.

8698. If you do not take the majority of them, is it worth your while taking any?—There are always the cases of adultery and there are the cases which involve difficult points of law, I think it desirable that we should do those.

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[Continued]

8699. You are looking at it from the point of view of administration of justice?—Yes.

8700. You think that there are certain cases of domestic disputes that it is better a stipendiary magistrate should deal with?—Yes, that is so.

8701. (Mr. Justice Pearce): I should like to clarify your position, as you appear to have given a slightly differing impression to various members of the Commission. Is this what you mean? If you are sitting alone you are completely concentrated on trying to find the right answer, with the knowledge that at the end of the case you have got to produce that answer. That is really an unusual form of concentration which you develop and that is your job. It is a different form of concentration if you have at the back of your mind a doubt as to how that piece of evidence is striking the person sitting next to you, and whether he has noticed a particular pointer which you think you saw. Now to that extent, you are losing something in concentration and losing something in the result in your mind. It may be that if he is a person of wisdom, you will get help from him. Would you agree to that?—(Mr. Bancroft Turner): Yes.

8702. If he is not a person of wisdom you may be hindered, not helped. It may be that on a doubtful point he will turn your mind the wrong way. You do not think, I gather, that the amount of help that you are likely to get from a lay colleague outweighs the defect of making your concentration less single-minded. Is that what you were saying?—That is so.

8703. It is a question of weighing the one against the other?—Not only that, but I do find that in the end the decision is left to me.

8704. To take the example of quarter sessions, it may be the Chairman in the end who is the person to decide the case, and whether he gets help from his colleagues or not, depends really on the value of their point of view as individuals?—Yes.

8705. (Chairman): Would it improve matters, from your point of view, if the procedure were that you conducted the examination of witnesses entirely without

feeling any obligation to bring in your lay colleague, but at the end of each witness's evidence you would be free to turn to your colleague and say, "How did that witness strike you?" Would that be of assistance?—(Mr. Briggs): I do not think that would help very much. I do not examine the witnesses. If the parties are represented, counsel or solicitors examine them, if they are not represented the clerk examines them.

8706. I follow. I have used the wrong word. But you are conducting the case in the sense that if you wish to put additional questions you do, and if you wish to intervene because you think the question is not fair or is against the rules of evidence you do so. You are conducting the case in that sense and in that sense I used the word. Suppose that you are the person who is conducting the proceedings but a lay magistrate, whose good sense and experience you respect, is sitting with you. Would it be a help to be able to turn to him and say, when each witness has finished, "What did you think of that man's (or woman's) evidence?" Or would it be unsettling in the sense that if he differed, you might be put in doubt? Which way do you look at it?—I think, on the whole, probably unsettling, that is more likely. Mr. Bancroft Turner says he agrees with me.

8707. (Mr. Maddocks): Is the difficulty this? If the lay magistrate does disagree with you, it puts you in an impossible position?—Yes. If there are two they can over-rule you, and can over-rule you on points of law.

8708. (Chairman): If there is only one you just differ?—And then the parties have to go away and come back again. (Mr. Bancroft Turner): Generally they do not carry a slight difference to the point of a different verdict. But it really has an unsettling effect.

8709. (Lord Keith): I have known cases where the lay members of the tribunal were right in law and the skilled Chairman was wrong.—(Mr. Briggs): That may happen. (Mr. Bancroft Turner): That might apply to the Court of Appeal. Accidents will happen.

(Chairman): Thank you for your memorandum and for the help you have given us this morning.

(The witnesses withdrew.)

PAPER No. 113

MEMORANDUM SUBMITTED BY MR. E. R. GUEST

This memorandum deals only with points of procedure which have been found inconvenient or productive of a sense of injustice in the course of day-to-day practice in a lay court of summary jurisdiction.

A. Appeals in matrimonial matters from courts of summary jurisdiction

1. The only form of appeal at present prescribed from decisions of magistrates in matrimonial disputes lies under Section 11 of the Summary Jurisdiction (Married Women) Act, 1895. This provides for appeal to the Probate, Divorce and Admiralty Division of the High Court. In fact, the Matrimonial Causes Rules and Rules of the Supreme Court (mainly under O.LIX) prescribe how such appeals shall be commenced and conducted. In sum, this is by notice of motion stating the grounds of the appeal, and, as the High Court has power as the hearing to make, *inter alia*, the order that ought in its view to have been made, is in effect a re-hearing. The only material on which the High Court exercises this power is the magistrates' clerk's notes of the evidence and the justices' reasons, which may or may not have been stated at the moment of announcing their decision. Neither the parties nor their witnesses are heard or seen on appeal.

2. This is manifestly unsatisfactory for many reasons of which the most important follow.

(a) Nobody conversant with the difficulties of conducting a trial of this kind in a magistrates' court, usually without advocates on either side, can suppose that any human clerk (good as most of them are) can reduce to writing more than what he considers the essentials from

the flood of bitterness, irrelevance, hearsay and real evidence (usually forthcoming in that order) from the unhappy and usually ill-educated parties. There is no guarantee, and could not be, that he has got down every point that has influenced the justices to believe one side rather than the other on issues of fact. Moreover, a clerk cannot write down demeanour. It is therefore not satisfactory that the High Court should be permitted to say on this material, as it often does, that there was no evidence on which the magistrates could find as they did. Such a finding is satisfactory enough in the Court of Appeal which has full shorthand notes of every question and answer, but not without that.

(b) There is no doubt in my mind that the ordinary man and woman, reduced to the state of unhappiness and anger that matrimonial disputes generate in the sphere for which magistrates' courts are intended, is shocked to find that, if a bench of justices has not accepted the story he has told, he has no chance to say another word upon it. He knows that an affidavit case can be taken on to quarter sessions by either side, and that the pettiest criminal can have a true re-hearing in his case if he wishes, and naturally cannot understand why in the much more complicated and important matter of the break-up of a home he cannot have the same facilities. When I am enforcing orders that have been unsuccessfully appealed against men have frequently said to me (when they have given as their reason for non-payment that the order was wrong, and been told that that was no reason), "Well, the judges didn't hear what I had to say: it would have been different if they had".

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(c) With the best will in the world, it is often not possible at a very busy summary court, correctly to advise an ignorant appellant (who generally comes at the very last minute or after it) on the best form that the grounds of his appeal should take in the notice that he must serve in twenty-one days from the decision of the justices; nor is it satisfactory in such cases either to refuse or give advice. If it is refused when there is not time to arrange for legal representation from the poor box the applicant goes away with a sense of bewilderment and sometimes injustice. If it is given and it is not followed by success at the appeal, many are convinced that the summary court "had something to do with it" or "had a down on them".

3. None of these disadvantages would arise if these cases followed the well-tried route that almost all other appeals from summary courts take, namely, appeal by way of re-hearing to the quarter sessions if desired, and thence—or originally—on points of law by case stated to the Divorce Divisional Court. A case stated, which has been considered by both parties before being stated by the justices concerned, should not fail to make clear the facts on which the justices acted. If it does, it can be remitted to them to make those clear beyond a peradventure, so that the decision of the superior court as to whether the justices were right in law can at any rate be made on the same facts as the justices considered.

4. Upon this matter I should be prepared to give evidence if the Commission should wish.

B. Enforcement of orders in matrimonial cases made by courts other than the enforcing court

5. Time and again it falls to justices to try to enforce orders made by some court other than their own when the respondent to the order lives in their area. In such cases they are not permitted to keep the accounts or receive the payments, but must act only on the certificate of arrears from the distant court. There is necessarily a lag between the issue of that certificate and the day when the defaulter appears before the enforcing court. Determined defaulters can and frequently do make it impossible to deal with these matters as they should be dealt with, by alleging that they have sent some or all of the arrears to the original court since the certificate was received. The justices must then choose between adjourning the case—and sometimes the defaulter has had to be

brought by warrant; and has been hard to find—or working a possible injustice. Occasionally, of course, the respondent's allegation is correct, and one feels that one has only avoided a wrongful committal narrowly. If the rule could be that whenever a court was required to enforce another's order the accounts should be forwarded to it and it should then become the collecting court, this could be avoided on all except the first occasion on which the defaulter appeared before it.

6. The Commission should know that this simple point has already been brought to the attention of the Home Office, but not accepted.

C. P.A.Y.E. tax on maintenance orders

7. Hardship is being inflicted on some wives who (a) are the beneficiaries of orders in justices' courts, and (b) work for their and their children's better living, and (c) have husbands who cannot or will not pay the orders against them.

8. The tax authorities have power to charge P.A.Y.E. on the earnings of married women who are supposed to be in receipt of such orders as if their earned income was the total of what they in fact earn and the amount of the order on their husbands. Thus, where the husbands do not pay, the women has more tax deducted from her weekly pay packet than her earnings warrant. The local tax collector is supposed, if she tells him her estimate of how much she will get as opposed to how much she ought to get, to make a variation accordingly in her P.A.Y.E. But most such women, who in any event do not know of this right, are working whenever the tax collector is available and can no more write about such matters than they can write a novel. They are handicapped as against the type of woman who relies on the National Assistance Board to supplement the order.

9. It is suggested that the tax on the order should be claimed from the husband. He could be allowed relief as a married man either to the maximum allowed by the Finance Act or to the amount of the order, whichever is the less. If the order exceeds the legal maximum of married allowance, why should he not pay tax on the excess just as he would have done had he committed no matrimonial offence? It is suggested that the convenience of the tax collector should not be preferred to the safeguarding of such deserted wives.

(Dated 22nd May, 1952)

EXAMINATION OF WITNESS

(MR. E. R. GUEST; called and examined.)

8710 (Chairman): Mr. Guest, you are a Metropolitan Police Magistrate. We have before us the letter which you enclosed with your memorandum. In that letter you say that you have only dealt with matters of procedure which, in your view, require alteration, and you have avoided all matters which you know other individuals and bodies have dealt with. I am going to ask you shortly some questions about your experience under the Metropolitan Police Courts (Domestic Proceedings) Order, 1952, and also one or two questions on your memorandum, but do you wish to add anything to your memorandum before I do so?—(Mr. Guest): My Lord, only one short matter, if I might. I think I ought perhaps to have reminded the Commission that there is at present, when the question of appeal on an order for the custody of an infant arises, a rather elegant difference between cases where that custody is ordered under the 1895 Act, if I may call it that, and cases where it is ordered under the Guardianship of Infants Act, 1925. In the former case, as the memorandum has reminded the Commission, the appeal is to the Divisional Court of the Probate, Divorce and Admiralty Division by notice of motion, and, as the memorandum reminds the Commission, the parties are not themselves heard. But oddly enough, if the order is made under the Guardianship of Infants Act the appeal is to quite a different tribunal. It is assigned to a judge of the Chancery Division in chambers, and my experience is that he invariably does hear the parties. If he realises that both parties have been heard in the court below he always hears both. Occasionally he is not told that and may do the matter *ex parte*, bearing

only one. But the same considerations apply to an order whether it is made under the former Act or the latter. Courts of summary jurisdiction may make an order for custody under either, and I personally have once at least had the odd experience of someone coming for an order for the guardianship of an infant, there having been a previous order for the other children under the Summary Jurisdiction (Married Women) Act, this child being born after the date when that order was made. And the parent chose, I think upon advice, to come for a summons under the Guardianship Act. The order was made under that Act, there was an appeal, and the party had to appeal to two different places.

8711. Two different places because one child was dealt with under one Act and the other children were dealt with under the other Act?—Yes, my Lord, and the reason why that happened, which I perhaps have not made as clear as I wanted, was that the child dealt with under the Guardianship Act was in fact only born after the other order had been made. The point was that the mother had not yet given birth to the child and no order could be made in respect of it under the original proceedings.

8712. What would be the remedy you would suggest, Mr. Guest?—My Lord, I would respectfully suggest that all appeals in all such matters, whether arising under the Guardianship of Infants Act or under the Summary Jurisdiction Act, should follow the course which I have suggested in my memorandum. There should always be re-hearings of facts in the same way as there is a criminal

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re-hearing of facts, and points of law should go to the Probate, Divorce and Admiralty Division upon a properly stated case, exactly as happens in criminal proceedings.

8713. Then the re-hearing which you suggest is to quarter sessions?—Yes, my Lord.

8714. Do not think I am objecting in any way, but that would cut out the Chancery judge in chambers?—Yes, my Lord. I do not see anything wrong in the judge in chambers hearing the parties, but I feel that the same channel of procedure should be followed in both cases because of circumstances which might arise such as I have detailed.

8715. Perhaps I had better deal with your memorandum first and then ask the other question I wanted to ask. You have already dealt with your first suggestion. Then we come to the question of enforcement of orders in matrimonial cases made by courts other than the enforcing court. I do not propose to question you on that, with which others are more familiar, except to ask you this. You say:—

"The Commission should know that this simple point has already been brought to the attention of the Home Office, but not accepted."

Could you tell me what reasons were given by the Home Office for not accepting it, if any?—I cannot, my Lord, because I did not hear them, they were never communicated to our body. I think the recommendation was one made by the Metropolitan Magistrates, and also by the Magistrates' Association, I believe. They may have heard why the proposal was not accepted, but we did not.

8716. Proposal C is also a very interesting one. You say:—

"Hardship is being inflicted on some wives who (a) are the beneficiaries of orders in justices' courts, and (b) work for their and their children's better living, and (c) have husbands who cannot or will not pay the orders against them."

I need not read it through, we have all studied it, but your suggestion is:—

"... that the tax on the order should be claimed from the husband. He could be allowed relief as a married man either to the maximum allowed by the Finance Acts or to the amount of the order, whichever is the less. If the order exceeds the legal maximum of married allowance, why should he not pay tax on the excess just as he would have done had he committed no matrimonial offence? It is suggested that the convenience of the tax collector should not be preferred to the safeguarding of such deserted wives."

I feel a little doubt whether that, which is a matter of the incidence of taxation, would fall within our terms of reference, but possibly it might be brought within them by a benevolent construction. However, I apprehend that you looked at the terms of reference before putting it forward?—I did look at them and, if I might be allowed to say so, I was equally doubtful, but I thought it could do no harm to include it in case the Commission thought it was a matter upon which they could proceed.

8717. We are very much obliged to you, and it is a suggestion which at least might be put to the taxing authorities perhaps by some appropriate means, whether by this Commission or not I am not quite sure at the moment. Passing from your memorandum, I see that the Metropolitan Police Courts (Domestic Proceedings) Order of 1952 only came into operation on 3rd November, 1952. It is very early days, Mr. Guest, and I do not wish to embarrass you, but could you, as the metropolitan police magistrate selected for this purpose, give us any observations on the working of that so far?—My Lord, I think I could. The Chief Magistrate is sitting for the Tuesday court and I am sitting for the Thursday court, so I have had in fact only three days' experience of how it will work. There are two observations I feel I could make with certainty. First, I have no doubt whatever that the removal of these cases geographically from the inevitable type of background that you must get in a busy magistrates' court—even when you do as we did and set aside two afternoons a week for matrimonial work—removes altogether from that atmosphere can only be an advantage from all points of view. That has been done, because this court sits at Woburn Street and it hears only domestic proceedings; it is not normally a criminal court at all. On one day a

week it is used for a juvenile court, but the whole atmosphere of the place is quite free of any necessity for considering criminal matters which may interrupt one at any time in any ordinary afternoon in an ordinary court.

8718. Are there other reasons, besides the risk of interruption, which make you think that this is an advantage? Would you specify them as far as you can?—I will try. The advantage is this: when we have matrimonial afternoons in an ordinary magistrates' court, it is inevitable that there will be matters hanging over from the morning which it is not just convenient to adjourn for any longer period than from the morning to the afternoon. They nearly always are small but sordid criminal matters, and the witnesses and some of the parties may be mingling in the only hall we have with mothers and children waiting for matrimonial cases. I do not personally like that, and I think it is an advantage that that is avoided. Secondly, we have to begin the matrimonial afternoons with a long and, if I may say so, miserable and dreary process of enforcing payments from reluctant husbands, which from time to time requires that they shall be committed to prison. That has to be done in open court because it is not a domestic proceeding. I think the less of that that is heard by the parties who are coming on later the better. The third thing I would like to say is this. There is not in the average metropolitan police court, built in Victorian days or at the turn of the century, very much in the way of accommodation, and all parties are not always persons of quite the same class. The parties for the afternoon list will all be sitting in the hall together, with their children, at any rate until the moment when they give evidence. Once again I prefer the much better accommodation at the new court. Those are the reasons, other than interruption, that appeal to me at the moment.

8719. (Lord Keith): I think there are only two points about which I wish to ask you. You suggest an appeal to quarter sessions in these cases that are dealt with in the magistrates' courts. We had that suggestion from another body, but I think the suggestion was that it should be an appeal to a special court which sat in the same way as quarter sessions sit, that is to say, there would be a re-hearing. Have you any comment to make upon that suggestion?—None, my Lord, provided it is a re-hearing of the parties orally and in each other's presence, I do not think it matters by whom.

8720. That is what was suggested. I am not very familiar with quarter sessions procedure; how often do quarter sessions meet? Is it four times a year?—Not in London. Outside London it is four times a year.

8721. In London . . . ?—At the County of London Quarter Sessions there is an appeal day once a month. I think at Middlesex Sessions it is also once a month, but it is the County of London Sessions which would affect my court.

8722. Then once a month would be quite convenient, but four times a year would mean too much of a hold-up in the hearing of appeals? If there could not be a re-hearing for three months that would rather suggest a special court?—There are two answers. The first is that it should never be necessary to wait three months. The counties of England are divided up in such a way that, normally speaking, there is at least one recorder's quarter sessions—to which, of course, if necessary, lay justices could be added for this purpose—and a county quarter sessions, in the course of the three months. So at worst I cannot foresee delay of more than six weeks, and that would merely give the parties time to gather themselves together. The second answer I would like to be allowed to make is that I am not aware that appeals are heard any quicker now, under the procedure by notice of motion to the Divorce Division.

8723. Of course in the Divorce Division there is no re-trial?—I should like to say that, but it is not the view of a great many people, I ought in fairness to add. Personally I think a re-trial from paper, as I have tried to point out, is no re-hearing, but it is considered to be a re-hearing and indeed the court has the powers that it would have had, had it re-heard in the ordinary way.

8724. (Mr. Justice Pearce): I do not think it is right to say that it is considered to be a re-hearing. It is exactly the same right of appeal as there is from a judge of first instance in the High Court. An appellate court has a

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perfect right to come to any conclusions on fact it likes, but there is always a limitation in that it does not see the witnesses, and for that reason it cannot be called a re-hearing. I stand corrected. Might I just make one observation on that? It is not the same in one sense as an appeal from a judge of first instance, because an appeal from a judge of first instance, though it is by paper hearing, if I may use the phrase, is by a shorthand note from extremely competent shorthand writers, usually from a hearing conducted before the learned judge with counsel on each side who go at the right pace and stick to evidence. What is now sent up, with the best will in the world, to the Divorce Division is the long-hand notes of the clerk, who has to do the very best he can in the sort of circumstances I pointed out in my memorandum.

8725. (Lord Keltie): I have one other matter, Mr. Guest, and it is with regard to your criticism on taxation. In the last paragraph you suggest that the tax on the maintenance order should be claimed from the husband by the Inland Revenue?—Yes.

8726. Am I not right in saying that, at the present time, if the maintenance order exceeds £5, the husband must deduct tax, when he pays his wife?—Yes.

8727. But if it is £5 or under, he cannot deduct tax?—Yes, that is right, my Lord.

8728. And your suggestion is that in that case the tax should not be taken into account in completing the P.A.Y.E. on the wife's earnings but should be a direct charge upon the husband?—Yes, my Lord.

8729. (Mr. Justice Pearce): Mr. Guest, it is obvious that the points you raise as to appeals have considerable weight, but there are other points that have to be weighed against them, are there not, which have not been dealt with? First, it is not right to assume, is it, that where the second decision differs from the first it is necessarily right? Do you follow?—I follow.

8730. Suppose that a wife loses before the magistrates, and wins at quarter sessions on the re-hearing. There is no particular reason, is there, to think that the second bench were right and the first were wrong, because they are persons of no greater infallibility?—I find that a rather philosophical consideration, my Lord. I would be inclined to say that that is true universally of all reversals on appeal.

8731. It is not put to you philosophically. I am basing it entirely on my own personal experience and I want you to deal with it just as a practical matter.—I find it extremely difficult to deal with. One's own personal tendency is naturally to think, when the appeal committee at quarter sessions reverses one upon a matter of fact, that they are wrong and one is right, but I try to suppress that feeling.

8732. That is perfectly right, and in that particular case then the problem is left for me, and I may think that it is more likely that you were right than that they were. It is a matter which one has to remember in considering a re-hearing, is it not?—The purpose for which I want to press the consideration of re-hearing upon this Commission has nothing to do with the fact that I felt that any one tribunal was so much better than any other tribunal. I wish I could make it clear how often, from those people whom you will not hear, the sort of people who come into our courts, one is very strongly given the impression, and I think rightly, that they resent the fact that if they ride a bicycle without a light and I convict them, or any bench anywhere convicts them, they can go and talk to a lot of other people; whereas, if their married life is broken up and the infinitely more difficult questions of fact there are considered by any bench, then, as far as the parties are concerned, they can never say a word about it again. That only creates a feeling of discomfort and dissatisfaction which, to my mind, has a considerable basis in sense.

8733. It may be, you know, that they will have a feeling of discomfort and dissatisfaction when they have had their second try and still lost there, and then there is no appeal.—I think they do.

8734. You agree to that?—Yes.

8735. Because the kind of people who feel discomfort and dissatisfaction after an adverse hearing are the people who are difficult to satisfy, is not that a fair generalisation?—Not in matrimonial matters. In other matters yes,

but I do have the strong feeling that truth in the small area of a criminal matter is one thing, and a fairly easy thing, but truth over the whole period of a married life, which is what we may have to consider, not only under rulings but under commonsense, is an extremely difficult thing to extract.

8736. I am accepting that from you, you need not develop that if you do not want to. But, you see, you have still got to remember that against the background of the fact that the first decision may have been right and the second decision may be wrong.—One always has to accept that. Would you allow me to add just one thing? The field in which I am from time to time haunted by a feeling that I may very well have been wrong is nearly always in the matrimonial sphere. Who can tell? It may be that you are forced to the conclusion that the nagging of a woman has broken up the married life, and it may or may not have certain consequences, who can tell? When you are listening to fifteen years of married life peeped by the parties to an afternoon, who can say who drove the wife to nag or whether she is a nagger by nature? I think that there ought to be re-hearing of the facts so that more minds can come to the problem.

8737. Do you mean to say that the second decision is more likely to be right because there are two or three people listening?—Not because of the number of people in the least, but because this is the second time the story has been told and each side knows what the other side is going to say, which they did not when they came before the first court. They can shape what they want to say and, if they appear in person, can stick a little more to what is relevant.

8738. That brings me to my second point. The second consideration, I think, which one has to weigh in this matter is that the second trial in general favours the unscrupulous rather than the honest? That again is not a philosophical problem, it is a practical problem. Have you not found in your practice at the Bar that if there is a second hearing it perhaps enables the person who is really devoting himself to winning to fill in the gaps that appeared in the first hearing?—I may have been very fortunate in my appeal tribunals, but the answer I am bound to give to that question is, no.

8739. I am not saying that he does it to an outstanding extent, but I am suggesting to you that on the whole the tendency is to give the unscrupulous person rather an advantage in making repairs to what happened in the first hearing?—Much as I would like to agree, I am afraid I must disagree.

8740. There is another consideration of course, that it is a hardship on a person who is perfectly in the right to have two hearings of this sort of matter. It is rather distasteful and may indeed cost a certain amount of money which they can ill afford?—I dislike disagreeing so frequently with you, but I cannot see what that has to do with it, because they have two hearings now, both of which cost money or may do, but a second hearing before quarter sessions is not likely to be anything like so expensive as a second hearing before the Divisional Court.

8741. I think you are not quite apprehending the point I am putting. At present, an appeal before the Divisional Court is not a re-hearing as the parties cannot go there and bring witnesses. One witness complained that there are not nearly so many appeals to the Divisional Court as he thinks there ought to be. You would agree with that, would you not? Put it this way, if you have a re-hearing you will obviously have a vastly larger number of applications for re-hearing than you now have for appeals to the Divisional Court?—I have no experience on which to judge. I can only say that in affiliation matters, where you do have a re-hearing at present, the number of re-hearings is extremely small in my experience. But I could not say with this other matter, because I just do not know.

8742. I should have thought it was a fair assumption that in matrimonial disputes the loser would tend to apply for a re-hearing if he thought there was any chance of winning his case?—I am afraid I cannot answer, my Lord. One which expect that is every affiliation case which it fought, but it is by no means the case.

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8743. Except that an affidavit case is simply a question of bringing home to somebody the fact that he is the father, and either there is enough evidence to do it or there is not. It has not got the difficulties which you have quite fairly put forward in connection with matrimonial cases.—Yes.

8744. And therefore I think it is fair to suggest that in matrimonial cases there would be a very large number of applications for re-hearing, and if that is so, of course the costs of substantially all those would be borne by the State, would they not, on both sides?—That may or may not be. I cannot tell what proportion throughout the country would on appeal get legal aid and what proportion would not.

8745. But most of the people we are talking about would be people who would need legal aid, so that a substantial number of those appeals would be at the cost of the State?—But if they put their cases before our courts all over the country without legal aid, and a great many do, I see no reason why they should not conduct their own re-hearings before quarter sessions without legal aid.

8746. If they do that, we are back again to some of the cogent complaints that you make about the nature of the hearing they get on the first occasion, namely, that they are not represented and they have not really the skill to put their case properly. Is that not so?—That is not the complaint I make about the hearing.

8747. Is not that one of the complaints which you say makes it desirable to have a re-hearing?—Yes, but the reason is not that I complain of the hearing, I complain of the machinery which allows the sort of material it does to go before the Divorce Division after such a hearing as I have described.

8748. I am sorry, I think you and I are at cross-purposes. What I thought you were saying was that an additional reason for having a re-hearing was because of the rather scrappy way in which the case has to be presented because there is no lawyer presenting it?—I did not intend to say that and I am extremely sorry if I created that impression. I hope we do not hear the case scrappily. What I am saying is that we hear such a lot of evidence, nearly all of which is probably inadmissible. . . .

8749. That is what I mean by "scrappy".—What I do say is scrappy is what is passed on in the clerk's notes to the Probate, Divorce and Admiralty Division, and upon which from time to time that Division proceeds to make findings of fact, that is all.

8750. I quite agree with that, but I thought that you put as an additional reason, and I should have thought it was fair to put it as an additional reason in favor of what you say, the difficulties arising from the fact that parties are not usually legally represented in your courts?—I am sorry to be so very argumentative, but what I have said about that applies a great deal more, I think, to magistrates' courts outside the metropolitan area, who have no poor boxes, or not very substantial ones, than it does in actual fact to our own courts. We have such substantial poor boxes that, when a case which contains any real point of law or difficulty arises, we can easily arrange for anyone who needs it to be represented. But I agree that, in general, it would be true that it would be better for the parties to be represented on appeal. It must be taken into account that it may cost a little but I am afraid I was only considering whether the principle was desirable or not, not what it would cost.

8751. I was trying to get down to practical considerations and trying to weigh up certain obvious advantages and certain obvious disadvantages. It is a disadvantage that they are not legally represented on the first hearing?—It may be.

8752. It would be desirable that they should be legally represented at quarter sessions?—Yes.

8753. If that were done it would then be quite an expensive burden on the State?—It would, of course, my Lord, if Mr. Justice Pearce's apprehensions of the number of appeals are right.

8754. There are serious matters to be considered on both sides, you would agree?—Certainly.

8755. (Chairman): One question I meant to ask: have you any comments on the way this new court is working?

—It is a little early yet but, from the point of view of a metropolitan magistrate, I think it is a comfort to have experienced magistrates with me. I am very surprised to find so far that it does not take really any longer than I used to take alone. But I do not think that anything ought to be based upon that, because we have not yet had a case with pugnacious counsel in it, and we have not yet had a case with anything much in the way of a point of law. I apprehend when that comes, the question of time will show at once because, whereas it is quite easy for a man sitting by himself to stop counsel if counsel is telling him what he perhaps happens already to know, when there are three of you, you must let counsel read out all the cases he wants to and make any submission he wants to make, because you cannot at that stage know what your colleagues want to hear or do not want to hear.

8756. That is very interesting. Of course the two who sit with you are not chosen at random. They are selected by the Chief Magistrate from a panel of such justices nominated from time to time by the Secretary of State?—Yes.

8757. So they are picked justices who sit with you?—Yes.

8758. (Mr. Maddocks): Following your answers to Mr. Justice Pearce, I think the pith of your complaint is this, is it not? The justices' clerks' notes are inadequate, although the clerks are excellent men and do the best they can?—That is right.

8759. You feel that when a case goes from you to the Divisional Court you may have heard and seen, especially seen, a great deal more than the Divisional Court can possibly get from the justices' clerks' notes. That is your view, is it not?—Yes.

8760. Then, with regard to this new court, what officers are in attendance, are they police or ushers or who are they?—At the moment we have one of the experienced warrant officers from my court, an usher from Bow Street, a civil clerk in the office to type out the orders and make any entries which are necessary, a policewoman who takes the place of my police matron to help with women or children who need comforting. That is all—and of course a clerk from, alternately, West London and Bow Street, according to which magistrate is presiding.

8761. In that court I gather that you do not do any enforcement of orders at all?—None, Sir.

8762. Supposing that you wanted to instruct a solicitor to appear on behalf of somebody who had a difficult case, because you thought that person ought to be represented, could you in your judgment use your own poor box for that purpose?—I always do, I am afraid. It depends entirely on their means, but if they are poor, I consider that no better use could be made of the poor box funds than to assist a man or a woman in difficulties of that sort who has not the money to pay a lawyer.

8763. But when this idea is developed and there are these courts all over the metropolitan districts, whose poor box is going to pay the money?—That I do not think will be a problem. I expect that each Order in Council will do exactly what this Order in Council has done and name the district for which the court it sets up will act. We act for the City of London, Bow Street and West London, and the poor boxes of those three courts are applicable each to its own district.

8764. It has been suggested by one witness, Mr. Crippin, that one advantage of those courts would be that you would be able to hear cases from day to day. In the metropolitan courts, as you know, the magistrate cannot possibly hear cases from day to day, he has to put them over. What do you think about that?—That is something I would like to see attained. Under the present Order in Council and the present circumstances, it is utterly impossible. First, the court is only conditioned to sit on Tuesdays and Thursdays. As I have pointed out, there is a different Chairman on Tuesdays and on Thursdays, as there has to be if the courts were they otherwise work are to carry on. Although we have been in operation only three weeks and the magistrates so kindly helping us are supposed to sit for two months, I have not yet had the same pair on two successive weeks—they cannot help this. But it would be quite impossible to carry on from day to day. The lay

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magistrates are nearly all busy people who have other work to do and they must have notice of when they are wanted.

8765. You do not get the same lay magistrates?—The theory is this, that the lay magistrates who have agreed to enter the panel shall, one man and one woman, always serve for a period of two months continuously. That is the ideal which they intend to attain but, for the reasons I have already given, they are not always completely their own masters, and I am quite certain it never will in fact be attained.

8766. (Chairman): Could I ask you a question arising out of that? Who discharges the functions which the probation officer would discharge if you were sitting at West London?—The cases are still listed and the orders are still kept in the books of the court from where they come. The probation officer follows his cases, that is to say, all West London cases are attended to by one or other of the probation staff from my court. Any case which comes from Bow Street will be attended by a similar representative from there. We have not had anything from the City of London yet.

8767. The probation officer will be in attendance when you are hearing the case, will he?—Yes, my Lord.

8768. (Dr. Robertson): One small point with regard to the working of the new Order. Reference was made to the out-of-the accommodation now available. Is it possible, if desired, to keep the children quite apart from the adults waiting?—Normally speaking, the children only come because our parties have not anybody to leave them with, they are not there as witnesses. They are nearly always under school age, otherwise they would be at school. (In the holidays we try to make special arrangements.) The children are so small that they generally go into the women's waiting room at the new court with their mothers. If it is a baby in arms and the mother has to give evidence, I get the policeman at this court to look after it—sometimes a policeman is more suitable—and in my own court we have the police matron.

8769. Children are very rarely called as witnesses?—I suppose I do, roughly speaking, about 300 domestic cases a year and I have done this for six years at West London. I can only recall having children under the age of sixteen as witnesses about two or three times in what is, I suppose, 1,800 cases.

8770. In the new accommodation, if need be, there would be a room available for interviews with probation officers?—The probation officer has a room; there is a waiting room for women; I do not think there is a waiting room for men, they have to wait in what remains of the hall; there is a waiting room to be used for children if anyone wants to put them there but, as I have explained, they want to go with their mothers. The clerk has a tiny room; the probation officer has a tiny room; and that is about all.

8771. (Sheriff Walker): I am interested in this question of the appeal to the Divorce Division of the High Court. Do I understand you to say that in some of these appeals the Divorce Division can hold that there was no evidence on which the justices could arrive at their decision?—They have done so.

8772. What puzzles me is how they can do that unless they know what evidence was before the justices?—The Matrimonial Causes Rules at the moment in operation require that the justices' clerk's notes, together with the reasons of the justices, shall be laid before the Divisional Court, and they decide purely upon what the clerk has managed to write down.

8773. So it really comes to this, that the Divorce Division is holding that the magistrates have no basis for arriving at their decision, because the clerk's notes do not record the evidence?—I am not saying that, it may very well be that the magistrates did arrive at the wrong decision. I have already made plain that it is quite easy to do that, as you probably know, but there are cases—I could give an example if required—where the notes have succeeded in giving the Divisional Court a totally wrong impression of what the issue was.

8774. Is it the clerk himself who is responsible for the final form of his notes, or do the justices have to certify them as correct?—No, Sir, it is the clerk who is responsible for his note.

8775. And the justices have no responsibility to check the accuracy of the clerk's notes?—No, and it would be a little difficult to do so by the time one gets notes that an appeal is to be made.

8776. Where there is no shorthand record of the evidence, the judge of first instance sometimes sets out his findings on fact on the rather detailed form provided. Is that procedure used in England?—It sounds like the county court judge's notes in this country, but justices do not follow that procedure.

8777. The form of stated case does not contain the justices' findings on law?—It does for appeals in criminal matters, where a point of law is desired to be brought before the High Court. The most detailed statement of the facts found and the law applied is then set out in a written statement and sent to the High Court. That works admirably on points of law in criminal matters, and I was suggesting to the Commission that that should be done for points of law in matrimonial matters.

8778. But in addition you want an appeal on questions of fact?—Exactly, as we now have in criminal matters.

8779. (Mr. Justice Pearce): I was wondering whether the Commission have got quite the right impression about the justices' clerk's notes, because, sitting in the Divisional Court, one is really rather impressed by them. In almost all the cases one gets a coherent account of what the husband and wife said, and what the witnesses said. Occasionally there is an argument about the meaning of a particular sentence, but very probably the solicitors will be able to help on that. I think that possibly the impression may be gained that the Divisional Court is rather more in the dark than it is. The notes are really very good. Have you seen your own clerk's notes?—I see them after every case to see whether I agree with them, but I have no function to do so. Yes, I would agree entirely, they are excellent, but they can only take down a slice of what in fact we hear.

8780. (Chairman): The point that was being made is that, however good or however bad they are, they are the only material which the Probate, Divorce and Admiralty Division has before it, and it must form its conclusion on that material?—Yes.

8781. (Mr. Young): May I follow that up by asking you about this question of notes? Would it make any difference to you if you had a skilled shorthand writer in your court taking down all the evidence?—Yes, it would make an enormous difference. It would be much fairer both to the parties and the Divisional Court, if the present system of appeal were to continue, and of course the time it would save would be fantastic.

8782. What occurred to me was that if your complaint is that the whole evidence is not being laid before the Divisional Court, you could get over that quite easily by having a skilled shorthand writer?—Yes.

8783. In your court does your clerk write in long-hand?—Yes.

8784. I have seen the clerk take it down in shorthand in some courts, but that is not universal?—In criminal matters I think it would be illegal.

8785. (Mr. Maddocks): It must be taken down in long-hand.—In matrimonial matters it would be highly undesirable, I think, because it is so difficult. . . .

8786. (Mr. Young): Perhaps I am talking out of turn. It may be that it is translated into long-hand.—I think there are some courts which do their indictable matters in this way. They have relays of shorthand writers. A writer takes down the evidence of a witness as fast as the witness can speak. The moment he has finished he is told to sit down and the shorthand writer goes away and transcribes his note. The next witness is taken meanwhile by another shorthand writer. As soon as the transcription is ready the clerk of the court reads it to the first witness, who signs it and it becomes a deposition.

8787. If you had that system, would your objection to what goes on today disappear?—No.

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[Continued]

8788. That would limit your objection though, would it not?—It would limit the business I feel on the material which is laid before the Divisional Court and upon which it makes some of its findings. It would not do away with what I feel strongly, which is that the parties ought to have the opportunity that they would have in every minor criminal matter, of being re-heard before another court.

8789. And you would allow on this re-hearing new evidence?—Certainly.

8790. With new witnesses?—Certainly, just as happens in criminal re-hearings.

8791. May I ask a question on a matter which is not dealt with in your memorandum? I would like to know what your practice is. When a person comes to you in order to get a summons, do you always send that person to the probation officer?—No, Sir, it works the other way round. If they are not legally represented, they have already seen one of the probation officers in my court, and explained to him or her what it is all about, and usually the probation officer tries to effect such reconciliation as he or she thinks right before the party comes to me. If they are represented by solicitor or counsel it is not, I think, for the court to interfere in any way.

8792. Can you give the Commission any idea of the people who call at your court for a summons, what proportion do not in fact go on with it as the result of the intervention of the probation officer?—I cannot give you exact figures, Sir, but it is a very substantial number indeed.

8793. Would it be as much as half?—It would be guessing.

8794. But you think it is a very substantial proportion?—I am sure it is.

8795. So that if that procedure were universally followed throughout the country it would in fact make a very substantial reduction in the number of matrimonial cases?—I would not like to say that, because I know that in some parts of the country much of the work which is done by the probation staff in the metropolitan area, is done by marriage guidance counsellors who may be effecting reconciliations without our knowing it. Do you follow what I mean? They are not attached to the court as the probation officer is and we may not know how much they do.

8796. That is of course assuming that people outside London have in fact gone to the marriage guidance council?—They are much more likely to for this reason. Everybody in London lives within, I feel it fair to say, a mile of one of the metropolitan police courts, and that court has been there so long, not only as a court but as a kind of guide, philosopher and friend for so many generations, that they come to us at once. People who live in small towns and villages, I think I am right in saying, have not got that easy recourse and they would probably go first to their person or their doctor or somebody like that, who would send them to a marriage guidance council. But this is, of course, pure assumption on my part.

8797. It comes down to this, it is a question of educating the individual as to where to go?—Partly, yes.

8798. (Lady Bragg): May I ask you about the notes taken by the clerk? My experience is very limited, but surely sometimes the clerk has a deputy, his second in command, the man who takes his place if he is ill or anything? Surely in a very long matrimonial case, where there is no solicitor on one side and so the clerk is trying to get at the facts on behalf of that unrepresented person, the deputy then takes the notes almost verbatim, and if the witnesses go too fast somebody says, "This is being taken down in long-hand, could you speak more slowly", so that in fact you do get perhaps a truer picture than you are suggesting?—I think that is a very just criticism, but you see, that is the ideal. It is not a question of a deputy. Our clerks, who do nothing else at all, are so experienced and so good that they need no relief or help of that sort. That is not what I mean. If you get parties wrought up to the degree of bitterness, misery and hysteria that a lot of ill-educated people, perhaps foreign people, such as we get, allow themselves to attain, the more you interrupt and say,

"Go slower and speak louder", the less you will ever arrive at what it is all about. So it is rather like over-refereeing a game of Rugby. You ought to see who it is that is going to benefit before you blow the whistle and slow the whole thing up. If I keep everybody to what is legal evidence, among those people I shall never get at the truth, so one lets them go on and winnows out what does not matter. The clerk is just as much an expert as I am, he writes down all he thinks is relevant. But I could give you, if you wanted it, an example of what I mean, as to how a perfectly taken note can mislead the Divisional Court.

8799. The other question I want to ask is this: you say that these two lay justices who sit with you give an undertaking to sit regularly for two months?—I do not know that they give an undertaking, but they certainly promise to, an undertaking is rather a solemn way of putting it.

8800. Suppose that towards the end of the two months, when they are likely to go off duty, you want to make an interim order or you want to adjourn a case, what happens then, do you make special arrangements?—I can only tell you what I would do. I would see if I could have the benefit of that justice on the occasion when the case was finished. But if I could not, the Order in Council gives express power to the Chairman or, in certain circumstances, others, to finish the case alone or with one of the other two, as the case may be.

8801. I have one last question—and please do not answer it if it is not a fair question. If there were a lay bench of three, on a motoring offence, and the Chairman decided on one course of action and the two others disagreed, there would probably be a majority decision, I think it is fair to say. In your court, where you would be the expert, if the two lay justices disagreed with you—perhaps one cannot imagine such a thing—what would happen?—It is kind of you to say I am an expert, and in a minor degree it might be true, but sitting in that court, I am merely the Chairman of three justices, and the majority would decide.

8802. And you are quite satisfied with that?—Certainly.

8803. (Mr. Brown): Mr. Guest, I would like to hear how a perfectly taken long-hand note could prove misleading to a court of appeal?—It will take me just a moment, but I think it is a valuable example. Two people came before my court about a year ago, or perhaps a little more. The wife sought an order under the Summary Jurisdiction (Separation and Maintenance) Act on the ground of desertion. I think I am right in saying that neither side at that time was represented. The wife gave her evidence, which was perfectly simple and normal, that the husband had left her after the sad and inevitable quarrels about money. The husband, who was twice the human being that she was—that you could see very quickly, a thin person—cross-examined her quite well, and in the course of the cross-examination, although he did not specifically ask it, it came out that some three or four months before he left her she had been released from prison, where she had been for sixteen months on a charge of child neglect, which happened whilst he was serving away in the Forces. Very naturally indeed, the clerk took that down at that stage, he would have been quite wrong if he had not. Then the husband gave his evidence, and, in accordance with my practice, I let him say everything which was even remotely relevant for which there was possibly time. It became quite obvious to me that the husband's course of conduct had been to go back to this girl, as a good man would, and do the best for her when he got there, and that then the thing degenerated into the usual wrangle about money, the quality of the housekeeping and housework, and so on, and he could not stand it and he left. To make quite certain that he did not in any way leave because of the precedent cruelty to the children, I asked him, in a non-leading form: "Will you just sum up for me shortly what your grounds for leaving were?", and he told me what he had already told me, only more shortly. Very naturally, as the clerk had got down all that he had told me, he did not write that down again. After that I felt forced, although I thought nothing of the wife, to make an order on the ground of desertion, because the husband had left for reasons which were neither grave nor weighty and I had no alternative but to make an order. He very understandably appealed. Now when the note

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[Continued]

got to the Divisional Court, somebody or other—and I think both parties were represented then—somehow led the Divisional Court to suppose that the issue had been whether or not she had been cruel to the child and he had left because of that. The learned President very rightly observed that the only evidence that she had been cruel to the child was a statement that she had been convicted of that offence and had served a prison sentence for that, and, I suppose assuming that it had a vital interest in the case, he pointed out that my court had assumed this fact of which the conviction, at any rate in the absence of a certificate of conviction, was no evidence whatsoever. The case was accordingly sent back to be re-heard by my colleague, to discover from all kinds of other witnesses, who had to be called at great expense and trouble, whether or not she had been cruel to the child, which was never a matter at issue before me and never a matter which actuated the husband at all. That was solely because, in my opinion, the clerk very rightly wrote down the answer about the prison sentence, when it came out, because he could not then tell if it was going to have any bearing on the case, and its appearance there misled the Divisional Court as to the issue, and showed the Divisional Court that, if that had been the issue, I had misconceived the case.

8804. (Mr. Justice Pearce): Could you just enlighten me? I thought the clerk omitted in the note to write down the husband's account of the reasons which led him to leave?—No, I am sorry, I did mislead you. He had written all those down, but I said that when the husband had given them at length, in order that I could be quite certain that he was not in any way relying on that question of cruelty, I asked him again to summarise shortly for me (he was quite intelligent) the grounds on which he had left his wife. He repeated very shortly what he had already said at length about the quarrels and the bad housekeeping and the slovenliness, and as the clerk had written all those down at length he did not write down the summary which was immediately afterwards given. If he had written down my question: "Will you summarise all the reasons?" and then the summary, it may be that the Divisional Court would have realised that the cruelty had had nothing to do with the matter.

8805. But would not the note state: "The reason I found no answer to the desertion was that he excluded the cruelty to the children from the matters which led him to leave"?—It certainly did not, because except for her passing remark—this is a perfect example of how notes do not report what happened—but for that, I would not have known, and nobody would have known, anything about that cruelty, because the husband never mentioned it and did not rely on it. And, as I pointed out, he had been back living with her for three months or more after she came out of prison at the expiry of her sentence.

(Chairman): May I say, on the question of long-hand notes, that from my experience in the Chancery Division, you have to choose between two things? If witnesses are voluminous, you have to choose between constantly polling them up, in which case you do get down a fairly complete long-hand account of the evidence but you may interrupt their train of thought and throw them off the track; and letting them go on, in which case your long-hand note can only be in the nature of a summary. However experienced you are, the human hand cannot write faster.

8806. (Mr. Justice Pearce): In the case you mentioned, Mr. Guest, it really looks as if the Divisional Court thought the husband had had rather hard measure, and it wanted you to look into the case again. Is not that what it really amounted to?—I cannot tell what the court thought. What the learned President said in his judgment was that I had relied on the cruelty—and he was misled on that, I think, by that chance remark on the note—that I had relied on the cruelty without having any evidence that there had been any. But in fact the cruelty had nothing to do with the case at all.

8807. But did your reasons say that you had relied or had not relied on the cruelty, because it seems to me that was what the learned President would be basing himself

on?—My reasons were, I am afraid, restricted to the matters at issue before me, and my reasons were very short. What I said was that where there was any difference in evidence between husband and wife, I unhesitatingly accepted the husband, but nevertheless could find no grave and weighty reasons sufficient to justify him in leaving without being in desertion. That was all.

8808. (Lord Keith): May I ask, Mr. Guest, just for my information: when notes are taken down by the clerk in the magistrate's court in long-hand, they are read to the witness, are they, after he has finished his evidence?—Only if they are going to be depositions for a criminal trial, not in any other case.

8809. (Mr. Mace): Following up that point, they are not available to the parties until notice of appeal has been served?—Yes, that is, generally speaking, right.

8810. Would you take your mind back to the procedure in matrimonial cases in your old court, before the new court was set up? Suppose that you have just tried a bookmaker for street bookmaking, and fined him £100, and then you turn to a husband and wife case. . . . That would not be normal, Sir, even in the old court, because I always sat aside Tuesday afternoons and Friday afternoons, intending them to be for matrimonial work only, and the only criminal work which would be taken would be things left over from the morning, which, for the reasons I gave, I felt it wrong to put on to some other day.

8811. Does the husband stand in the same place as the accused in a criminal matter?—As soon as he has said whether he agrees or disagrees with the allegations in his wife's summons, he sits down on a bench which is beneath the dock.

8812. In a normal trial of a matrimonial case he is addressed and shown where to go by the officer who has been addressing criminals and showing criminals where to go during the morning?—I keep on being argumentative—that is not true in London. In the morning we take charges, and the jailors will be showing in and showing out the persons who are charged. In the afternoon we take summonses, and the warrant officers, who are different individuals—though of course they are also policemen—do that work. I do not know whether that answers your question?

8813. It does, I think. And do you not think your new court as constituted has an advantage in this respect over the old procedure?—No, because exactly the same people do exactly the same thing. We have one of our old and trusted warrant officers to show the parties in and out, and, as I say, a policeman to look after the women.

8814. Perhaps I have not made myself clear. Perhaps you have not noticed the glint in a wife's eye when she sees her husband occupying what amounts to the dock?—No, I have not.

8815. I will leave that. Would you agree that matrimonial cases could be taken in a room?—Yes, I frequently do take them there.

8816. Turning to the question of appeal, Mr. Justice Pearce was asking you about the costs of appeal. Before the grant of a legal aid certificate, you are aware that five solicitors or counsel judge whether there is a *prima facie* case?—Yes.

8817. Do you think that that would be of any assistance in stopping frivolous appeals at government expense?—I do, Sir, yes.

8818. Do you agree that children are brought into matrimonial cases so rarely that there would be no benefit in changing the law to prevent them being called as witnesses in matrimonial cases?—I do, yes.

8819. It has been suggested to us, you see, that the law should be changed to prevent a child under sixteen ever being called in such a case.—My experience is that even the least considerate parties, least considerate with each other, hesitate a very long time before they call young children.

(Chairman): Thank you, Mr. Guest, for your memorandum and for your help this afternoon.

(The witness withdrew.)

PAPER No. 114

MEMORANDUM SUBMITTED BY THE PROGRESSIVE LEAGUE

Section 1

1. The Progressive League was founded in 1932 for the study of political, economic and social problems and for the application of rational principles to their solution. Its membership is largely drawn from the professional classes and includes teachers, lawyers, social workers, doctors, civil servants, psychiatrists and psychologists.

2. Among many prominent persons who have been associated with it are Gerald Heard, Aldous Huxley, Professor Julian Huxley, C. E. M. Joad, A. S. Neff, Bertrand Russell, Olaf Stapledon, H. G. Wells and Barbara Wootton.

3. In 1934 the League sponsored the publication by Messrs. George Allen and Unwin, Ltd., of a volume of essays on social questions entitled *Manifesto*. This volume included a chapter on Reform of the Sex Laws, by Janet Chance.

4. From its inception, the League has consistently advocated the application of liberal and enlightened principles to the sphere of sexual law and conduct and the present published statement of its policy includes the following aim:—

"The abandonment of fear and ignorance as a means of controlling sexual conduct in favour of an appeal to the enlightened conscience of the individual."

5. In connection with its work in this sphere, the League has had the privilege of association with and assistance from the following writers on sexual questions: Eustace Chessier, J. C. Flugel, Norman Haire, Ernest Jones, Joan Mallowson and Dora Russell, the views expressed in whose published works have the support of the League.

6. The following organisations had their genesis in the discussion and propaganda work of the League:—

The Marriage Law Reform Society.

The Abortion Law Reform Association.

The Society for Sex Education and Guidance.

The League wishes to associate itself with their views.

7. The present work undertaken by the League in relation to sexual reform consists mainly of the organisation of occasional conferences and lectures at which an open platform is provided for discussion.

Section 2

8. We put forward the following statement as representing the general attitude of the Progressive League towards marriage:—

Marriage as a legal contract is a fundamental part of the structure of human society, though its form and its laws vary with the conditions and outlooks of communities. We regard the function of marriage in our own country as being three-fold:—

(i) to give legal protection to the interests of the individuals concerned, both in relation to one another and to the community;

(ii) to provide a means for ensuring the welfare of children;

(iii) to establish a pattern of sexual conduct conducive to the health and stability of society as a whole.

9. A marriage code can only be regarded as satisfactory to the extent to which all these requirements are fulfilled. The formulation of such a code must thus be approached empirically, not dogmatically, and must aim at avoiding conflict between legal requirements and the known facts of human nature. Moreover, while due weight must be allowed to the underlying powerful emotional forces, no purely emotional or mystical view of marriage should be allowed to determine the nature of its laws, nor should historical and contemporary experience, which proves the unwisdom of attempting to confine all sexual activity within the framework of the marriage institution, be ignored.

Section 3

10. With this general attitude in mind, we submit the following observations:—

(i) The welfare of society would appear to be best secured on the basis of contented, enduring, family life. Unhappy marriages are acknowledged to be inimical to the welfare of the married persons, their children and

the community as a whole. While certain legal reforms can be recommended, it is clear that legislation alone cannot ensure happy marriages, which ultimately depend upon wise sex education before and after marriage, upon co-operation between husband and wife and upon an understanding by each of the physical and emotional needs of the other. Moreover, the diversity of human character is such that an element of compromise is inescapable, and only acceptance by both parties of the restrictions of marriage as a corollary to its advantages can ensure its success and permanence.

(ii) Such conclusions point to the need for a legal framework which, while encouraging permanent marriage, will allow unhappy individuals to escape from intolerable situations to form new and more satisfactory family units.

(iii) Any extension of facilities for divorce or separation must be accompanied by full recognition of the problem of the psychological and economic welfare of the children of divorced or separated persons. It is of paramount importance that the welfare of such children should be safeguarded by law to the greatest possible degree. In our view present safeguards are very inadequate.

(iv) In view of the desirability of permanence in the marriage relationship and of the inevitability of compromise, it is doubtful whether an isolated act of adultery, apart from other factors which may have contributed to the failure of a marriage, should be regarded as a legitimate ground for divorce.

(v) Full and equal partnership, which is essential to individual and family contentment, can only be achieved if husband and wife share equal economic rights and responsibilities, the contribution of the wife and mother in the home making with that of the husband and father in his employment.

(vi) The gratification of sexual desire is in itself natural, normal and legitimate, and, while sexual intercourse is only one factor in marriage, no marriage can be regarded as successful which fails, after adequate trial, to provide sexual satisfaction for both parties. Moreover, it appears that a satisfactory physical relationship stabilises and strengthens the marriage tie.

(vii) Ecclesiastical influence on the marriage and divorce laws has been so great in the past and so much weight has been given to religious evidence that we must record our categorical rejection of the claim of certain religious organisations to impose their doctrinal conceptions on the community as a whole or even on the large number of seriously religious persons to whose consciences clerical dogma on these matters makes no appeal. We refer in particular to the doctrine of the "indissolubility of marriage", and point out that its advocates have always been ready to allow the break-up of marriages by legal separation while opposing only divorces which allow remarriage. The consequence of this principle is the creation of a large body of people who are in theory compulsory celibates but who in fact contract irregular unions and produce technically illegitimate children. We believe that the existence of such a body is conducive to such evils as prostitution and the spread of venereal disease.

Section 4

11. The acceptance of these observations would involve far-reaching amendments to the law and, without claiming to be legal experts or detailing all the reforms that are undoubtedly called for, we wish to particularise those legislative changes which appear to us obviously necessary in the light of sections 2 and 3 above. Thus:—

(i) We consider that the best remedy in cases of irreparably broken marriages is divorce by mutual consent on terms agreeable to both parties. This proposal is subject to the proviso that the courts should satisfy themselves that the agreement is real and not coerced and that financial and custody arrangements are equitable to all parties, and not extortionate, or unfair to children.

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(ii) Where there has been legal or *de facto* separation for a period of three years or more, divorce should, in our view, be obtainable on those grounds alone by either party, subject to reasonable financial and custody arrangements approved by the court.

(iii) We consider that divorce should be granted to either party without requirement that the marriage should have existed for a specified time (now three years) on the already existing grounds and on the following additional grounds:—

Willful refusal without reasonable cause to have children.

Unreasonable refusal of sexual intercourse.

Habitual drunkenness.

(iv) We consider that divorce should be granted for desertion if the court is satisfied that permanent desertion is intended, even if it has not lasted for three years.

(v) We consider that the following grounds for nullity should be added to those already existing:—

(a) wilful concealment of any grave diseases or physical defect;

(b) wilful concealment of insanity affecting a party to a marriage or his or her immediate blood relations.

(vi) We recommend:—

(a) The abolition of the "sine" period and of the office of the King's Proctor.

(b) The reduction of costs of divorce by the simplification of legal procedure.

(c) That the petitioner's own adultery and other bars to divorce should cease to be so regarded.

(d) That cruelty should be re-defined so that injury to health ceases to be a necessary ingredient and the conception of cruelty expressly includes habitual drunkenness, communication of venereal disease, cruelty to children and conduct which is grossly unreasonable as judged by the commonly accepted standards of the parties' social environment.

(e) That the statutory obligation placed on the courts to follow the judgments of the old ecclesiastical courts on questions of marriage and divorce should be abolished.

(f) That the court in hearing divorce cases and in making consequential orders, should abandon the assumption that one party is necessarily guilty and the other necessarily innocent.

(g) That homosexual practices on the part of either husband or wife should rank equally with adultery as matrimonial offences.

(h) That wives should be equally liable (according to means) with husbands for the support of children of a marriage ended by separation or divorce.

(i) That damages in divorce and enforcement cases should be abolished except in so far as they represent repayment for actual financial loss to a deserted spouse or children.

Section 5

12. In addition to the foregoing recommendations concerning divorce and nullity, we wish to put forward the following observations on wider, though associated, legal issues:—

(a) In our view husband and wife should have equal rights as regards the occupancy of the matrimonial home and the use of its furniture. In cases of divorce the courts should order equitable arrangements, having regard to the length of marriage, the conduct of the parties, and their respective contributions (financial or otherwise) to the property in question.

(b) We consider that the law of landlord and tenant should be amended to secure the result that husband and wife are joint tenants of a rented matrimonial home and that, in cases of divorce or separation, the courts should have discretion to apportion the rights of the spouses in regard to the said tenancy. The law of landlord and tenant should be further amended to secure that on the death of a tenant the surviving spouse should have the option of taking over the tenancy or cancelling it.

(c) Marriage between parents should always confer upon a child born before marriage the status of legitimacy, whether at the time of the birth either parent was free to marry or not. No discrimination should be made between legitimate and illegitimate children as regards entitlement to State benefits.

(Received 13th December, 1951.)

EXAMINATION OF WITNESS

(Mr. A. CRAIG, representing the Progressive League: called and examined.)

8820. (Chairman): I understood, Mr. Craig, that you are the Chairman of the committee which prepared the memorandum submitted to the Commission by the Progressive League?—(Mr. Craig): That is so, my Lord.

8821. We have had a letter from the secretary of your committee—unfortunately it was delayed—in which it was said in effect that you desired to say something by way of addition to or elucidation of your memorandum, so we have invited you to come here. Before I put any questions, do you wish to add anything at this stage? I might say that your memorandum seems very clear to me, and there is of course no need to travel over ground which you have covered in writing, unless you want to explain something. If there is any explanation you want to give, or anything you want to add which is omitted, we should be very glad to hear you.—My Lord, after the first memorandum was received by you, you were good enough to send us memoranda put in by other bodies, and we sent in a second memorandum.

8822. Yes, you sent in certain comments on other evidence. [Not reproduced.]—That was so, my Lord, and we should like those two memoranda to be taken together as our evidence in chief. Since then we have been following the proceedings of the Commission, as reported in *The Times*, and my committee thought it might be useful to you if we made a few further comments on the evidence, apart from the memoranda which we have sent to you, but that would be for you to say.

8823. May I say that we have had other instances where bodies, having seen the evidence of others, have made

comments in the nature of reply; for example, we have had such comments from a body which takes diametrically the opposite view from yours? We can give no guarantee that comments on some other body's memorandum will necessarily be printed. That will be entirely a matter for the Commission to consider.—Thank you, my Lord. We would welcome any information about that. Our anxiety was whether our main memorandum would be printed.

8824. I think I can assure you now that your main memorandum will be printed. On that footing, I now ask you again, is there anything you wish to add by way of explanation or addition to your memorandum?—We understand, my Lord, that the second memorandum was in a different class, and it is a matter whether you would wish me now to make one or two remarks, which I promise will be short, with regard to the other evidence which we have seen in *The Times*.

8825. Yes, I do not see any objection to that.—Thank you. We were naturally pleased to see that the Federation of Business and Professional Women's Clubs and the National Women Citizens' Association supported what was one of the main . . .

8826. May I say this? What you see in any newspaper is not a full report of all that takes place before the Commission. It is impossible that it should be. For example, from what you are beginning to say you appear to have thought that particular bodies supported your proposals. The fact is that, in the case of the Federation of Business and Professional Women's Clubs, certain clubs

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[Continued]

forming part of it did support these proposals, and others did not.—My Lord, the fact that we apparently had some measure of support from those bodies, I will put it that way, encouraged us in our desire to emphasise before you the views which we put forward in paragraph 10 (v) and paragraph 11 (v) (b) of the first memorandum, with regard to the desirability of equality between husband and wife, not only in respect of rights but also in respect of responsibilities. Again, my Lord, it may be that Dr. Marie Stopes' evidence was not fully reported, but we were pleased to see that we apparently had some measure of support from her over the matter in our second memorandum, with regard to the minimum age of marriage, and that emboldens us to emphasise that part of our evidence. Indeed, if it were possible, we would rather like that to be regarded as part of our main evidence, because we do now think that it is a matter of very considerable importance.

8827. This Commission is not concerned with the age of consent to marriage, it is not within our terms of reference. It is true that Dr. Marie Stopes gave some evidence on it, and we might possibly mention the matter in our Report, but I want you to understand that it does not come within our terms of reference.—Yes, I am afraid we ought to apologise to some extent in that respect. It is the view of the Progressive League, which I represent, that this question of happy and stable marriage is a very wide subject, and it is almost impossible to delimit it, and to say that something concerns it and something is irrelevant to it. We could not ourselves be sure what the Commission would think was within its terms of reference, and we took the widest possible view of the matter, so we can only apologise, and emphasise that neither of these memoranda is put forward as anything in the way of legal expertise. We realise that we are laymen, and we are putting our views forward as laymen, without making any claim to indulge in legal discussions as legal people.

8828. I think we appreciate that, and many other associations have, of course, put forward memoranda on the same basis.—To continue, my Lord, I am afraid we have transgressed probably in that respect in paragraph 12 of the main memorandum, where we emphasise what we consider the relevant and important relation to the matters which you are considering, of the financial and property status.

8829. That is within our terms of reference, clearly.—Thank you. That refers to the law of landlord and tenant, which we were gratified to see that the Magistrates' Association, as reported, dealt with, and from the report appear to have some measure of agreement with us. Further, the question of legitimacy, that perhaps from our point of view was a borderline case.

8830. I have not said that legitimacy is within our terms, of course.—No, my Lord, I was simply putting in an apology for paragraph 12, because it seems to me that some of it at any rate may err in the way you have pointed out. That is all, I think, guided by what you have said, my Lord, that I want to say in supplementary oral evidence. If there is anything on behalf of the Progressive League which I can say in clarification, or if there is in your mind or in the minds of the Commissioners any objections which you think I could answer on behalf of that body, that is what I have also come to do.

8831. There are two matters on which I want to ask questions. First, although you give us some particulars of the Progressive League, I should like to know a few more facts about it. Secondly, in your second paragraph you name certain prominent persons who have been associated with it. How many persons of those named are today, or have been, members of the League? I did not quite know what you meant by "associated".—I think that at one time or other all of them have been members, but that is not quite what we meant to say. What we meant to say was that they had spoken for us at times, had come to our conferences and to our meetings, and had been in touch with our governing body and with our members.

8832. I see. Can you tell me how many members the League has today?—About 200 now. May I say, to supplement that, that we do not put ourselves forward at all as a large body of public opinion? Ours is a small society of a character which is set out in section 1 of our

memorandum, and if we have any claim to your attention it is rather at second-hand than at first-hand. I think our chief pride, if I may put it that way, is that, working in a rather un-public and unobtrusive way, we have given both to such bodies as the Marriage Law Reform Society, the Abortion Law Reform Association, and the Society for Sex Education and Guidance. It is as a body of that character that we are asking for your attention, rather than as claiming to represent any large body of organised public opinion.

8833. I see. Is there an annual subscription to your League?—Yes.

8834. I noted that the Marriage Law Reform Society, which we have already heard, had its genesis in your League, and I suppose there is still today a close association between you, is there?—There is a close association, a personal rather than an official one. Mr. Robert Pollard, whom I think you have heard, is a personal friend of mine, and we do work together as much as we can. I should, however, make it clear that our evidence was prepared quite independently from that of the Marriage Law Reform Society, and from a rather different and, if I may say so, somewhat broader angle.

8835. Are there any of your members who are also members of the Marriage Law Reform Society, or do you not know that?—There may be, I should not think very many.

8836. Many of the questions which I might have put to you have already been put very fully to that Society and other societies, so there is only one other matter about which I wish to ask you. Would you turn to paragraph 10 (ii), where you say:—

"Any extension of facilities for divorce or separation must be accompanied by full recognition of the problem of the psychological and economic welfare of the children of divorced or separated persons. It is of paramount importance that the welfare of such children should be safeguarded by law to the greatest possible degree. In our view present safeguards are very inadequate."

Could you tell me, what proposals would you make to supplement the present safeguards for the psychological and economic welfare of the children of divorced or separated persons? Have you any concrete suggestions to make?—Yes. As laymen, I think the chief thing we should suggest is that a separation or divorce action should not be regarded as a dogfight, if I may use that word, between the two parties concerned, which is settled in favour of one or the other, and then the welfare of the children brought in after. Instead, the attitude of the court should be: "Here you are, two parents, and you want to separate. Will you tell us what you propose to do about the children?"

8837. I see, that it should be dealt with by the court on that footing?—That it should be a principal matter. I do not know whether I would be right in saying that it is now a subsidiary matter—it appears to me as a layman to be so—that the main issue is decided on things that have nothing whatever to do with the children, and then they are brought along afterwards. We, I think, would say that we think the question of what is going to happen to the children should be put at the word "go", and regarded as one of the principal issues and not a subsidiary one.

8838. May I put my question in rather a more concrete form? Is it your view that no divorce decree should be granted unless and until the court is satisfied that adequate provision has been made for the psychological and economic welfare of the children?—I should like to answer that right away, my Lord, by saying, "Yes", but I can imagine that there would be circumstances in which it would be rather difficult to do that. In a straightforward case of desertion or outrageous cruelty, or something like that, it may be that the victim of such action would not be in a position to do anything for the children, and I do not think then, in those exceptional circumstances, that it would be right to hold up the decree. My only comment would be that the decree would probably tend to help the children, because in this case, a case which I think is exceptional, in which all the wrong

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MR. A. CRAIG

[Continued]

is on one side, the petitioner might be able to marry again and set up another home for them. That, in our view, is the great advantage of divorce over separation.

8833. (*Sheriff Walker*): I would like to put one question on paragraph 11 (i) and (ii). You seem to approve both divorce by consent and divorce at the instance of either party after separation for three years. What puzzles me at the moment is this: if these two grounds of divorce were introduced, why need there be any other grounds of divorce? Would that not cover the whole field? Why do you want to keep divorce for adultery, and all the other matrimonial offences, if you have got these two new grounds of divorce?—If I may express myself a little paradoxically, I should say that divorce by mutual consent was our ideal, in this sense, that though we would deplore divorce or any breaking up of marriage, we think that a mutual consent, in the sense of the two parties, realising their responsibilities, saying: "We will break up on these grounds", is the most civilised way of doing it. Where that fails, you come to (ii), and my League suggests that if there is a legal or *de facto* separation of three years or more a divorce should be obtainable by either party. That is, where there is not this mutual consent, we suggest a period of three years. But the other grounds would be means of obtaining immediate relief, that is to say, where there is neither mutual consent nor has there been three years' separation.

8840. I do not quite follow that. How would there be immediate divorce in the case of desertion? You want a new ground of divorce, a divorce at the instance of either party where there has been three years' separation, and then you want to keep the present ground of divorce for desertion?—We consider that divorce should be granted for desertion if the court is satisfied that a permanent desertion is intended, even if it has not lasted for three years. Then, there is another reason for our putting in the additional grounds in (ii) and (iv) of paragraph 11. I think we should be unduly optimistic if we thought we could persuade you all to accept (i) or even (ii). So we would say, if we cannot persuade you on that, we would like to persuade you on (ii) and (iv). I think there is some convenience in setting out the whole thing.

(The witness withdrew.)

(Adjourned to Thursday, 27th November, 1952, at 10.30 a.m.)

8841. (*Dr. Baird*): In paragraph 10 (v), Mr. Craig, where you say: "Full and equal partnership . . . can only be achieved if husband and wife share equal economic rights and responsibilities . . .", have you any concrete suggestions about how this can be achieved?—Yes, I think paragraph 12 (a) is the answer. There we say:—

"In our view husband and wife should have equal rights as regards the occupancy of the matrimonial house and the use of its furniture. In cases of divorce the courts should order equitable arrangements, having regard to the length of marriage, the conduct of the parties, and their respective contributions (financial or otherwise) to the property in question."

This question only arises in those unhappy cases in which the marriage does break up, but where it does I think we should say that both parties should be regarded as equal members of the partnership and have equal property in everything.

8842. That does not quite cover, I think, the whole implication of paragraph 10 (v), which says: ". . . the contribution of the wife and mother in the home ranking with that of the husband and father in his employment". Did you have anything in mind as to the wife's having a legal right to a personal allowance of her own which would be hers to spend without having to account for it?—I think we should rather put it in this way, that it would be quite wrong for a husband to say: "I earn the money and you spend it", whereas she is in the work of the house, and so forth, is in effect contributing as much as he is at his office or workshop. I could not say how far the Progressive League would think it desirable to have any rules about what the arrangements would be while the marriage was going along happily, and so forth, but I am quite sure they would agree that it was a just right of complaint on the part of a wife that the husband took the view that the income was his to hand out or not as he thought fit. Unless he treated her fairly financially, I think she should have a complaint.

(*Chairman*): Thank you for your memorandum, and for your attendance here today.

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TAKEN BEFORE THE

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ROYAL COMMISSION
ON
MARRIAGE AND DIVORCE

THIRTY-SEVENTH DAY

Thursday, 27th November, 1952

WITNESSES

MR. T. F. DAVIS

DR. ALEXANDER WALK, M.D., D.P.M.

DR. J. A. HOBSON, M.D., M.R.C.P., D.P.M.

DR. A. M. SHENKIN, M.B., Ch.B., D.P.M.

} representing the Royal Medico-Psychological Association.

MRS. ELIZABETH POMEROY

MR. A. NABARRO, LL.B.

} representing the Married Women's Association.

MRS. HOLT WILSON, J.P.



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1953

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MINUTES OF EVIDENCE TAKEN BEFORE
THE ROYAL COMMISSION ON MARRIAGE
AND DIVORCE

THIRTY-SEVENTH DAY

Thursday, 27th November, 1952

PRESENT

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MRS. MARGARET ALLEN
DR. MAY BAIRD, B.Sc., M.B., Ch.B.
MR. R. BELOE, M.A.
LADY BRADD
SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.
MR. G. C. P. BROWN, M.A.
SIR FREDERICK BURROWS, G.C.S.I., G.C.L.E.
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THE HONOURABLE LORD KEIR
MR. D. MACF
MR. H. H. MADDOCKS, M.C.
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DR. VIDUAT ROBERTSON, C.B.E., LL.D.
MISS M. W. DENNIEHY, C.B.E. (*Secretary*)
MR. D. R. L. HOLLOWAY (*Assistant Secretary*)

PAPER No. 115

MEMORANDUM SUBMITTED BY MR. T. F. DAVIS

COMMENTS ON THE MEMORANDUM SUBMITTED BY MR. FRANK J. POWELL*

Allegations of adultery in matrimonial proceedings in magistrates' courts

1. I am not satisfied that the absence of a co-respondent or an intervener amounts to a serious defect, or even to a defect. In the vast majority of cases in which adultery is alleged a petition for divorce is presented in the High Court. Although the magistrates' courts are available to husbands as well as to wives who seek separation on the ground of adultery, I have not heard of a case in which an application has been made by a husband. Applications to discharge maintenance orders are sometimes made by husbands on the ground of alleged adultery. Magistrates' courts are not therefore concerned with co-respondents except in few cases.

2. Wives sometimes apply to the court for a separation order on the ground of adultery, and their reasons for adopting this course instead of presenting a petition for divorce are in the main:—

(a) the simplicity of the procedure in the magistrates' courts where they have the advantage of the advice of the probation officers and the staff of the court;

(b) religious conviction;

(c) the security of a maintenance order, which is more easily enforceable than an order for alimony or maintenance in the Probate, Divorce and Admiralty Division;

(d) divorce affords no advantage when there is no desire to re-marry;

(e) spite—which is frequently confused with the inability to see any advantage to the wife and children, but only possible disadvantage.

3. In my experience on the bench (four-and-a-half years), I have had to deal with very few cases of alleged adultery amongst the numerous matrimonial cases which have come before me. In most cases where there is adultery there is also desertion, and the latter is usually the ground relied on. Seldom is a complaint founded on adultery alone and still more seldom is there a contest as to the truth of the allegation.

4. I am not aware of any case in which a "faithful and perhaps happily married person" has learned " (possibly for the first time) from his local newspaper that a few days before in the local court he was accused of adultery and that the accusation was held to be true". Can particulars of any such case be given? I suppose that it is possible to imagine such a case but at present it

seems to me that the statement is a flight into the realm of imagination and fantasy. Such a state of affairs could only happen if both parties to the proceedings conspired to make an unfounded allegation in a mutual desire to obtain relief, because if a respondent were indignant at such an allegation the respondent would at once acquiesce the "faithful and happily married person" and both would strenuously contest the allegation.

5. It must be borne in mind that the accessibility of the magistrates' courts to persons of small means depends almost entirely on the simplicity of the procedure. Any rule requiring service of proceedings on the co-respondent or on the woman named would lead to endless difficulty, delay and expense. A complete set of rules would have to be drawn up to cover cases where service could not be effected because the names and addresses are unknown, as is so often the case in magistrates' courts. Presumably affidavits would be required and power given to order substituted service and so on. In my view this would be too cumbersome for magistrates' courts and would have the effect of deterring poor people from applying for relief. It is of course possible to grant legal aid in any such case, but it would have to be granted to both sides and the expense would not in my view be justified.

6. It is significant that although magistrates' courts have been trying issues of adultery since 1896, in no reported case has the absence of provision to summons a co-respondent or woman named given rise to comment in the High Court, as far as I am aware.

7. It should not be overlooked that a witness summons can be issued requiring the attendance of a co-respondent or of the woman named if the name and address are known to the complainant. It is appreciated that there are limitations to the questions which may be asked (Matrimonial Causes Act, 1950, s. 32 (3)) but if there is no truth in the allegation of adultery it is not likely that the co-respondent or woman named would claim the protection of the Act.

8. In so far as complainants do not desire to present petitions for divorce because of religious conviction, I would only say that those with religious convictions are entitled to have their views treated with respect. They certainly should not have their religious convictions overridden and their status altered because in some cases there may be spite with or without religious conviction.

9. The disadvantage of a divorce as opposed to an order for separation arises from the fact that the financial position at the time the divorce is decreed does not remain static. It frequently happens that after a divorce the

* See Paper No. 95, Minutes of Evidence for the Thirty-Second Day.

husband re-marries knowing full well that he cannot support two homes and two families. It is true that after an order for separation the husband sometimes sets up another home, but on an application by the wife to recover arrears or an application by the husband for a reduction of the amount of the order, less weight is attached to it than if the husband were lawfully married.

Uselessness of orders made in magistrates' courts under the Summary Jurisdiction (Separation and Maintenance) Act

10. The hardship which arises owing to the housing shortage is likewise a matter for consideration. But surely the principle is sound that an order should not be enforceable while the parties are residing together and that the order should cease to have effect if they continue to do so for three months. The principle is sound because the homes of married people should be inviolable, and it is fundamentally wrong to interfere with the affairs of a man and wife who are residing together. An order on a husband to pay a weekly sum into court in such circumstances would lead to chaos in the home and discourage all effort on the part of both parties to compose their differences and would render reconciliation impossible.

11. If, as I think, the principle is sound, the fact that hard cases are created by external circumstances is not a good reason for destroying the principle. It is true, no doubt, that many women refrain from applying to the court for an order because they fear that they may lose their "home". This is one of the factors which deter women from regarding the marriage less seriously than they otherwise would. It is not uncommon to find that some women want the best of both worlds. They want a husband who will provide for them, whilst at the same time they would prefer to live apart and not perform any wifely duties.

12. In cases where there is cruelty to children there is a remedy in the juvenile courts. In a case of alleged cruelty to the wife where violence is feared, it is possible to ask the probation officer to make arrangements for accommodation to be found for the wife and for the hearing of the case to be expedited. Except in a case of apprehended violence, it is not, in my opinion, the function of any court to encourage or compel separation or even assist the parties to decide whether they should separate.

13. I do not think that it would be a useful or humanitarian legal reform for justices to have the power to apportion the contents of the home. On the contrary, it is a revolutionary proposal that because a marriage is not a success the court may be empowered to take away a person's property. It is inherent in the suggested "reform" that the contract of marriage should in certain circumstances confer on the other spouse an unspecified interest in that part of his or her property which is called the "home", and that each may be deprived of the right to deal with his or her property. A power to split up the "home" might lead to considerable hardship and lead to unequal treatment being meted out. For example, a husband who has spent his savings in making a "home" would be liable to have his property taken away, whilst another who kept his savings and lived in furnished lodgings would escape. There would be complications if the furniture were being bought on hire-purchase, or the house through a building society, or if the house were owned by one and the furniture by the other. If such a power were conferred on the court the result would in most cases be that neither party would have a home, and the chance of reconciliation would be banished. In a case of alleged desertion, the splitting up of the home would seriously affect (if it did not destroy) the exercise of the right of either spouse to make a home life offer to return. The court ought not to have to decide whether the only bed should be awarded to the husband or the wife. Before any adjudication could be made as to the splitting up of the home there would have to be a prolonged enquiry as to the relationship and earnings of the parties before and during the marriage including the assessment of the values of the items of furniture. Such a power is more consistent with the appointment of a commissioner with despotic power.

14. The suggestion that there should be power to transfer a tenancy appears to give no consideration whatever to the sanctity of contract, whilst a landlord friendly

to one of the parties could either veto the right of the court to deal with the tenancy, or encourage the court to substitute his tenant.

15. At present it is not infrequently happens that a husband leaves his wife in possession of the home. If it were possible for an application to be made for the home to be split up between the husband and wife, it may well be that this would prove a disadvantage in a large number of cases.

16. It is not clear whether the proposal to give power to the court to allocate the "home" between husband and wife is intended to pass the property in a chattel from one spouse to the other, or whether it is intended only to confer a right to use the chattel till further order. If the latter, it is improbable that this would be understood, and the probabilities are that it would be entirely disregarded.

Collection of maintenance arrears

17. It would of course be a great convenience if it were possible for the same court to collect moneys and enforce the orders. The fact is that we are dealing with persons of modest means and easy facilities must be given for payments into court and for withdrawing money from the court. In the case of a husband living outside the area of the court where the order was made, any alteration of the present system would require:—

(a) the money to be sent by post, or

(b) the transmission of the money from one court to another.

As to (a), a registered letter costs 6d., (a not inconsiderable addition to the amount of the order), apart from the trouble involved, particularly in cases where the husbands are itinerant. As to (b), a great deal of administrative work would have to be done, the cost of which cannot be regarded as negligible.

18. I am glad to observe that Mr. Powell does not favour the suggestion that the National Assistance Board should pay to the wife the amount ordered by the court. He gives as his reason for this that it might lead to fraud. No doubt he is correct, for wherever there is money there will inevitably be fraud. But even though Mr. Powell rejects it, he has published it widely and this creates a danger that it may receive support by some who, on superficial consideration, see an advantage in it and none of the disadvantages. I think it right, therefore, to point out that there are other good reasons for rejecting it. The National Assistance Board must have control of public moneys, which should only be paid out after proper investigations have been made. Furthermore, there is no reason why a separated wife should have the security of a guarantee of maintenance which she never had when she was living with her husband. It is pertinent to enquire, also, what action would be taken if a husband fell into arrears. Would the National Assistance Board have to initiate proceedings on behalf of the wife or compel the wife to commence proceedings, or would the Board be left to recover the amount due under the order from the husband? The onus ought not to be thrown on a government department, which would necessarily be reluctant to commence proceedings. Finally, and still more important, it is in my opinion far better to keep government departments as far away as possible from the matrimonial differences between husband and wife.

Right of guilty party to obtain divorce after a long period of separation

19. The suggestion is that the guilty party should be given such a right. It is inevitable that the innocent party will sometimes refuse to assist the guilty party, on the ground of religious conviction or spite amongst other reasons which I have dealt with in paragraph 2 above.

20. The question is, first, whether it is in the interest of public morality that regard for the marriage vow should be weakened by the passage of time, and the religious convictions ignored or mutilated. There is still a Church of England and the King is Defender of the Faith. The Roman Catholic faith does not countenance divorce and avowedly discourages it, as also do many other denominations. Public morality surely requires that the bond of marriage as a contract with all its religious implications should be respected and upheld. If the guilty party takes it upon himself to ignore public morality in this respect and live an immoral life, I do not know by what principle of law or morality he should be allowed to plead

PAPER No. 115—MEMORANDUM SUBMITTED BY MR. T. F. DAVIS
MR. T. F. DAVIS

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his own immorality as entitling him to relief on the ground that it would be in the best interests of morality to change the status of the innocent party against his or her will and flout religious conviction.

21. The innocent persons affected are, primarily, the innocent party to the marriage, and, secondly, any illegitimate children. The guilty persons concerned are the parents of the illegitimate children, both of whom defied the marriage tie and the religious convictions of the innocent party. In the event of a subsequent marriage the illegitimate children would not be legitimised. The legitimate children would be saved from continuing to live in the home of parents who are not married, and this is the extent of the benefit which would accrue to them. I find it difficult to believe that it is just and equitable to dissolve a marriage contract which the innocent party desires to maintain, because the guilty party has brought into the world offspring of an illicit union. It cannot be just and equitable to ignore the innocent party and religious beliefs and other considerations advantageous to the innocent party and the issue of the lawful marriage.

22. It is suggested that such a right should be exercised only on terms favourable to the innocent spouse and any children of the lawful marriage. Such a right as this must necessarily result in the right being exercised only in favour of the guilty parties whose financial position is far superior to that of the bulk of the population. There would indeed be one law for the rich and another for the poor—the latter would be excluded entirely.

23. In a changing world, the "terms favourable to the innocent spouse and any children of the lawful marriage" cannot be relied on to continue. The changing circumstances would include the increasing cost of maintenance of the legitimate children as they grow older, the advent of children of a second marriage, the vagaries of business, sickness, and so on. In the vast majority of cases the guilty party has no "general assets". He has weekly earnings which are not sufficient to provide for the innocent wife and the legitimate children when he is living apart from them. To confer a right of divorce on such a person would put a premium on irresponsibility, whilst it could only be conferred on those sufficiently prosperous to be able to buy their freedom.

24. If such a right were conferred on guilty parties, then presumably similar provision would have to be made covering the case where the parties to the marriage have separated by mutual consent and have not lived together for a specified time. If this were not done, it would seem that a guilty party would have an advantage over parties who have entered into a separation agreement and have lived apart for many years.

25. Many cases are met with where "incompatibility" is the cause of the breakdown of the marriage and neither party can present a petition for divorce. Therefore they separate by consent. It would be an injustice if such persons were left in a worse position than a "guilty"

party, but if this injustice were remedied we should arrive at a point when divorce could be obtained by agreement of the parties, because separation by consent plus lapse of time would in many cases amount to divorce by agreement so long as the parties were prepared to wait for a specified time.

26. There is, however, still the possibility that one of the parties is content to live separate and apart while not being willing to divorce or be divorced. If, in such a case, a right to petition for divorce were conferred on either party, it would be necessary to provide for variation of the separation agreement, whilst the exercise of discretion would once again depend on the financial position of the applicant.

27. I have mentioned incompatibility as one of the reasons for entering into separation agreements, but it is only fair to point out that incompatibility can cover a multitude of sins. The relationship of man and woman is often unathomable and there is a secret side to it, to which too much importance cannot be attached. There are many offences sexual and otherwise which are never revealed and which lead to separation agreements because public enquiry into the grievances is not desired by both or one of the parties. Indeed, in some cases it might well be feared that it would be ruinous to the husband financially and in reputation and that the wife would lose the security of an income if their matrimonial complaints were investigated in open court.

28. It follows that there must be many cases in which a husband or wife had a ground for divorce and did not act on it, but decided at the wish of both or one of them to enter into a separation agreement instead of positioning for divorce.

29. Equally, there must be many cases when the parties have agreed to separate owing to the wilful refusal or inability of one of them (after consummation of the marriage) to have sexual intercourse, or owing to the refusal to have children.

30. In such cases it would be difficult if not impossible to do justice between the parties without deciding the reasons for the separation and whether they were justifiable or not. The difficulty of making such decisions is manifest, particularly when a long time has elapsed; but even if it were possible, the intention of the parties at the time the separation agreement was entered into would be violated and the purpose of the agreement (for which valuable consideration was given) would be destroyed at the will of one party to it.

31. My submissions are that unless Parliament is prepared to ignore all religious convictions and the sanctity of contract and admit the principle of divorce by consent, the proposal to give to a guilty party a right to petition for divorce is not practicable. I am certain that the religious susceptibilities of all denominations will be offended by the proposal and would be shocked if the proposal were adopted.

(Received 28th December, 1951.)

EXAMINATION OF WITNESS

(MR. T. F. DAVIS; called and examined.)

(Chairman): In all probability this will be the last occasion on which the Commission will meet in public. In view of the wide public interest shown in the work of the Commission, it is perhaps fitting that I should now say something as to our past work and future plans. The Commission started work just over a year ago and has collected a vast mass of information and evidence bearing upon the very varied topics which come within its terms of reference.

The written evidence may be broadly described under three heads. First, we have had over two thousand letters from private individuals telling us of their own experiences and, as a rule, begging us to report either for or against some particular proposal for alteration in the law. Secondly, we have had more than 250 memoranda from bodies and individuals in the United Kingdom, ranging in length from 200 pages downwards, supplying us with information and putting forward views and suggestions. Thirdly, in addition to certain information supplied by Government Departments in the United Kingdom, we have collected, and are still collecting, a great deal of

information from countries all over the world as to the laws in force in these countries and the history of the development of these laws.

It was necessary for us to decide how far this mass of written evidence should be supplemented by oral evidence. Most of the persons who wrote us personal letters did not show any desire to give oral evidence. These letters form a very valuable part of the evidence before the Commission, but the Commission felt that no useful purpose would be served by questioning the writers. The facts were set out clearly, and the reasons for the suggestions made were based on the human experience of the writers and needed no further elucidation.

I now come to the second category of written evidence. Obviously many of these memoranda had to be supplemented by oral evidence in order to give the Commission an opportunity of testing the soundness of the views expressed, by questioning the writers or their representatives. Here a selection had to be made, as it would have been impracticable to hear oral evidence from all the bodies and individuals who have put forward views and

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[Continued]

suggestions. Such a course would have involved a great deal of unnecessary repetition of views on which evidence had already been given to the Commission. Accordingly, the Commission made a selection from amongst those bodies and individuals, taking care to see that every point of view was represented. Some bodies and individuals have not been called to give oral evidence, and some of the memoranda will not be printed with the Report. All those who submitted memoranda may rest assured that their memoranda have been given full consideration by every member of the Commission and have formed part of the material which will assist the Commission in reaching its conclusions. A list of all memoranda received will be included in the Report.

The third category of evidence has been of the utmost value in supplying the Commission with information. It may be supplemented in response to further enquiries by the Commission.

There must come a time when the collection of evidence stops, and that time has now come, except for further evidence which the Commission may find it necessary to obtain in the course of its deliberations. Every individual and organisation in Great Britain has been given an invitation, by notices in the Press, to supply evidence, and no further evidence can be received from bodies or members of the public after today unless under very exceptional circumstances and by special leave of the Commission.

The Commission is now faced with the task of forming conclusions upon a vast number of suggestions which have been made, covering every part of its very wide terms of reference. It is impossible to foretell how long it will take to form conclusions on all these matters and to issue a Report. It is also impossible to say at this stage whether it will be desirable or possible to issue an Interim Report upon some of the more pressing topics. The Commission may decide that all the matters before it are so intimately connected that it is wiser to deal with them in one Report.

8843. Mr. Davis, you are a Metropolitan Police Magistrate. Which court do you sit in and how long have you been a magistrate?—(Mr. Davis): I have been a magistrate for five-and-a-half years. My present court is Clerkenwell but I have sat at other courts in the metropolitan area including the South Western, where there is a large residential area and a good deal of matrimonial work, and North London, where there is also a large amount of matrimonial work.

8844. Is there anything you would wish to add to your memorandum before I ask you questions on it?—I would like to preface my memorandum, if I may, my Lord, by saying that it was written by way of comment upon Mr. Powell's memorandum, which was circulated to metropolitan magistrates and which was originally written for consideration by a sub-committee of magistrates. I want to make it quite clear that Mr. Powell has been a friend of mine and still is. I have known him for very many years, and anything I have written or said is not intended to be a criticism of him in any way, but we do permit ourselves differences of opinion on matters of public interest. I am sure it will be taken in that spirit.

8845. I am sure the Commission has never doubted that that was the position. There is purely a friendly difference of opinion on certain topics of public interest. Please turn to your first few paragraphs where you comment on a suggestion by Mr. Powell that, in matrimonial cases, a person accused of adultery with the respondent ought to be given notice of the proceedings or made a party—that, I think, is Mr. Powell's suggestion. We have read your reasons and I do not wish to repeat them, but there are one or two questions I should like to ask you on them. In paragraph 3 you say:—

"In my experience on the bench . . . I have had to deal with very few cases of alleged adultery amongst the numerous matrimonial cases which have come before me."

I think Mr. Powell had had a fair number in the course of his experience. About how many come before you personally in a year where adultery is alleged? Can you give us any idea?—I doubt whether there are more than a dozen. I should put it at a dozen at the outside.

8846. Then, in paragraph 5 you say:—

"It must be borne in mind that the accessibility of the magistrates' courts to persons of small means depends almost entirely on the simplicity of the procedure. Any rule requiring service of proceedings on the co-respondent or on the woman named would lead to endless difficulty, delay and expense. A complete set of rules would have to be drawn up to cover cases where service could not be effected because the names and addresses are unknown, as is so often the case in magistrates' courts. Presumably affidavits would be required and power given to order substituted service and so on. In my view this would be too cumbersome for magistrates' courts and would have the effect of deterring poor people from applying for relief. It is of course possible to grant legal aid in any such case, but it would have to be granted to both sides and the expense would not in my view be justified."

I have two points to raise on that. When the point was put to Mr. Powell he suggested that a registered letter to the last known address, if any, of the co-respondent or woman named would be sufficient, and if there was no reply to such a letter the matter could proceed. That, of course, would be a course of action which would lead to comparatively little expense. That is the first point. The second point is that if the cases where adultery is alleged are as infrequent as you have just told us, the expense even of a slightly more elaborate form of substituted service would not be very great in the course of a year. What do you say to those two points?—I see no objection to a registered letter in such a case. It would not, of course, cure the main complaint, because it does not follow that even a registered letter is going to be received by a certain person if it is addressed to a house. It may be waiting there while the person is away.

8847. That is true. At any rate, it would cover some of the ground.—I agree that it would cover some of the ground. On the other hand, I incline to look at it in this way. If the respondent is denying the adultery, then it seems to me that the natural course would be for that respondent to contact the person with whom the adultery is alleged and ask for the assistance of that person. That is the natural course. If, on the other hand, there is no answer to the adultery, there is no harm done to the adulterer if he does not appear at all.

8848. Yes, I see that point.—If, of course, there is the usual case where neither side wants to call the alleged adulterer, then I should think there might be grave doubt as to whether the adultery has been committed at all, and if the alleged adulterer were present in court I should not hesitate at some stage to invite him to deny it on oath if he wanted to.

8849. You might get a case, might you not, where adultery was alleged, neither party wanted to call the alleged adulterer, and he or she might not hear of it until after the proceedings had taken place, and he or she had been branded as an adulterer?—I am not sure how that could come about without some sort of collusion between the two parties. It seems a strange thing that neither party would let the alleged adulterer know anything about it.

8850. You mean, if the accusation was true there would be no injustice to the alleged adulterer, and if the accusation was false it would be likely that the respondent would get hold of the alleged adulterer and say, "Come along as a witness." Yes, I follow that point.—My great objection to any other procedure, apart from the one your Lordship has mentioned of sending a registered letter, is the cumbersome nature of the proceedings. Frequently the name or address of the alleged adulterer is unknown and then one would have to make an application to dispense with service.

8851. I follow that also. Would you now turn to paragraph 9, in which you say:—

"It is true that after an order for separation the husband sometimes sets up another home, but on an application by the wife to recover arrears or an application by the husband for a reduction of the amount of the order, less weight is attached to it than if the husband were lawfully married."

I understand that to mean, first, that if the wife applies to recover arrears she has more difficulty in recovering them if the man has married again than if he is merely

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living with a mistress. Secondly, if the man applies for a reduction in the amount of the order he is in a better position if he can say, "I have another wife now and I have a family", than if he can only say, "I am living with another woman and for that reason I want the amount reduced". Is that your point?—That is my point exactly.

8852. Can you tell me how far that is based on personal experience of your own?—It has definitely arisen in cases I have dealt with. An extremely difficult problem arises when the man applies for a reduction in the amount of a maintenance order and says he has married again, his second wife is ill and there are children of the second marriage, and one finds that his income is really not enough to support two families.

8853. Then, in paragraph 10, dealing with the fact that at present an order for maintenance is not enforceable while the parties are residing together and it ceases to have effect if they continue to do so after three months, you say:—

"The principle is sound because the homes of married people should be inviolable, and it is fundamentally wrong to interfere with the affairs of a man and wife who are residing together. An order on a husband to pay a weekly sum into court in such circumstances would lead to chaos in the home and discourage all effort on the part of both parties to compose their differences and would render reconciliation impossible."

I was wondering whether that is not stating it rather too highly. May not there be cases where once the weekly sum has been fixed and the parties are living together, they may or may not realise that it is unenforceable, but they settle down again, partly because of the difficulty of getting accommodation? In time the order, which has perhaps served a useful purpose for a moment in crystallising what the wife ought to get, becomes a matter which has passed out of sight. Is it not a real hardship on a wife whose husband will not maintain her to be driven to leave the house that belongs to him, because otherwise the order she has is unenforceable? What do you say about that?—I think it is almost impracticable. Although the husband and wife may be living together, the court must fix the amount of the order on the basis that they will be living apart. Therefore, if they continue to live together, the husband is being required to pay a sum based on a different foundation. For example, the court assumes that the wife is going to live apart from the husband and will have to pay a separate rent. The husband says, "It is wrong that I should pay the rent and still have to pay the full amount of the order". Then he will say, "I bought this and that article" and allowance would have to be made for that in payments under the order. What is the wife to do? Is she to keep the husband out of the money that is to be paid to her or is she only going to use it for herself and the children? Is she going to do the housekeeping or not, because if she is she ought to have more than the amount under the order, and so on? All these matters are going to lead to interminable wranglings and disputes as to whether the husband has been fair or not. There are so many considerations that arise in the course of a family living together. I do not see how one can regulate it. The husband will say he gave the wife so much and the wife will say he did not, and then what is to happen? There is no check upon the payment or the expenditure.

8854. The husband would still have to pay the money into court, would he not?—Not whilst they are living together. He does not have to pay it at all.

8855. That is true, but assuming the law were altered in that respect, he would go on paying the money into court and he would, I imagine, say to the wife, "Now there is that money for you, and that is supposed to cover the rent and other expenses, so do not forget that". However, I follow your difficulty.—And he is to say, "I am paying you the money, you have to pay out for my rent".

8856. That is what it would come to.—It would be a strange state of affairs. I think it would be more likely to keep the parties at arm's length than anything else.

8857. I follow that view. Then, in paragraph 13, you say:—

"I do not think that it would be a useful or humanitarian legal reform for justices to have the power to

apportion the contents of the home. On the contrary, it is a revolutionary proposal that because a marriage is not a success the court may be empowered to take away a person's property."

Then you go on:—

"It is inherent in the suggested 'reform' that the contract of marriage should in certain circumstances confer on the other spouse an unspecified interest in that part of his or her property which is called the 'home', and that each may be deprived of the right to deal with his or her property."

That is undoubtedly true in a sense. On the other hand, does it not mean that in an event which we hope the parties do not contemplate when they get married, the court will have a power to allot to one or other of them furniture which may not strictly belong to him or her? That, I think, is rather more the position than that each one has a specified interest?—Would it not be adding an extra incident to the contract of marriage?

8858. Yes, I think that is true. Then you go on to say:—

"A power to split up the 'home' might lead to considerable hardship and lead to unequal treatment being meted out. For example, a husband who has spent his savings in making a 'home' would be liable to have his property taken away, whilst another who kept his savings and lived in furnished lodgings would escape."

That is perfectly true, but on the other hand, supposing a husband has given his wife cause to apply for a separation order, and she is given the custody of the children, is there not a certain amount of justice in allowing to her part of the property which has been bought for the purpose of the joint home even if it has been paid for by him? I am leaving out for the moment the hire-purchase difficulty which I am coming to later. I agree that the man in furnished lodgings gets off. That cannot be avoided.—I would not like to say that it is unjust as between those two parties, but looking at it generally, it may be unjust to differentiate between one married couple and another, because all men would not be treated alike in that respect.

8859. There would be complications if the furniture were bought on hire-purchase or the house bought through a building society or if the house were owned by one and the furniture by the other. I think these difficulties are very fully before our eyes.—Quite. I might add, if I may, that I have sometimes tried to imagine myself faced with the likelihood of having to apportion a home, and I have sometimes wondered how I would set about it. Should I have the assistance of a valuer, should I have to go down and look at some dwelling that consists of a couple of rooms, have a look at the bed and the sideboard or whatever it is? How do I do it? Do I do it on a value basis or on a utilitarian basis?

8860. May I make a suggestion as to how you might do it? I do not say that it would be easy. You might ascertain from the parties, or if necessary through the probation officer, what there was in the home, and you might say to yourself, "The wife has the custody of the two children and therefore must have so much in the way of bedding. She must have a chair or two, and so on". On that footing you would see what was absolutely necessary for the wife to make a home and say, "Now the rest belongs to the husband".—The answer to that is that there would be no "rest". Everything would go to the wife because they do not have anything that is not necessary.

8861. That may be so in many cases.—I should say in ninety-nine cases out of a hundred there would be nothing left. You might say that the home would rest with the wife and children.

8862. (Lord Keith): I would rather put it this way. I am trying to find some basis for arriving at a solution. Would not the basis be the need of the wife and the children? If there are, let me say, two beds in the house and a wife and three children, you would have to give the wife and the three children the two beds, as I see it. It is quite true that that would leave the husband without a bed, but then it just means the husband will have to go into lodgings or go and buy himself another bed. I would have said that primarily the basis of division would be the needs of the wife and the

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family.—If one is going to ignore entirely the needs of the husband, I agree with you. I apprehend that that is not the way it is going to work at all. In an apportionment you are at least considering the needs of the husband to some extent. The apportionment on the basis your Lordship has mentioned is confiscation, and when your Lordship says that the husband must go and buy a bed, the parties we are dealing with have not the money to go and buy a bed.

8863. But we are summing a case where the wife gets an order for maintenance and where the husband is then under an obligation to support his wife and family. It is quite true he may have no bed if the beds are all given to the wife and family, but that is just in a sense part of his obligation to support.—Do not think I am falling out with that as a proposition, but that is an extension—and a very big extension—of the present law.

8864. Yes, I quite agree.—And it is adding another incident to the contract of marriage. It simply means a man shall not deal with his own property. Once he gets married, the home is, as it were, under a power of the court from that moment, if there is a falling out between the parties.

8865. I am not saying anything at the moment for or against the idea. I was merely suggesting that you could find a basis for division on the needs of the wife and family if you were going to look for some basis. That is all.—Yes, but as a practical proposition I think I can say that in the vast majority of cases that come before magistrates' courts the means of the parties are such and the assets are such that there is nothing really to be divided. What is more, I think that a power to apportion would probably interfere with what happens at present in many, many cases. The husband walks out and leaves the wife with all. The moment one starts talking about apportionment, the husband will begin to want to know how much he can get out of it.

8866. (Chairman): Just pause there. I do not think that the suggestion is really an apportionment. One provides first of all for the needs of the wife and children in the way of furniture, and then what is left is the husband's. You can call it apportionment, but it does not mean getting a value and going into respective values. It is a simple proposition. It may be right or wrong.—I was dealing with the proposition in Mr. Powell's memorandum (see para. 6, Paper No. 95, *Minutes of Evidence for the Third-Second Day*) because, as I said in my memorandum, I did not think it would be a useful or humanitarian legal reform for justices to have the power to apportion the contents of the home. I was dealing with the question of apportionment, not with the wife's needs.

8867. Very well. I will pass from that. Now we come to the collection of maintenance arrears, where you say in paragraph 17:—

"It would of course be a great convenience if it were possible for the same court to collect moneys and enforce the order."

There I think you agree with Mr. Powell?—Yes.

8868. You go on:—

"The fact is that we are dealing with persons of modest means and easy facilities must be given for payments into court and for withdrawing money from the court."

Then, you say that sending the money by post or from one court to another would cause extra expense and administrative work. Even so, and taking these matters into consideration, would not the proposal on the whole be an improvement, that the same court should collect the money and enforce the order?—I would like to see it happen myself, yes, but I am bound to say that I think that there would be a lot of trouble in getting the money that would have to be sent by post. There are numerous cases in which some of these people actually put money into an envelope and send it to the court without putting their names and addresses on it.

8869. As a member of the Bar you will appreciate, of course, that while we have put the contrary views to you we equally put them to Mr. Powell, and our effort is simply to discover what is the right thing.—Naturally, my Lord, I understand that exactly.

8870. (Lord Kest): I have only one question. You said that many people sent money through the post without giving their names and addresses. What happens to that money?—The court officials are very good at recognising the postmarks and things like that, and they are able to trace the senders in many cases, but sometimes it requires a summons for arrears to find out whose money it is.

8871. Are there any untraced moneys lying in your court, for instance?—Yes.

8872. Is it a substantial amount?—That I cannot tell you. I did not make enquiries about it.

8873. (Mr. Justice Pearce): I want to ask you about this proposal to give the court power to deal with the home and its contents. I fully appreciate the argument you put against it, but there are one or two arguments in favour I should like put to you. One of the existing incidents of marriage is that in certain contingencies the court will have power to deal with the husband's earnings and with any interest on his savings, and a power to secure even those savings which he had when he entered matrimony. Do you agree?—Yes, the Divorce Court certainly has that power.

8874. The magistrates' courts have power to deal only with his current income?—I think it goes further than that. If I know that a man has substantial savings and property . . .

8875. Then the magistrates' courts really have power indirectly to deal with his savings?—Indirectly, yes.

8876. And therefore the situation is that if a man has £100 saved and that fact is known to the wife, both the High Court and the magistrates' court can get at it for her. Is that right?—Yes, but only in a very small way. The court may take it into consideration when fixing the weekly sum payable, but of course that cannot be very greatly affected by the fact that the husband has £100. It would not last very long.

8877. If he is temporarily out of work and he wants to reduce the amount so as to leave his wife starving while he lives on his savings, I take it you would say, "This is a temporary matter, but £100 will certainly last for some months, and for the moment I shall not reduce the order"?—Certainly.

8878. So that the court has got at his savings?—Yes.

8879. And the alteration which the proposed suggestion would bring about in this, is it not, that if, instead of putting £100 into the Post Office, he were to invest £100, either before or after the marriage, in buying a suit of furniture, the court could then get at the furniture as it could have got at the savings? That is the only additional incident of marriage that the suggestion would bring, is it not?—Yes.

8880. Now, that is not a very radical change to make in a man's obligation, is it?—I am not so satisfied about that.

8881. You have spoken of the difficulty of apportioning furniture where there is so little to divide. It only comes to this really, does it not, that in a case where there is one bed only, if the husband breaks up the home and it has to be decided who shall sleep on the floor, the husband or the wife and small child, the court would say that the wife and the small child shall have the bed and the husband will have to sleep on the floor? Would you not think that was reasonable?—Of course it sounds very reasonable, but I do not like the idea of giving away other people's property. It is so easy to do.

8882. Would your view of it be changed if you had power to give a temporary right to the home, which did not take from the husband any future right to the furniture, but by way of injunction stopped him from depriving the wife of the use of it?—I have always been puzzled as to whether it is only the use of the furniture that would be given or whether the property in the furniture would be given. If, of course, furniture is moved out of the home to some other place where the wife is going to live then, to all intents and purposes, the property in the furniture has left the husband.

8883. You say that you are not quite clear. What we want is help from you as to what you think would work. Various suggestions have been made on these lines. If

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you object to any order that could vest the title to the property in the wife, would you object to a power of the court to say that she shall have the use of the bed until further order?—No, I do not think I would.

8884. Now, in regard to vesting the property, have you come across the sort of case where substantially what the couple have by way of savings is a home with a dining-room table and so forth, and where the home is broken up by divorce? In such a case considerations caused may have gone to some trouble to try to stop the outstanding problems between the parties by arranging a division of the home?—As part of the financial arrangement, certainly, but such a division has a bearing on the amount of the order for maintenance.

8885. Certainly. Now have you found that there have been occasions when the parties have said: "Let the judge decide, if he does not mind, in his private room"?—No.

8886. At all events it would be very convenient, would it not, provided the power was used reasonably, for some court to have power to hear the views of both parties on what would be a fair division of the home in all the circumstances and to make some decision thereon?—One is always a little bit afraid of the word "reasonably". There are many, and I say it quite seriously, many who adjudicate on these problems who are pro-wife, and it is very doubtful whether one would get much agreement as to what would be reasonable as between husband and wife.

8887. What you are saying there is that the court has very great power already, and you would not extend it because you think damage might be done?—I am always a little bit doubtful about the "Chancellor's foot". The thing is so elastic. What one may think reasonable others may think most unreasonable. Indeed, if one had two separate tribunals trying the same issue, one would find that they would come to two different results, one of which would probably be unreasonable.

8888. With regard to the problem of whether a maintenance order should be unenforceable or not when the parties are living together, there are a lot of cases, are there not, where really the chief or only trouble is the wife's difficulty in extracting a proper amount of maintenance for herself and the children?—There are some cases, yes.

8889. And as you know from your experience at the Bar, there are cases in the Divorce Court where a husband's meanness forms the background to charges of cruelty against him?—Yes.

8890. And where one sometimes feels that if that had been cured the rest of the trouble would have been avoided?—Yes, that may be so. On the other hand, if one is going to try to arrange the financial affairs of husband and wife too much, one comes up against tremendous difficulties.

8891. I want to consider at this stage some of the arguments in favour of the proposal. Are there not many cases where a wife who has obtained a maintenance order would willingly become reconciled with her husband if she knew that she could get money for the support of herself and the children from him, yet because she knows that she has got to starve whenever she lives with him she does not want a reconciliation?—I do not know about "many". There may be some, of course.

8892. In that sort of case it would really help the husband if he were made to pay maintenance, if in other respects he is a decent sort of husband. Do you agree?—It may be so.

8893. And so against the arguments you have quite reasonably put forward you have to weigh the fact, have you not, that there will probably be some cases where a maintenance order which would be effective during the time the spouses are living together may actually help rather than hinder the matrimonial establishment?—It is possible, yes. I suppose, however, if a woman marries a very mean man she should take him for what he is, to some extent. Is it for anybody else to say that one should not be mean?

8894. The court only intervenes if he has wilfully neglected to maintain her. Is it unreasonable, in those circumstances, for the court to say, "We are going to see

that you do not wilfully neglect to maintain your wife in future"?—It is all a matter of degree. Whether there has been wilful neglect or not depends on the man's income. It is easy to determine in the case of husbands with large incomes but most difficult when one comes into the smaller income group.

8895. (Mrs. Allen): You indicated that generally they were very poor people who came before your court. Would you agree that very often in these cases the home, such as it is, has been built up really by the efforts of both husband and wife and not just by the husband?—I really cannot say that. There must, of course, be many cases where the woman has had some money before marriage and has contributed to the home, but as to how these people get their homes together I have no actual knowledge.

8896. But apart from what the parties have to start with, in the average working home the home is gradually built up, would you not agree, by their joint efforts? Perhaps not from a monetary angle but by her services within the home the wife does make a contribution in establishing the home?—I think a wife makes a tremendous contribution. If she is economical the husband has more money to spend on the home, of course. It does not necessarily mean that she has handled the money, but her efforts must leave him more to spend on the home. In that sense, I agree.

8897. In that case would you not consider that the woman would have a justifiable claim to certain of the property within the home?—I think there is a lot to be said for it, yes.

8898. So that if in any way the home could be shared when troubles occur, would you not consider that that would be a good thing?—What one has to determine is whether one is going to make a definite rule governing everybody. There may be many men who have built up a home in spite of their wife's extravagance, and such men would be the worse off. How is one to know which it is? I am merely pointing the difficulty of making these hard and fast rules to govern everybody. The difficulty in these matrimonial cases, there is no doubt everybody will agree, is that every case concerns two different individuals; there are no two which are alike in make-up, temperament or anything else. Some are dirty, some are clean, some are extravagant and some are thrifty, some have respect for each other, some have not, some have sexual tendencies and some have not; all that sort of thing in combination makes these hard and fast rules so difficult to apply.

8899. (Dr. Selous): Mr. Davis, I gather you rather suspect that the people who are putting forward proposals for the matrimonial home to be divided are pro-wife?—No, I said that in some cases these who adjudicate on these problems are pro-wife. I know very few who are pro-man.

8900. But nevertheless are not these proposals made because the wife is the person who is usually left with the custody of the children? The difficulty does not arise if the husband is left with the custody because he has the legal right to the home and would not need to have any provisions for safeguarding his property there, but only arises when it is the wife who has the custody of the children?—Of course that is so, and we are all, I hope I may truthfully say, decent sort of people who are very tender towards the wife and the children.

8901. But what do you do if the wife and children in a case of that sort are left without a bed and without a home?—At the moment of course we have not got to consider that. If we have decided to make a separation order the only remaining question is how much should the husband pay by way of maintenance, and therefore we look at his income. We enquire as to the position of the tenancy as a rule, to find out whether the wife or the husband has got to go out. We also enquire about the number of children, and their ages—the ages must necessarily be considered because an older child costs more to keep than a young one. As a rule we have only the man's income to consider because, you can take it from me, ninety-nine per cent. have not got any other assets. It is then a question of splitting up the man's income between himself on the one hand and the wife and children on the other, trying as best we can to strike a fair balance, bearing in

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mind that the man has to pay rent, to eat, to pay fares, and so on. We try as best we can to see what the needs are and then to divide the income fairly.

8902. But you can do nothing if the man is a tenant and he hangs on to all the furniture?—No, if he does not mean to go then the wife and children have to find somewhere to live, and sometimes we try to help them to find it.

8903. It is a most distressing situation?—It is a most distressing situation when you are dealing with people whose incomes are so limited. It is a different thing altogether in cases where there are larger incomes.

8904. (Mr. Seloe): I think you said that there were not more than a dozen cases in your court in a year where separation is asked for on the ground of alleged adultery?—I do not think there are more.

8905. Is it usual for the alleged adulterer to be present in the court?—I should say, no. I have known it happen, but I would not say that it is usual. So often it happens that the man has gone away and is living with a woman whose name is unknown to the wife, and then the man comes along and admits he is living with a woman, and the wife goes into the witness box and she gives a short history of the marriage and says that her husband said that he was fed up with her and was going to live with somebody else. There is no dispute between the parties that the husband is living in adultery.

8906. (Chairman): But the question is, does it often happen that the person accused of adultery is in court, and your answer is, "No, it rarely happens"?—I think it seldom happens. I have known it happen, and I have had well-fought disputes about the adultery.

8907. (Mr. Seloe): That was my point. Then, with regard to paragraph 12, do you consider that the remedy in the juvenile courts is sufficient to prevent most cruelty to children?—I do not see why it should not. I find it a very difficult question to answer.

8908. You have sat as a juvenile court, I imagine?—I have not. (Mr. Seloe): Then I will not bother you, thank you very much.

8909. (Mrs. Jones-Roberts): I would very much like to hear something of Mr. Davis' experience in connection with what are called Assistance Board cases. It has been suggested to us more than once that this aid is obtained rather freely and, in fact, that it almost amounts to an abuse. I am going to put this illustration to you: a woman is left early in the week without any resources at all, she has no money to go to the grocer, no money to pay her rent; on Saturday naturally she goes to the Assistance Board and they relieve her destitution, as is their duty. How long, in your experience, will the Board go on giving her assistance without pointing out to her that she has a remedy in the magistrates' court?—The high-water mark with me came in a case where a woman took out a summons after twenty weeks. The husband, to use her own words, "stopped her wages". They had had some quarrel and he had stopped her wages as she put it, and so she had gone to the National Assistance Board, although he was earning £9 a week, and for twenty weeks she had drawn over £2 a week. The total came to £63 or something like that. I asked whether anything would be done to try to get some money back from the husband and the answer was, "No".

8910. In that case, when the matter was explored by the National Assistance Board, did she then come to your court for an order?—It took the Board a long time to tell her to come to the court. As I say, it took twenty weeks before the case came before the court.

8911. Would you call that something rather exceptional?—I think it probably is—I hope so.

8912. What would you regard as the generality?—I am afraid I have no data upon which to express an opinion there.

8913. You would not know how long a woman had been drawing national assistance?—No, I do not think so.

8914. Are you able to say, roughly, how often after you have made an order it has had to be supplemented by the Assistance Board?—I should say in a very large number of cases, from what I can gather.

8915. That would be your experience?—Yes.

8916. What would be the proportion contributed by the Board and the husband, respectively?—There again, it is so difficult to say because one must know the amount of the payments under the order. You have to bear in mind that sometimes men do not pay because of sickness or slackness of work, sometimes because they just do not want to pay. All those things bear upon this matter and of course in such cases the National Assistance Board no doubt makes good the deficit.

8917. What I am really trying to establish is to what extent you consider that men evade their obligations because of this other direction to which the wife can turn?—Could I put it in another way? I believe that the State contributes a tremendous sum to the dependants of these people because of their matrimonial differences.

8918. (Chairman): Do you think that the State relieves the husband of a considerable amount of the sum which he ought to pay?—No, I would not go as far as that because, as I have pointed out, the incomes are too small to split up. In some cases husbands who ought to pay are relieved.

8919. (Mrs. Jones-Roberts): In what proportion of cases where you make an order would you say that the husband defaults completely and does not pay at all? Would you say that it was a high proportion or a very small proportion?—I should think a fairly small proportion, provided always that he is in work.

8920. If he is in work your experience is that he does pay up pretty regularly?—For the most part, the orders are fairly well complied with.

8921. Do you have many cases where the husband has gone to prison once, and then again refuses to pay, and is prepared to go to prison a second and a third time?—We do find the truculent and obstinate man who refuses to pay and feels he is suffering an injustice from having an order made at all; one gets that odd case, but it is not frequent.

8922. Just an odd case?—It is more an odd case than anything else and I may say that some firmness with them in regard to the enforcement of the order frequently has its effect.

8923. That is what I wanted to establish. In your experience, if a man has been to prison once you find it has been a salutary lesson and he will generally pay up afterwards?—I can assure you that, generally speaking, they do not like to go to prison at all. If they have gone once, I am not so sure that they object so much to going a second time.

8924. So the fear of imprisonment does have some effect?—Yes.

8925. Have you any experience of a case where there has been a voluntary arrangement between the husband and the employer to deduct the money from his wages?—No, I have not come across that in my experience.

(Chairman): Thank you, Mr. Davis, for your memorandum and for helping us this morning.

(The witness withdrew.)

PAPER No. 116

MEMORANDUM SUBMITTED BY THE COUNCIL OF
THE ROYAL MEDICO-PSYCHOLOGICAL ASSOCIATION

SUMMARY OF PROPOSALS

The following is a summary of the proposals which the Council of the Royal Medico-Psychological Association submits to the Royal Commission:—

(1) Conciliation machinery should be established.

(2) Amendment of Section 3 (1) (b) of the Matrimonial Causes Act, 1950 (grounds of nullity).

(i) This sub-section should be clarified.

(ii) The provision should cover defectives "ascertained" or "certified" under the Act.

(iii) Instead of "subject to recurrent fits of insanity" the criterion should be the history of "one or more attacks of insanity which are likely to recur".

(iv) Epilepsy should not be singled out as a ground of nullity: there should be a general clause providing for nullity if either party knew of and concealed from the other, the existence of some grave disease or abnormality likely to be detrimental to the happiness of the marriage, or the health of the children.

(v) The court should have power to extend the time limit for presenting a petition for a decree of nullity under this Section.

(3) Amendment of Section 1 (1) (d) of the Matrimonial Causes Act, 1950 (divorce on grounds of insanity).

The suggested criteria for divorce on grounds of insanity are:—

(i) mental disorder of five years' duration, shown by medical evidence in each case, and

(ii) extreme unlikelihood of recovery, and

(iii) one year's continuous care and treatment as a patient in mental hospitals immediately preceding the presentation of the petition.

(4) The legal definition of cruelty in its application to divorce should be amended so that the nature of the conduct in question is the criterion, regardless of whether such conduct is wilful or otherwise.

(5) In cases of divorce proceedings on grounds of desertion, where the deserting partner has been insane during some part of the material three years, the court should have full discretion to decide whether or not the loss of capacity to form an intention to desert might be ignored in view of the circumstances of the case.

STATEMENT OF SUPPORTING ARGUMENTS

Preamble

1. The Council of the Royal Medico-Psychological Association wishes to thank the Royal Commission for affording it an opportunity of submitting a memorandum of its views on certain of the matters which the Commission is considering.

2. The Royal Medico-Psychological Association has over 1,200 members representing every branch of psychiatric practice. Many of its members specialise in the treatment and care of patients in mental hospitals or institutions for mental defectives. Many others work outside mental hospitals and treat psychiatric patients not sufficiently ill to require institutional care. Frequently, social factors are found to contribute to the production of the milder forms of psychiatric illness, and among these problems of marriage and divorce are prominent. Conversely, psychiatric factors may be among the most potent causes of marital disharmony.

3. The affairs of the Association are in the hands of a Council consisting of the officers and representatives of the territorial Divisions and of the scientific Sections and additional nominated members, reflecting all aspects of the Association's work. There is also a Parliamentary Committee which concerns itself with any legislation on administrative practice affecting psychiatry. The Scottish

Division of the Association enjoys autonomy in matters concerning Scottish legislation and administration and its Report is presented separately.

4. In November, 1951, the British Medical Association invited the Royal Medico-Psychological Association to nominate three members to their Committee then being set up for the purpose of preparing evidence for submission to the Royal Commission. The Council of the Association decided to accept the invitation so that the British Medical Association's evidence might have the authority of this Association also. The following were nominated:—

Dr. J. A. Hobson, M.D., M.R.C.P., D.P.M., Psychiatrist, Middlesex Hospital.

Dr. T. Tennant, M.D., F.R.C.P., D.P.H., D.P.M., Medical Superintendent, St. Andrew's Hospital, Northampton; Honorary Treasurer and President-elect, Royal Medico-Psychological Association. (President since July, 1952.)

Dr. H. Wilton, M.D., F.R.C.P., D.P.M., Psychiatrist, the London Hospital.

The British Medical Association's Evidence Committee also included two other members of the Royal Medico-Psychological Association, who had been nominated by the British Medical Association's Psychological Medicine Group. These were:—

Dr. Doris Odum, M.A., M.R.C.S., L.R.C.P., D.P.M., Senior Psychiatrist, Elizabeth Garrett Anderson Hospital; Chairman of Committee on Psychiatry and the Law, and Sub-committee on Maladjusted Children, of B.M.A.; President, Medical Women's Federation.

Dr. A. Walk, M.D., D.P.M., Physician-Superintendent, Cane Hill Hospital, Cusdon; Honorary Librarian, Royal Medico-Psychological Association; Co-Editor, *Journal of Mental Science*.

5. The memorandum of evidence drawn up by this Committee was in due course submitted to the Commission and oral evidence was given by five of the Committee members. Among these were three members of the Royal Medico-Psychological Association—Drs. Hobson, Odum and Walk. [See pp. 164-178, and Note on p. 179, *Minutes of Evidence for the Sixth Day*.]

6. In consequence of the British Medical Association's action in withdrawing its memorandum, it became necessary for the Royal Medico-Psychological Association to consider its position, and the matter was discussed at a special meeting of the Council of the Association. It was considered that the memorandum, which had previously been circulated to all members of the Council and of the Parliamentary Committee, adequately represented the views generally held by members so far as the sections immediately affecting the practice of psychiatry were concerned. It was decided, therefore, to appoint a small sub-committee to re-edit the psychiatric portions of the memorandum. The revised document has now been approved by the Council and is submitted as the evidence of the Association.

7. In the main the present document follows very closely the relevant portions of the British Medical Association's memorandum and no major changes have been made in the proposals put forward. Where the text has been altered it is in order to explain more clearly what is intended, or to meet certain points which have been raised since the original memorandum was drawn up.

8. It should be noted that in accordance with the terms of reference of the Royal Commission, this memorandum is limited to such matters as seem to call for changes in the law concerning matrimonial causes and mental abnormality. The wider issues have not been dealt with here; the Association can only emphasise the bearing of psychiatric factors on the problems of personal adjustment of which matrimonial litigation is the outcome.

PROPOSALS AND EVIDENCE

(1) Conciliation machinery should be established

9. The Council has considered the Denning Report (Report of the Committee on Procedure in Matrimonial Causes, 1947, Cmd. 7024) and in general is in favour of the recommendations there made. In particular, it wishes to support the conclusion (para. 28 (iii)), "that means for reconciliation should be available both before and after divorce proceedings have been commenced, but it must be recognised that there is much less chance of reconciliation after a suit has been started".

NULLITY ON GROUNDS OF INSANITY, ETC.

(2) Amendment of Section 8 (1) (b) of the Matrimonial Causes Act, 1950

10. Section 8 (1) (b) of the Matrimonial Causes Act, 1950, provides, in addition to any other grounds on which a marriage is by law void or voidable, that a marriage shall be voidable on the ground: that either party to the marriage was at the time of the marriage

- (A) of unsound mind,
- or (B) a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1934,
- or (C) subject to recurrent fits of insanity or epilepsy.

Provided

- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
- (ii) that proceedings were instituted within a year from the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

11. As to (A), the reason for the inclusion of the words "of unsound mind" is not clear, since the law already provides that the validity of a marriage depends upon the person's capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities involved and his freedom from insane delusions on the subject. If, however, the words are meant to cover the case of persons who do fulfil these criteria, but are nevertheless certified as of unsound mind, then this should be made clear by an appropriate change in the wording.

12. As to (B), the Council agrees with this provision, but would like it to be clarified. The wording does not make it clear whether the respondent must have been actually certified under the Mental Deficiency Acts, or merely "ascertained" by the local authority, or whether it is sufficient to bring forward medical evidence of defectiveness. It is well known that the proportion of mental defectives "ascertained" and "certified" varies greatly in different local authority areas, depending on the policy and activity of the authority, on the institutional accommodation available, etc. It is recommended that the provision should be clarified as referring to defectives "ascertained" or "certified" under the Acts.

13. As to (C), the Council considers this part of the clause to be unsatisfactory, in that it is ambiguous and based on an imperfect knowledge of the conditions with which it deals. In the first place, the word "fit" is here used to cover two quite different phenomena. An epileptic fit is, generally speaking, a convulsion, lasting a few minutes; these fits may occur several times a month or several times a day; to say that a patient is subject to recurrent fits of epilepsy is simply to say that he is an epileptic. A "fit" of insanity, on the other hand, can only mean a period during which the patient was mentally ill; recurrent mental illnesses may occur at first at quite lengthy intervals, five years perhaps, or ten, becoming more frequent in later life. Provisions applicable to epilepsy are, therefore, not at all applicable to mental disorder.

14. Next, the words "subject to recurrent" are extremely vague, and might denote any of the following conditions:—

- (1) The patient might have had at least two attacks before marriage, irrespective of their nature, and might

be considered "subject" even if medical evidence stated that further attacks were unlikely; or

- (2) at least two attacks, coupled with evidence that recurrence was likely; or

- (3) one attack only before marriage, but liability to recur proved by a second attack after marriage; or

- (4) one attack only, coupled with medical evidence that recurrence is likely; or

- (5) no actual attack, but a strong family history, coupled with temperamental abnormalities leading to a medical opinion that recurrent attacks were probable in the future.

15. The Council considers, therefore, that, as far as insanity is concerned, this clause should be clarified, and suggests that it should be reworded to read:—

"has suffered from one or more attacks of insanity which are likely to recur".

16. As regards epilepsy, the Council feels that there is no logical reason for making special provision for epilepsy and omitting other illnesses which may be just as inimical to, or disruptive of, marriage. The reports of the debates on the Matrimonial Causes Bill show a good deal of ignorance and prejudice; one influential speaker said that epileptics "should be regarded as a class apart and treated with the utmost humanity and sympathy, but not regarded as fit members of society". This is quite contrary to current medical teaching. Epileptic fits may be of varying degrees of severity, and may cause less interference with normal life than other paroxysmal diseases such as asthma and migraine.

17. The Council is of opinion, therefore, that epilepsy should not be singled out in this way. It has considered whether the present provision should be replaced by a clause in which epilepsy would be included with other diseases as grounds for annulment. In this connection the following recommendation put forward by the Joint Committee of the Convocations of Canterbury and York in 1935 has been noted:—

"Where a party knows of and has concealed from the other the existence of some notable hereditary mental or physical disorder in his or her family, likely to be detrimental to the happiness of the marriage or the health of the children . . ."

18. It will be seen that this recommendation deals both with established disease and with hereditary tendencies but the Council thinks that these should be considered separately.

19. It is in agreement with the view that the existence at the time of marriage of a grave disease likely to make a satisfactory marriage impossible should be a ground for annulment, provided that this was known to the affected party and not disclosed to the spouse at the time. Examples of such diseases might be tuberculosis, haemophilia, various progressive diseases of the nervous system, epilepsy if severe or intractable, and others. It is believed, however, that it would be extremely difficult to draw up a satisfactory list of diseases under this heading, especially as the severity and prognosis of the disease ought to be taken into account. It is recommended, therefore, that there should be a clause in general terms which the court would apply to each case on its merits with the aid of medical evidence. A suggested wording is:—

"A marriage shall be voidable on the ground that either party at the time of the marriage knew of and concealed from the other the existence in himself or herself of some grave disease or abnormality likely to be detrimental to the happiness of the marriage, or the health of the children."

20. The Council also feels that the court should have the power to extend the statutory period of one year from the date of marriage within which proceedings for nullity must be instituted.

GROUNDS FOR RELIEF

(3) Amendment of Section 1 (1) (d) of the Matrimonial Causes Act, 1950 (divorce on grounds of insanity)

21. The provisions of the Matrimonial Causes Act, 1937, re-enacted in the Act of 1950, were largely based on the proposals of the Royal Commission of 1909-1912 (Majority Report). It will be remembered that the Act

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was a Private Member's Bill, and it would seem that the promoters felt that there was a better chance of their proposals becoming law if they were supported by the authority of a Royal Commission. Little account was taken of changes in the law, in current practice, or in psychiatric opinion subsequent to 1912. The only adaptation referred to voluntary patients and was not in the original Bill, but was an amendment proposed by another Member.

22. With the introduction of the new status of voluntary patient and temporary patient, the development of out-patient care, the opening of psychiatric units as part of general hospitals, and the extension to all patients of the relative's powers of discharge under Section 72 of the Lunacy Act, 1890, it is no longer possible to equate insanity with certification, and detention under an order should no longer be the criterion required.

23. The recognised practice nowadays is to avoid certification as much as possible. Whereas formerly a patient would be certified as soon as he was certifiable, he may now be treated in the first place as an out-patient; later perhaps he may enter a mental hospital as a voluntary patient; he may discharge himself repeatedly or be taken home by relatives; all this irrespective of the persistence of his insanity. Even when incontinent, or after long residence, he may still have the status of a voluntary patient, for instance in cases of chronic depression when the patient is utterly lacking in confidence and cannot bring himself to leave the shelter of the hospital.

24. Again, the application of modern treatments produces a number of partially cured patients, many of whom are discharged from hospital not fully recovered because it is thought that a return to normal surroundings will complete their rehabilitation. A proportion of these fail and have to return to hospital, but the continuity of detention has been broken.

25. Numerous obvious anomalies have been the subject of judicial and other comment since the Act was passed. For instance, voluntary treatment following on certification counts towards the required five-year period, but voluntary treatment preceding certification does not. Difficulties in interpretation have arisen in England over periods of absence from hospital for holidays or on trial. Divorce has been refused on technical grounds, e.g., because some formality required for the patient's detention has not been complied with. Moreover, the present provision penalises a faithful spouse who does her best for the patient, e.g., by taking him home during a period of partial improvement, and encourages the spouse who is indifferent to the patient and is contemplating divorce from the start of his illness.

26. The Council does not consider it worth while to suggest detailed remedies for these anomalies since it is felt that the estimation of the five-year period should not depend on the patient's status. The criterion should be the actual duration of the mental disorder as shown by medical evidence in each case.

27. It may be argued that it is difficult to establish the exact time at which mental disorder begins. It is true that there are cases of insidious onset, and there are also intermittent cases in which it may be difficult to distinguish between a full cure followed by relapse, and a mere transitory improvement. But in all cases, sooner or later, a date must have been reached when a psychiatric examination was carried out, a diagnosis of mental disorder was made, and some form of care and treatment was instituted or recommended. If, retrospectively, the disorder then diagnosed can be shown to have been continuous with that existing at the time of the petition, and the period amounts to five years or over, then the condition as to duration should be regarded as fulfilled.

28. So far, it is assumed that the present statutory period of five years will be retained. The Council would not object, however, to a reduction of this period to three years, since there is little difference in the number of recoveries which occur by the end of three and five years, respectively.

29. The Council cannot agree, however, with the proposal put forward by the General Council of the (English) Bar, that the question of incurability should be treated purely as a question of fact, and that the requirements as to care and treatment should be abrogated. Insistence

on a prescribed period, three years or five, of duration of the mental disorder, provides a valuable safeguard for the patient, prevents hasty action by the spouse and greatly reduces the possibilities of disagreement as to the prognosis. It would be quite wrong to allow a petition for divorce on the grounds of incurable insanity to be presented at the outset of the illness, for the very existence of mental disorder might be denied, and the question of the patient's sanity might be debated in open court and in the patient's presence—a procedure which would constitute real cruelty.

30. The Council believes also that the requirement that the respondent shall have been under care and treatment should be retained in a modified form, and recommends that the prescribed period should in all cases include a period of residence (in any status) in a mental hospital or its equivalent, immediately before the petition is presented. This period of residence should be long enough to allow of careful observation of the nature and trend of the disorder, and the Council suggests that it should be at least one year, with a proviso for the usual short leaves or holidays which might be granted during that year.

31. Under the present Scottish Act a person is deemed to be under care while any order under the Acts specified is in force and therefore a petition may be presented when the respondent is "on trial" from a mental hospital. A patient might therefore be living at home and actually cohabiting and yet the spouse might at any moment decide that she was tired of him and forthwith sue for divorce without even having to return the patient to hospital. This seems a somewhat repugnant possibility and the Council suggests that in all cases the requirement of residence in a mental hospital should be fulfilled, as recommended in the last paragraph.

32. Under the Council's proposals, the medical evidence will have to be considered carefully in each case. The procedure for the submission of evidence should, however, be as simple as possible, and the summoning of a number of medical witnesses should be avoided. Evidence obtainable from clinical records, unless contested, should be given by affidavit, and where, for instance, notes or reports covering the whole progress of the case are contained in the records of one hospital, a single affidavit by the Medical Superintendent or Consultant Psychiatrist in charge of the case, submitting sworn copies of the relevant material, should be accepted as sufficient.

33. The Council considered whether some restriction should be placed on divorce in cases where the patient, though incurable, is likely to be distressed by the news that he has been divorced. It is not true that all incurable and long-standing patients are devoid of normal feelings, as was suggested to the previous Royal Commission. But the number of patients who might be harmed is probably too small to make a change in the law worth while.

34. The Royal Commission of 1912 also proposed an age limit, as it was suggested that it ought not to be possible to divorce an elderly spouse who might be suffering from senile dementia only. This proposal was not included in the Matrimonial Causes Act. The Council has considered it, but does not feel that a restriction is needed, as experience shows that it is very rare for a divorce of this kind to be asked for.

35. Finally, the Council has considered whether the term "incurably" used in the Act, should be replaced by words indicating more precisely what is meant. It is appreciated that the courts have interpreted the term liberally, but there appears still to be a good deal of hesitation in the minds of many of those called upon to give evidence as to whether they can conscientiously pronounce a patient to be "incurable" while any chance of improvement remains. It is felt, therefore, that a change should be made which would dispel such doubts or hesitations.

The Council recommends that the relevant clause should read as follows:—

"A petition may be presented to the court on the grounds that the respondent:—

(a) is suffering from mental disorder which has been present continuously for a period of five years, and that his or her mental state is now such that recovery is extremely unlikely; and

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(8) has at the time of the presentation of the petition been under care and treatment as a patient in one or more mental hospitals (or licensed houses) continuously for a period of one year."

36. If these proposals are adopted, the conditions laid down would not be affected by any change in the law of lunacy and mental treatment; but if grounds for divorce are to continue to depend on the respondent's legal status, then it is imperative that the relevant clauses should be revised whenever a new Mental Treatment Act is being drafted. For instance, it is possible that a new Act might greatly extend the provisions for temporary treatment without an "order", and thus exclude numerous patients from the definition now in force.

37. The Council has considered whether there should be any extension of the present grounds of divorce to forms of mental abnormality not at present included. The inclusion of recurrent insanity was urged both at the time of the previous Royal Commission and in the debates on the Matrimonial Causes Bill, but the difficulties of establishing satisfactory criteria were thought to be too great. It has also been suggested that various forms of psychopathy, alcoholism, drug addiction and personality changes, following head injury or leucotomy, might be added.

38. It is not felt that a personality change alone should be taken into consideration; such changes may occur even in the normal course of advancing age, and should be regarded as among the ordinary risks of marriage. It is generally the intolerable behaviour of the affected person that drives the spouse to seek relief by divorce. The same applies to the recurrent case of mental disorder; the patient may be an admirable partner in the intervals between his illnesses, but on the other hand his behaviour may be disturbed by a recurrence short of established illness, and may be very hard to bear.

39. If it is accepted that cruel behaviour, as defined in paragraph 41 below, should be a ground of divorce even if it proceeds from mental abnormality, there should be no need to extend the grounds of divorce specifically to include the conditions referred to.

(4) Amendment of definition of cruelty

40. The Council has considered the present accepted legal definition of cruelty, namely:—

"Conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger."

In the Council's view the purpose of the clause in its application to divorce and separation proceedings should be not to seek out guilt and inflict punishment but to afford relief from suffering, and it should not be necessary to show the existence of intention to cause cruelty. For instance, if the petitioner's health has suffered as a result of the conduct of the respondent, irresponsibility on grounds of insanity or drunkenness should not be a sufficient defence: or, for instance, if the petitioner's health

has suffered as a result of the respondent's habitual drunkenness or drug-taking, absence of intent to be cruel should not be a sufficient defence; or, for instance, cruelty to the children should be held to be sufficient grounds of divorce, even though the cruelty was not with the intent to wound the other spouse's feelings, nor to injure the other spouse's health.

41. The Council recommends, therefore, that the words "wilful or otherwise" should be inserted in the definition after "conduct", and that "cruelty" for the purpose of proceedings for divorce and separation should thus be defined as:—

"Conduct, wilful or otherwise, of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger."

42. It is also recommended that more emphasis than hitherto should be laid on the last phrase of the definition, "or as to give rise to a reasonable apprehension of such danger".

43. If, however, it is held that the notion of "cruelty" is inseparable from that of intention to cause suffering, so that the term cannot be re-defined, two alternatives are suggested: (1) that the term "intolerable behaviour" be used in place of "cruelty"; or (2) that no single term be used, but that the entire definition should be quoted, i.e., divorce should be allowed on the ground "that the respondent has conducted himself, whether wilfully or otherwise, in such a way as to have caused . . ."

(5) Discretion in application of provisions regarding desertion

44. The accepted legal definition of "desertion" is as follows:—

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse."

Under the Matrimonial Causes Act, the intention to desert must subsist continuously during the three years immediately preceding the presentation of the petition, and hardship arises in cases where the respondent has been insane during some part of the three years' period. As the law now stands, any period, however short, during which the patient is so disordered as to be incapable of forming an intention to desert must interrupt the required period. This may cause considerable hardship, especially where an attack of mental disorder occurs towards the end of the period, and it is, therefore, recommended that the court should have the fullest discretion to decide in each case, according to the circumstances, whether the period of incapacity should be ignored.

(Dated 7th November, 1952.)

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The Scottish Division of the Royal Medico-Psychological Association wishes to thank the Royal Commission for giving it an opportunity of submitting a memorandum of its views and giving oral evidence on certain of the matters which the Commission is considering.

The Council of the Royal Medico-Psychological Association, which represents psychiatrists in Great Britain and Ireland and which therefore includes Scottish representatives, has already submitted evidence to the Royal Commission.

This memorandum, which should be considered in conjunction with that of the parent body, is presented by a Committee specially appointed for the purpose by the Scottish Division, which comprises 120 members of the Royal Medico-Psychological Association domiciled and practising in Scotland.

The Committee consisted of:—

- Dr. A. M. Shenkin, M.B., Ch.B., D.P.M., Psychiatrist, Southern General Hospital, Glasgow; member of the Executive Committee of the Scottish Division, Royal Medico-Psychological Association; member of Council of Royal Medico-Psychological Association.
Dr. E. J. C. Hewitt, M.D., D.P.M., Medical Superintendent, Rosythvale Mental Hospital; Secretary, Scottish Division, Royal Medico-Psychological Association; member of Council of Royal Medico-Psychological Association.
Dr. F. K. McCrowe, M.D., F.R.C.P., D.P.M., Barrister-at-Law; Physician Superintendent, Crichton Royal Hospital, Dumfries; past Chairman, Scottish Division, Royal Medico-Psychological Association; past President, Royal Medico-Psychological Association.

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Separate evidence was considered to be advisable because of the existing differences between the two countries in the laws relating to marriage and divorce, and because even where the law is similar, different interpretations have in some instances led to different practices as between Scotland and England.

Although it may be considered desirable that the law relating to marriage and divorce should in major respects be the same in both countries, it is perhaps inevitable, in view of the separate legal tradition and the different religious and cultural background, that some differences will persist.

The Committee, in presenting evidence, has been guided by the opinions expressed at two general meetings of the Scottish Division convened for discussions of the subject and by the answers to a questionnaire circulated to the members of the Division.

RECOMMENDATIONS

(1) Conciliation machinery should be established

The Committee has considered the Denning Report (Report of the Committee on Procedure in Matrimonial Causes, 1947, Cmd. 7026) and in general is in favour of the recommendations there made. In particular, it wishes to support the conclusion (para. 24 (ii)), "that means for reconciliation should be available both before and after divorce proceedings have been commenced, but it must be recognised that there is much less chance of reconciliation after a suit has been started".

(2) Nullity on the grounds of certified insanity and mental deficiency

The main difference between existing law in Scotland and England lies in the fact that whereas the Matrimonial Causes Act in England includes several provisions for nullity, the corresponding Divorce (Scotland) Act, 1938, contains no such provisions. The English law in fact recognises that there are certain circumstances in which a happy, stable marriage cannot be expected. It seems to us that the dignity of the marriage contract is upheld by such recognition. At present in Scotland a patient certified as of unsound mind, who is on trial, on parole, or has escaped from a mental hospital, can go through a form of marriage. Such marriage is valid provided the patient is capable of understanding the nature of the contract entered into and is free from the influence of morbid delusions upon the subject. There is no obligation for the patient to make known his or her certified status to the partner.

A similar position obtains so far as the marriage of a certified mentally defective person is concerned.

It is recommended that a marriage should be voidable on the grounds that either partner was at the time of the marriage:—

(a) *certified as of unsound mind within the meaning of the relevant Act; or*

(b) *a certified mental defective within the meaning of the Mental Deficiency Acts.*

Provided that

(i) *the petitioner was at the time of the marriage ignorant of the facts alleged;*

(ii) *proceedings are instituted within a year from the date of the marriage, although the court should have discretion to extend this period in special circumstances;*

(iii) *marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.*

The Committee approves of the existing law with regard to the marriage of insane or mentally defective persons not legally certified as such, i.e., that the validity of such a marriage depends on the person's capacity at the time of marriage to understand the nature of the contract and the duties and responsibilities created, and his freedom from insane delusions on the subject.

The Committee confines its recommendations to certified mental defectives in spite of the well-known fact that the proportion of mental defectives "ascertained" and "certified" varies greatly in different local authority areas, depending on the policy and activity of the authority and

the institutional accommodation available. It was encouraged in confining its recommendations to certified mental defectives in the knowledge that some uncertified mental defectives may be liable to be dealt with on the same basis as some uncertified insane persons, namely, on the grounds of inability to understand the nature of the contract, as mentioned in the previous paragraph. Others may fail to disclose their mental defectiveness and so make possible a successful suit for nullity as described under the next heading.

(3) Nullity on the grounds of undisclosed grave illness, mental or physical

It is recommended that a marriage should be voidable on the grounds that either party at the time of the marriage knew of and concealed from the other the existence in himself or herself of some grave disease or abnormality likely to be detrimental to the happiness of the marriage, or the health of the children.

The English law contains a provision for a suit of nullity when either party was at the time of marriage subject to recurrent fits of insanity or epilepsy. It is not considered that epilepsy, or recurrent mental illness, should be singled out in this way. It is considered that the existence at the time of the marriage of a grave disease likely to make a satisfactory marriage impossible should be a ground for annulment, provided that this was known to the affected party and not disclosed to the spouse at the time. Examples of such diseases are severe mental illness or defect, tuberculosis, haemophilia, various progressive diseases of the nervous system, epilepsy if severe or intractable, and others. We do not consider that it would be possible to draw up a satisfactory list of diseases under this heading, especially as the severity and prognosis of the disease would require to be taken into account. It is recommended, therefore, that the grounds for nullity under this head should be stated in the general terms indicated above and that the court would consider each case on its merits with the aid of medical evidence. As in actions for nullity on the grounds of insanity, proceedings would require to be instituted within a year of the marriage and no marital intercourse should have taken place after the facts were known.

(4) Divorce on the grounds of incurable insanity

The present law in Scotland allows for a petition for divorce where the respondent "is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person". For the purpose of this Act a person is deemed to be under care and treatment while an order or warrant for his detention under the Scottish Lunacy Acts is in force.

With modern developments in treatment and changing attitudes to hospitalisation, many patients are now admitted to mental hospitals as voluntary patients who formerly might have been certified; it is therefore no longer possible to equate insanity with certification. As the law stands at present, the time spent as a voluntary patient does not count towards the material period of five years under care and treatment. It would seem to be the opinion of the majority of Scottish psychiatrists with experience of the operation of this Act, that no differentiation between voluntary and certified patients should be made in this respect.

There is a difference in the application of the law relating to continuous treatment as between Scotland and England. Periods of trial at home have not been regarded as interrupting the continuous treatment in Scotland, whereas in England the question has been treated differently and periods of prolonged trial have been considered to interrupt detention. It is the opinion of the Committee that the Scottish attitude is the better one.

Full consideration has been given by the Scottish Division to the question as to whether the period of five years under care and treatment should be reduced.

In Scotland five years' continuous care and treatment as an insane person raises a presumption of incurability. It is considered that this presumption would be equally justified in the case of voluntary patients under treatment for the same time. It is our opinion that any reduction in the stipulated period of time would render the justification of the presumption questionable.

PAPER No. 117—MEMORANDUM SUBMITTED BY THE SCOTTISH DIVISION OF THE ROYAL MEDICO-PSYCHOLOGICAL ASSOCIATION

27 November, 1952] DR. A. WALK, M.D., D.P.M., DR. J. A. HOBSON, M.D., M.R.C.P., D.P.M. AND DR. A. M. SHENKIN, M.B., Ch.B., D.P.M.

Where genuine hardship might well be caused by longer breaks than twenty-eight days invalidating the petition, it would probably be because of the intolerable behaviour of the affected partner. In Scotland, where the legal interpretation of cruelty is as defined later in this memorandum, an action for divorce would lie in such cases on the ground of cruelty in spite of the mental abnormality of the defendant.

It is recommended that:—

A petition may be presented to the court on the grounds that the respondent is, and has been continuously for a period of five years immediately preceding the raising of the action, under care and treatment in a mental hospital or similar institution, either as a voluntary or a certified patient.

Periods of leave, trial at home, or absence from hospital against medical advice should not be considered to invalidate the petition for divorce of a non-certified patient provided that no single period away from hospital exceeds twenty-eight days.

(5) Divorce on the grounds of cruelty

The parent body of the Royal Medico-Psychological Association has recommended that cruelty for the purposes of proceedings for divorce and separation should be defined as:—

"Conduct, wilful or otherwise, of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger."

It seems that in England legal practice has determined that the notion of "cruelty" is inseparable from that of intention to cause suffering.

In Scotland the tendency has in recent years been to relax the standard of legal cruelty, and it seems to have been settled that wilful intent to injure is not essential to warrant a divorce. It has been said by Lord Carmichael "that the legal conception of cruelty has passed from a narrow construction, solely based on a consideration of the mind of the perpetrator of certain acts, to the character of the acts themselves, and to the effect they will produce on the mind of a spouse of normal susceptibility".

The Committee approves of such developments and is of the opinion that this case law could with advantage be made statutory.

It is recommended that the case law relating to the legal conception of cruelty should be made statutory in Scottish law.

(6) Divorce on the grounds of desertion

In its memorandum the parent body of the Royal Medico-Psychological Association has recommended that in actions for desertion where the respondent has been insane during some part of the three-year period, the court should have full discretion to decide whether this need constitute a lapse in the intention to desert. We

understand that no case of this sort has arisen in Scotland but we approve of the recommendation of the parent body.

It is therefore recommended that where the deserting partner during some part of the material three years has been a patient in a mental hospital the court should have full discretion to decide whether or not the intention to desert has existed continuously during the whole of the period.

SUMMARY OF CONCLUSIONS

1. That means for reconciliation should be available both before and after divorce proceedings have been commenced, but it must be recognised that there is much less chance of reconciliation after a suit has been started.

2. It is recommended that a marriage should be voidable on the grounds that either partner was at the time of the marriage:—

(a) certified as of unsound mind within the meaning of the relevant Acts; or

(b) a certified mental defective within the meaning of the Mental Deficiency Acts.

Provided that

(i) the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) proceedings are instituted within a year from the date of the marriage, although the court should have discretion to extend this period in special circumstances;

(iii) marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

3. It is recommended that a marriage should be voidable on the grounds that either party at the time of the marriage knew of and co-operated from the other the existence in himself or herself of some grave disease or abnormality likely to be detrimental to the happiness of the marriage, or the health of the children.

4. It is recommended that a petition for divorce may be presented to the court on the grounds that the respondent is, and has been continuously for a period of five years immediately preceding the raising of the action, under care and treatment in a mental hospital or similar institution, either as a voluntary or a certified patient.

Periods of leave, trial at home, or absence from hospital against medical advice should not be considered to invalidate the petition for divorce of a non-certified patient provided that no single period away from hospital exceeds twenty-eight days.

5. It is recommended that the case law relating to the legal conception of cruelty should be made statutory in Scottish law.

6. Where the deserting partner during some part of the material three years has been a patient in a mental hospital the court should have full discretion to decide whether or not the intention to desert has existed continuously during the whole of the period.

(Dated 7th November, 1952.)

EXAMINATION OF WITNESSES

(DR. A. WALK, M.D., D.P.M., DR. J. A. HOBSON, M.D., M.R.C.P., D.P.M. and DR. A. M. SHENKIN, M.B., Ch.B., D.P.M., representing the Royal Medico-Psychological Association; called and examined.)

8926. (Chairman): We have before us Dr. Alexander Walk, M.D., D.P.M.; Dr. J. A. Hobson, M.D., M.R.C.P., D.P.M.; and Dr. A. M. Shenkin, M.B., Ch.B., D.P.M. I understand that Dr. Shenkin will speak as to the views of the Scottish Division of the Association. May I ask what offices, if any, you respectively hold in the Association?—(Dr. Walk): In the first place, I should like to apologise for the absence of the General Secretary of the Association, Dr. Armstrong. Dr. Armstrong intended to come here to introduce the other members giving evidence and to answer any general questions concerning the Association itself; he has asked me to act for him. My own position in the Association is that of member of the Council, I am Honorary Librarian and I am Co-Editor of the Association's journal. Dr. Hobson holds

no official position in the Association but was one of the members nominated by the Association to serve on the Committee set up by the British Medical Association and which submitted the earlier evidence. Dr. Shenkin is a representative on the Council of the Association of the Scottish Division. (Chairman): Thank you. I am going to ask Sir Russell Brain to put his questions now.

8927. (Sir Russell Brain): May I ask first a question on paragraph 12 of your memorandum? It deals with mental deficiency as a ground of nullity. Would you give your views as to whether this wording should cover ascertained as well as certified mental deficiency, or even just acceptance of evidence of mental deficiency as such?—(Dr. Hobson): The view of this Association would be the latter of these three, acceptance of mental deficiency as

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such, that is, such as would be required to fulfil certification or ascertainment. [See Question 8974.]

8928. Then, in paragraph 17, you allude to hereditary tendencies which you think should be considered separately from established disease. But I do not think you consider them further, so is it the case that you do not feel that they should be taken into account?—It is, the main reason being that we feel it would be far too difficult, both medically and legally, to be able to deal with purely hereditary tendencies.

8929. Coming to paragraph 19, where you are considering voidability of a marriage, you recommend, firstly, that this should really be for the court to determine. You think it is too difficult to lay down in advance conditions except the broad ones stated here?—Yes.

8930. And when you come to those conditions, they are that the party should have known of and concealed from the other the existence in himself or herself of some grave disease. Now, would it be your view that in such a case the doctors should be asked whether in their view this was a grave disease, or whether they should be asked to tell the court the nature of the disease and then it would be for the court to determine whether it was a grave disease?—We feel that it should be for the court to determine, and perhaps also not merely the fact that it is a grave disease, but it should be for the court to determine whether or not the party concealing this knowledge himself felt that it was a grave disease and detrimental to the marriage.

8931. Yes, I assumed that, and I was going to ask further—and I think perhaps you have answered it already—that he should know or have known not only that it was a grave disease, but that it was such a disease as to be detrimental to the happiness of the marriage or the health of the children?—Or that he should have intentionally concealed it.

8932. Would you agree that, in general, it is more likely that a person would know that he has a grave disease than that he would know that it was likely to be detrimental? I am looking at human nature and the lack of foresight which often exists in such cases.—I think that probably is true. I think a person suffering from a grave disease tends to believe what he wishes to believe, that it is not quite so bad as might be feared.

8933. (Chairman): Might I ask something arising out of that? Would it improve your formula, or would it not, to say, "of some grave disease or abnormality [it] is the opinion of the court to be detrimental to the happiness of the marriage or the health of the children"? That would mean that you would have to prove that the party to the marriage deliberately concealed the existence of some grave disease or abnormality, but whether that disease or abnormality is likely to be detrimental to the happiness of the marriage or the health of the children would be a matter for the court, on the evidence given. Do you see what I mean?—Yes.

8934. Do you think that would be better?—I think that would improve it.

8935. As you say yourself, a man might know that it was a grave disease or abnormality, but might not realise it was likely to be detrimental?—Yes. (Chairman): I do not know if that clears the matter up?

8936. (Sir Russell Brain): If that meets their views, you. Coming to the question of how this would be established, I take it that the petitioner could only establish this by proving from the evidence of the respondent's doctor that he knew these facts?—I think the respondent's doctor would be one of the more important witnesses, but it is conceivable that other people could give evidence to this effect.

8937. But in general it would probably be desirable to call the respondent's doctor?—It would, yes.

8938. That would usually mean that he would have to be subpoenaed?—Yes.

8939. And a psychiatrist might be called to give evidence as to the fact that his patient had been in a mental hospital?—Yes, he might.

8940. Would you agree that in general doctors are rather reluctant to give that kind of evidence?—Yes, I would agree that we are reluctant. It is always distasteful to

give evidence against one's patient, but I think that sometimes one must do it, and it may be in the best interests of justice that we should do it. (Dr. Walk): Of course, if I may intervene, that has to be done under the existing law where a suit for nullity is brought on the grounds that the patient is liable to recurrent attacks of insanity. The same considerations already apply there, and doctors are now being subpoenaed to give evidence of that kind.

8941. Yes, I appreciate that, but perhaps there is a little difference there from a person who is mentally normal, and who would perhaps be defending the suit and would himself be reluctant to have his doctor called. But I think you have answered the question. May we come to paragraph 30, which relates to the question of insanity as a ground for divorce? You say that you would like to have a period of care and treatment required which should be long enough to allow of careful observation of the nature and trend of the disorder, so on that ground you would disagree with those who put forward the view that evidence of incurable insanity by itself would be enough?—Yes, that is so, and that is something we are quite unanimous about. There are no differences here between the Scottish Division and the Association as a whole nor, if I may say so, between any majority and minority within the Association. That is something which we all feel is essential.

8942. Would you agree that there is an additional reason for that, namely, that if there is no such criterion of severity, doctors might find it extremely difficult to define insanity or unsoundness of mind in any given case?—We do not think that the doctors' difficulties, as such, need weigh very strongly. Difficulties might arise in some cases; in other cases it might, on the contrary, be very easy. Our reasons for insisting that there shall be this period are, I think, largely set out in our memorandum.

8943. I was not questioning that, I was wondering whether you would agree that this was an additional reason, that in borderline cases it would be difficult for doctors to say whether a person was or was not of unsound mind, whereas with a period of care and treatment you had a rough criterion of severity.—We do want to reduce to a minimum any possible differences of opinion, and to that extent I agree with Sir Russell Brain.

8944. Now with regard to the Council's report and the Scottish Division's report, you both agree that there is need for evidence of the duration of the illness, which might be five years in one case and possibly three years in the other?—We both agree there is necessity for evidence of the duration of illness, but there is a difference between us as to whether there should be an insistence on continuity of residence in hospital during the whole of that period, as the Scottish Division suggests, or whether, as the Association as a whole suggests, evidence on the question of the residence should not be taken into account at all, and the evidence should be directed entirely to establishing the length of the illness itself.

8945. You do take one year's residence into account?—We have included that.

8946. Your criteria are three, one year's residence, three years' duration of illness and, finally, medical evidence of incurability?—That is correct.

8947. Whereas the Scottish Division would be satisfied with five years' residence as in itself evidence of incurability, is that the position?—That is the position, yes.

8948. May I ask about the period of duration of the illness? Do you think that there is any difference between these two extremes? In one case, the patient has been ill for three years and the last one is spent in a mental hospital; in the other case, the patient falls ill acutely and is admitted to a mental hospital at once and spends the full three years there; the difference being that in the second case there have been three years to observe the effect of treatment, whereas in the first case the first two years have been spent without any treatment at all and there would only be one year under care and treatment to observe the effects.—No, Sir, that is not quite what we have in mind. We quite agree that if in fact the first two years have been spent without any form of care and treatment, then probably we would all be very unwilling to declare the patient incurable after only one year's treatment, but the previous years may not have been spent

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without care and treatment at all. On the contrary, the patient may have been under continuous observation, there may have been treatments of various kinds given in hospital or outside hospital, but which did not come under the present definition of continuity of treatment, either because they were not given in a mental hospital or because the patient has been in a mental hospital at some time during those previous years but the continuity has been broken. We wish to overcome these anomalies which at present lead to hardship, by having one comprehensive definition referring to the duration of the illness, ending up with a period in hospital, rather than insisting on a particular form of disposal or treatment during the whole of the period.

8948. And you would accept three years' duration of illness including a year's care and treatment immediately before the petition is presented, and medical evidence of incurability. You have already said that, I think?—Yes, that is so.

8950. I wonder whether Dr. Shenkin could tell us why he feels the Scottish proposal would be better?—(Dr. Shenkin): In Scotland the existing law is a little different. In Scotland five years' continuous treatment in a mental hospital, under certification, raises a presumption of incurability. Scottish psychiatrists feel that this makes for a workable law which we would not like changed. We feel that the same presumption could probably be held for patients under treatment for the same period, whatever their status, in a mental hospital.

8951. And you would not feel quite happy that one year's care and treatment and the other conditions suggested by the Council would be quite adequate evidence of incurability?—No, Scottish psychiatrists feel that the retrospective evidence involved might lead to great difficulty and controversy.

8952. On the subject of cruelty in paragraph 41 of the Association's memorandum, your proposals would make it possible to include, as grounds for divorce, mental abnormalities which were never severe enough to take the person into a hospital, what we call psychopathic individuals, for example, and also partially recovered patients, on the ground that their conduct was intolerable. That is really the intention, is it not?—(Dr. Walk): That is so; we would like to include such persons if, and only if, their conduct is in fact intolerable.

8953. And you feel that it has this advantage, that it is very difficult to include them under any category?—Yes, that is so. We thought that any other way of dealing with these people would be unfair, both to the patient and to the spouse.

8954. And you feel it is very desirable that there should be some way of including them, that there are sufficient of such persons to make it necessary to provide relief in this way?—Yes, we do.

(Chairman): Before I ask any questions, I will ask Dr. Baird to put her questions.

8955. (Dr. Baird): I want to ask a question following up the one Sir Russell Brain has asked. We have had it suggested to us that habitual drunkenness might be an additional ground of divorce. I understand that you would prefer habitual drunkenness, drug addiction and so on, to come under the ground of intolerable behaviour and cruelty?—That is so.

8956. There is another matter. You know that at present sodomy and bestiality are grounds for divorce at the suit of the wife, and it has been suggested that lesbianism should be a ground at the suit of the husband. Do you think that these should also be included under this heading of psychopathic behaviour rather than singling them out in this way?—(Dr. Hobson): Yes, I suggest it could be so. (Dr. Walk): In the memorandum submitted by the British Medical Association there was a proposal that lesbianism as such should be made a ground for divorce, in the same way as sodomy. [See para. 13, Paper No. 19, Minutes of Evidence for the Sixth Day.] But our Association did not feel that they ought to support that, and it has therefore been left out of our memorandum. If a case of lesbianism does fall to be dealt with, it should be under the

umbrella of intolerable behaviour, and not singled out as a ground.

8957. And do you think that the other grounds—sodomy and bestiality—should be taken out of the law? I wondered if it would be more in trend with present psychiatric thought that these particular maladjustments should not be singled out in the law but should be dealt with under the general ground of cruelty. Has your Association any view about that?—(Dr. Hobson): We have not discussed this point in Council. I personally think that the less the law, not only the law with regard to divorce but the law generally, says about these abnormalities, the better. I cannot say that I am answering for the Association on that. (Dr. Walk): I personally would agree with Dr. Hobson, but I cannot say whether those are the views of the Association.

8958. (Chairman): Might I put that last point to you from a judicial rather than a medical point of view? I think you may be putting judges in a grave difficulty if you do as Dr. Baird suggests. If a judge has to consider definite grounds, lesbianism, sodomy and bestiality, he has only got to decide—has this offence been committed or not? But if he has to weigh up the effect of any of these three things on the mind of the other spouse or on the health of the other spouse, you are confronting him with a very difficult task indeed. I do not say that it is not one which he might have to face, but you do see, from the point of view of certainty of the law and the solicitor advising his client as to whether he or she has a good cause for divorce, that there are advantages in setting these things out in plain terms in the Act? The other point I wished to mention was this. Both Sir Russell Brain and Dr. Baird have used the words, "intolerable behaviour". Now, would you look at paragraph 40, where you suggest an amendment of the definition of "cruelty"? You quote the present definition—"conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger". The only change you suggest, in paragraph 41, is the insertion of the words "wilful or otherwise". You do not suggest bringing in the phrase "intolerable behaviour". That is so, is it?—That is so, so far, and that is as far as the British Medical Association's memorandum went.

8959. I follow that.—But since then it has been suggested to us that such a proposal might be unacceptable, because the word "cruelty" has always been held to be inseparable from intention, and therefore we put forward two possible alternatives in case that view was upheld. I think that around this table today the words "intolerable behaviour" have been used as a kind of shorthand to cover the behaviour we have in mind, whether the Commission eventually decides to call it "cruelty" or "intolerable behaviour" or leave it without any specific designation. (Chairman): I see the phrase "intolerable behaviour" in paragraph 43, where you do mention certain alternatives, and that no doubt is where it came from in the present discussion. (Sir Russell Brain): It is also mentioned in paragraph 38, my Lord. But I was using it rather loosely and not with any sense of definition. (Chairman): But "intolerable behaviour" in paragraph 38 is dealing with the question of insanity, is it not? (Sir Russell Brain): Yes. (Chairman): I see, however, that there are the alternatives. Mr. Justice Pearce points out that he could not quite accept without qualification a certain statement, perhaps you could put it yourself, Mr. Justice Pearce?

8960. (Mr. Justice Pearce): You have said that intention is a necessary ingredient and has always been held so.—I beg your pardon, I did not say that that is the law, but we have had criticism of our proposal on those grounds, and therefore to meet any possible criticism we have suggested these alternatives.

8961. (Chairman): I see. I was citing your suggested definition of "cruelty" to show how very difficult it would be to bring the three matters which I mentioned under your definition of cruelty. I can imagine that if a husband, for example, was guilty of sodomy, you might say that it was not of such a character as to cause danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. Is that what you would say, would you not, that it should not be a ground for divorce, if the wife was so insensitive or so

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[Continued]

strong physically and mentally that even this terrible event did not in fact affect her health?—I think, my Lord, we had in mind, in leaving out any reference to lesbianism, the fact that the question of lesbianism itself may be difficult to establish, more difficult than in the case of sodomy, so that the judge at the time of a case might all be in a good deal of difficulty even if the word "lesbianism" were inserted in black and white in the statute.

8962. I was not dealing with the point of lesbianism only. Take sodomy, which is an existing ground for divorce at present. The wife has only got to prove sodomy if she wants a divorce, and that is that, she gets it. If you bring it in under the heading of cruelty, under your definition the wife might quite often fail to get a divorce, might she not, and there would be great uncertainty whether she would get it or not?—I imagine that in all cases where cruelty is alleged there must be difficulty in deciding in any case whether the effect on the petitioner's mind has been what it is alleged to have been.

8963. That is quite true, but you see, you are bringing in an additional difficulty if you bring in sodomy under cruelty, whereas at the moment you have it as a definite ground for divorce.—There was no proposal from the Association to change the law in that respect, it was merely a personal opinion expressed here.

8964. A very interesting discussion has taken place already, but I am pointing out that from a judicial point of view I see certain difficulties.—(Dr. Hobson): May I say that I would disagree with both of you on this point? I think that in any case of proven sodomy I would be prepared to go to the court and say that that in itself gives rise to reasonable apprehension of danger to the health of the wife.

8965. Danger to health?—Danger to the health of the wife. I have come across two or three cases in my experience where the wife's health has suffered because of the worry of the sodomy of the husband. In one case she had become infected with venereal disease but she would not go for divorce on the ground of sodomy, because to put in a petition on that ground would mean that almost automatically would follow a criminal charge against her husband. I have come across two or three cases where the wife does not put in a petition although she would like to be divorced, because it would mean a danger to her husband's liberty. I think, therefore, that I would much prefer to align myself with Dr. Bain's suggestion and include sodomy and lesbianism under cruelty. I think it must be very exceptional that it will not be possible for a medical witness to go into the box and say that in this case there would be reasonable apprehension of danger to the health of the other spouse. (Chairman): I follow that from the medical point of view it may be more consistent and more logical not to single out particular forms of abnormality and make them grounds for divorce, but I think if you are going to rest entirely on cruelty you will put not only the courts, because after all they have to do difficult things today, but also those advising persons contemplating divorce, in a position of considerable uncertainty.

8966. (Lord Keith): There is another point I would like to put to Dr. Hobson. You are thinking of one type in your illustration of sodomy, but of course there may be sodomy with a third party?—I am thinking only of sodomy with a third party.

8967. I thought you said something about the wife being infected?—She was in this particular case. The husband contracted syphilis homosexually and then gave it to his wife.

8968. I see. The case I am thinking of is this, Dr. Hobson. If a husband has committed sodomy with a third person, the wife might not know about it, it could not affect her at all; then she discovers that he has done so, and at the present time that would be a ground for divorce, although it does not affect her health in any way?—Yes.

8969. If you take it out as a specific ground of divorce and put it into cruelty, then it would not be a ground of divorce unless she knew of his behaviour and it was so persistent and it had such reactions on her that it preyed on her mind and affected her health. Only in that case could she get a divorce if it had to be treated as a species of cruelty. You see the point, do you?—I do, yes.

8970. You would say that it should be taken out altogether as a specific ground of divorce and dealt with as a species of cruelty, in which case in some cases it might be a ground of divorce and in other cases it could not be?—I think it should stay in as a specific ground.

8971. That was what I wanted to be quite clear about?—I think lesbianism should be dealt with in the same way.

8972. (Chairman): As regards the preamble, I note the position with regard to the British Medical Association's memorandum, which was withdrawn. You say there:—

"It was considered that the memorandum, which had previously been circulated to all members of the Council and of the Parliamentary Committee, adequately represented the views generally held by members so far as the sections immediately affecting the practice of psychiatry were concerned. It was decided, therefore, to appoint a small sub-committee to re-edit the psychiatric portions of the memorandum. The revised document has now been approved by the Council and is submitted as the evidence of the Association."

I only read that to emphasise the point that nothing that is not in this memorandum, whether it is in the British Medical Association's memorandum or not, is the evidence of your Association. You have dropped certain portions of your memorandum.

I think you answered Sir Russell Brain on the question I was going to put on the last sentence of paragraph 12. You say:—

"It is recommended that the provision should be clarified as referring to defectives "ascertained" or "certified" under the Acts."

Would you repeat again the answer you gave to that? Do you mean that one or the other should be specified, or what exactly do you mean?—(Dr. Walk): It is both, but actually there is a slight change from the memorandum submitted by the British Medical Association, where it was recommended that the provision should include all defectives who were actually defective, even if they had not been ascertained or certified. That did not commend itself to the Council of our Association, and the recommendation now is that the provision should refer to defectives who have either been ascertained or certified, that is, both categories, but not including defectives who may be proved to be defectives but have never been under the provisions of the Mental Deficiency Act.

8973. (Sir Russell Brain): I understood Dr. Hobson to say the reverse of that, that it includes all defectives, whether ascertained, certified or not?—(Dr. Hobson): So I did.

8974. (Chairman): Which are you putting forward?—The explanation is that I drafted this paragraph. When I answered Sir Russell Brain, I presumed it was the same, but I now see that it has been changed a little since I wrote it. The Council have evidently not followed entirely my recommendation, so I wish to withdraw my previous answer and say it would refer only to "certified" or "ascertained" defectives. (Dr. Walk): That puts the Association as a whole in line with the recommendations of the Scottish Division on that same point.

8975. That is a satisfactory picture, no doubt. Coming to paragraph 13, I have just one question on that. You are dealing with the words "subject to recurrent fits of insanity or epilepsy", and you point out that the word "fit" is here used to cover two phenomena, and you say what the two quite different phenomena are. You say therefore that the meaning of the word "fit" is not quite clear. Can you suggest a suitable wording in place of it?—We have included a proposal in paragraph 15 which we thought covered the case. That is our recommendation in lieu of the existing wording—"has suffered from one or more attacks of insanity which are likely to recur".

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8976. But there you are dealing with the words "subject to recurrent," are you not?—We took out "subject to recurrent" as well, because we considered that was ambiguous, and our final recommendation is that the clause should read, so far as insanity is concerned, "has suffered from one or more attacks of insanity which are likely to recur." As far as epilepsy is concerned, we are of course taking that out altogether as a separate condition, and we wish it to be included under our other recommendations concerning grave diseases likely to be detrimental to marriage.

8977. I see. Then the formula which appears in paragraph 15 is a formula for insanity, and you do not wish epilepsy to be mentioned at all?—There is no mention of epilepsy here. We were all unanimous that epilepsy should not be singled out, and therefore, if the provisions concerning the concealment of a grave disease are not accepted by the Commission, epilepsy would come out altogether as a ground for annulment. We do not wish epilepsy to be singled out in any way.

8978. Thank you, that makes it quite clear to me. Just one question on paragraph 35, about which Sir Russell Brain asked a question. You recommend a clause in regard to insanity. Where in that definition do we find the three years' duration of illness which Sir Russell Brain mentioned and which you discussed with him?—It is in paragraph 28. You will see that we say there:—

"So far, it is assumed that the greatest statutory period of five years will be retained. The Council would not object, however, to a reduction of this period to three years . . ."

8979. So I should simply read this definition in paragraph 35 (a) as " . . . which has been present continuously for a period of five years or alternatively three years . . ." ?—Yes, if that commands itself to the Commission; it is not actually our recommendation. We are really in favour of five years but we would not object very strongly, as the view has been put forward from other sources, to the duration being reduced.

8980. (Mr. Byles): My Lord, could I ask at this stage, is the one year under clause (b) of the definition included in the five years, or is it in addition to the five years?—It is meant to be included in the five years.

8981. (Chairman): Yes. What would you say if it were two years instead of one, would you object to that?—We would not object to that provided that—and this is essential—there is some recognition given to periods of temporary absence. As long as we are quite sure that there would be no danger of any technical interruptions of continuity and that the usual periods of trial or temporary absences of voluntary patients could be included in those two years, we would not object. We are very anxious that the total period shall not be artificially interrupted by some strict requirement of the law irrespective of the persistence of the actual condition of insanity.

8982. Then, in the last paragraph of your memorandum, you deal with discretion in the application of provisions regarding desertion, and you point out:—

" . . . hardship arises in cases where the respondent has been insane during some part of the three years' period."

I need not read it all through, but your recommendation is that the court should have the fullest discretion to decide in each case, according to the circumstances, whether the period of incapacity should be ignored. Again, speaking from a purely judicial point of view, I was wondering on what principle you suggest that the court should exercise its discretion? Where there has been an attack of mental disorder, it is a fact that the deserting party, during the attack, no longer has the intention to desert. But why should the court have regard to it in some cases and not in others?—We find it difficult to keep up-to-date on this subject, because there have been from judicial decisions during the time we have been engaged in considering this. I gather that the latest decision is that a period of incapacity may not interrupt the three-year period if it cannot be proved that the intention to desert had lapsed, so to speak. We wanted to provide for periods of temporary insanity where, for

instance, the parties had been living apart for a long time, and there could have been no question that when the respondent's mind was normal he was in a state of desertion, but he then has an attack of temporary insanity, recovers from it, and resumes his desertion. It has been held in such a case that the period of desertion had been interrupted because during that time he could not form an intention. We feel in a case like that, that the period of insanity should be ignored, and it ought to be held that as he had lived away from his wife both before and after his attack, what happened during his insanity was irrelevant and of no account. On the other hand, we took the case of a man who had perhaps left home and a few weeks later had been admitted to a mental hospital and remained there for the whole of three years, and it would appear that his desertion of the wife was merely a symptom of his mental disorder. We felt in a case like that, that the whole matter really ought to be dealt with as a case, if the other criteria are fulfilled, of incurable insanity and not as a case of desertion.

8983. Would it not come to this then, that the court would have to see when the intention was formed? If the intention to desert was not formed before the insanity supervened, then, on your suggestion, they would say that there was no desertion. On the other hand, if he had formed the intention before the insanity supervened, then the period of insanity would be counted as part of the three years. Is that your suggestion?—That really would satisfy us.

8984. (Mr. Justice Pearce): Would it not be simpler to say that insanity should not be held to interrupt desertion "in any period of continuing desertion"? I will explain what I have in mind. Suppose that the day before the man became insane he wanted to come back to his wife. He has then ceased to be in desertion—the desertion has ended. But if the day before he became insane he did not want to come back to his wife, then it is absurd to suggest that, after he became insane, he might have been nursing a reversal of his former policy. I suggest this test because it is quite simple and, speaking as a judge, practical; in other words, if he is deserting when he becomes insane he is continuing to desert.—That is what we had in mind.

8985. In giving full discretion to the judge you are raising a problem which is a very difficult one—I am quite certain that if the Commission can find a form of words which would cover our intention here it would be very acceptable. (Lord Keith): Might I just ask you if this means what you have in mind? That insanity shall not affect desertion unless it is proved that it affected the intention to desert? (Mr. Justice Pearce): That is just what I was trying to avoid. You have to choose between what I suggest and what Lord Keith suggests. My suggestion is that insanity should not interrupt an existing period of desertion; the judge does not deal with the intention of a man suffering from insanity at all.

8986. (Lord Keith): I think there is a misunderstanding. I am not dealing with insanity as interrupting a period of desertion. I am dealing with it as affecting the original intention to desert. If there is insanity proved during the three years, and there is reason to believe that that insanity affected the man when his desertion was said to commence, in the sense that he really had not the mind to desert, then there would be no desertion. Unless that is established, then there is desertion, and insanity does not interrupt the desertion at all. I am only trying to get clear in my mind what you are suggesting—I think that both those points were included: Mr. Justice Pearce has covered the example I gave of the man whose temporary insanity was quite irrelevant and should be disregarded; Lord Keith covered the other point where the desertion itself may originally have been a sign of insanity, and where it is the desertion which should be disregarded and not the insanity. If all that can be expressed in a form of words we should be only too glad to agree to it.

8987. (Chairman): As I have only one question on the Scottish memorandum, as distinct from the English, perhaps I could put it before we adjourn. Sir Russell Brain and Dr. Baird have cleared up my other queries.

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It is at the end of paragraph (5) in the Scottish memorandum. You say there:—

"It is recommended that the case law relating to the legal conception of cruelty should be made statutory in Scottish law."

I just wanted to ask you this. Do you agree with the suggested definition that is set out in paragraph 41 of the English body's memorandum, or are you suggesting something different?—(Dr. Shenkin): Cruelty in Scotland has already been established as not to require the intention to cause suffering and really the quotation from Lord Curzon, which is given in paragraph (5), satisfied us. We felt that we had to continue separately here from the English Division of the Council, who are trying to establish something which has already been established in Scotland.

898. Yes, but what I wanted to know was this. Never mind what the past history is, does the suggested definition here express the Scottish law on the subject, because I rather thought it did, and I see Lord Keith nodding assent?—Yes.

(At this stage the Commission adjourned for a short period.)

899. (Lord Keith): Dr. Shenkin, I think I might ask you one or two questions on the Scottish memorandum. Taking paragraph (3), "Nullity on the grounds of certified insanity and mental deficiency", I am right, am I not, that the position at present is that a person who is suffering from insanity cannot contract a marriage at all unless he does so during a lucid interval, that is to say, when he understands what he is doing? That is the common law, is it not, with regard to the contracting of a marriage by an insane person?—I thought the position was determined, in the case of a mentally deficient or insane person, by the capacity to understand the contract.

900. You are putting it that even if he is insane, if he understands what he is doing he can enter into a valid marriage?—I thought he could, at present.

901. Of course, it is a legal question and perhaps we need not enter into that, but I think there is some doubt about that. What I really wanted to clear up was this: in this question of statutory unsoundness of mind, the proposal which you recommend is simply going to enact that anyone who is certified as of unsound mind or who is certified as a mental defective cannot enter into a valid marriage? That is the effect of your proposal, is it not?—That is correct, yes.

902. And that will leave untouched, of course, the common law position as to how far an insane person could enter into a valid marriage if he were not certified?—That is so, yes. We thought we did not need to deal with that.

903. I take it, then, that it would have to be made clear, if a provision of this kind, such as you recommend, were introduced into legislation, that it was not to abrogate the provisions of the ordinary law with regard to sanity and marriage?—Yes. You will see that in the same paragraph we say: "The Committee approves of the existing law with regard to the marriage of insane or mentally defective persons not legally certified as such."

904. Yes. Then, why is it exactly that you want to create this distinction between what I will call the common law of marriage by insane persons and the proposed statutory law in respect of persons who have been certified as insane?—When we were considering the question of the withholding of knowledge of a grave illness from a spouse, we thought that certified insanity could be considered to come under that category. The question, however, as to whether the patient could be blamed for not giving information with regard to illness which affected his mind, made us consider that this would have to be dealt with separately from the other grave illnesses.

905. I see. But might not the same apply to a person who was insane but was not certified?—If he was not certified he might be held responsible with regard to disfigurement to his wife, and could be dealt with under the other category.

906. You think he could?—It might be possible.

907. The first of your provisions strikes me as a somewhat curious provision: "Provided that the petitioner was at the time of the marriage ignorant of the facts

alleged". Do you mean that the petitioner must be ignorant of the fact that the other spouse was certified as of unsound mind?—Yes.

998. I think I can say this, Dr. Shenkin, that at the present time even if the petitioner knew that the other spouse was insane at the time of the marriage, that would not be any bar to having a marriage annulled if it was quite clear that at the time of the marriage the insane person did not know what he was doing. You would be introducing rather a modification of that principle here, would you not?—We feel that those persons who do not understand the contract are adequately dealt with by existing law, but this is an extra provision to deal with persons who, despite insanity, may understand the marriage contract. (Lord Keith): You see, what I am a little afraid of is that if one grafts statutory provisions with regard to unsoundness of mind on to the common law provisions, it may be very difficult for the court to know how far the common law has been modified by the statutory law. That is one of the difficulties, as I see it, for the courts when they come to administer these provisions. (Chairman): I suppose this could be done by some express provision in the statute intimating that the statutory provisions are without prejudice to the common law position?

999. (Lord Keith): I think it would have to be that. One would have to be very careful in the drafting of this legislation. I think I see how the matter stands. Your next proposal, in paragraph (3), "Nullity on the grounds of undisclosed grave illness, mental or physical", is just the same as in the English memorandum?—Exactly.

5000. That has been dealt with and I have nothing additional to ask on that. We now come to divorce on the ground of incurable insanity. Here your recommendation is really substantially different from the proposal in the English memorandum?—There are differences, yes.

9001. What occurred to me was this. I know there are differences at present between the statutory law of the two countries on this matter, but do you think it is desirable that in a matter of this kind, which is after all a relatively new ground of divorce, there should be perpetuated differences between the law in Scotland and the law in England?—I think, as we said earlier, that we should like uniformity of law, but we did not consider that with the different traditions it was likely, and we felt it very difficult to get Scots psychiatrists and English psychiatrists to agree, since they were starting off from different standpoints on this matter.

9002. But there has not been much tradition in this matter, because this ground of divorce was only introduced into England in 1937 and into Scotland in 1938, therefore, one cannot say that there is any real tradition in the matter at all, it just so happens to be the accident of some difference in legislation. Let me put it this way: as a psychiatrist, what in your view is the advantage of your proposal as against the proposal in the English memorandum? I know what the difference is, you want a five years' period of treatment either as a voluntary or a certified patient, is not that right?—That is true, yes.

9003. Continuous treatment for five years, and that means treatment in a mental hospital or similar institution?—That is correct.

9004. As I understand it, the English proposal is that as long as a person is insane the whole of that period need not be spent in a mental hospital or similar institution. Is that the chief difference?—Yes, that is the chief difference.

9005. What is the advantage in your proposal as against the English proposal?—In Scotland there has been a difference so far in that breaks in treatment up to twenty-eight days have not been held to interrupt the period in hospital. This difference and the fact that a presumption of incurability arises when a patient has been in hospital for a five-year period, made us feel that the Scottish law worked more easily, both for the doctors and in the courts. We did not want to lose this presumption, which we felt worked well.

9006. But does it not rather cut the other way? Take a patient who is certified, if that patient manages to elude

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outside the hospital in which he is detained for more than twenty-eight days, he ceases to be a certified patient?—That is true.

9007. Therefore he ceases to be regarded as insane?—That is true.

9008. And accordingly, if such a situation arose, one could not get a divorce under this provision which you make, merely because the patient had managed to get away and elude detention for a period of twenty-eight days?—Quite.

9009. Is not that rather a flaw in this proposal?—It seemed to us that where the patient and the spouse had cohabited for a longer period than twenty-eight days, it would be mainly on the grounds of the behaviour of the patient during that period, especially of the intolerable behaviour of the patient, that the other spouse would subsequently be seeking a divorce, and we thought that in those circumstances relief might be obtained on some other ground.

9010. I am not sure that that is entirely satisfactory; the patient who has managed to elude capture for twenty-eight days need not go back and live with his or her spouse, you know.—That is a contingency we have not considered. (Dr. Walk.) Might I say here that this difference between the Scottish proposals and the English proposals does not in fact only depend on any differences in Scottish law and tradition? There is a genuine difference of opinion.

9011. Yes, I rather gathered that.—And the difference of opinion exists in both countries. Possibly the differences in law may account for the different results in the two countries, but it so happens that in Scotland the majority opinion is that these provisions should continue to be tied up with continuous residence in hospital, and the only difference they wish to make in the existing law is, roughly speaking, to extend the provisions to voluntary treatment. That view exists in England as well, but is a minority view. The majority view in England is that we should cease to tie it up with continuity of treatment, and have regard to the period of the actual insanity.

9012. So it comes to this, that either we have to try and resolve this conflict between the two views, or we have got to say that one law will prevail in Scotland and the other in England. That is really what it comes to?—Yes.

9013. Then I do not think that I can get any further light from either of you. There is no point, I think, in asking you to explain more fully the reasons which moved the majority in one direction in one country and in another direction in the other country.—Unless you would like us to debate further the advantages and disadvantages of the two views. (Lord Keith.) I do not think that would help me very much.

9014. (Chairman.) There does not seem to be any reason why a Scotman should think one way and an Englishman the other way on this particular subject. An insane person is the same whether he is in England or in Scotland, and I cannot see any practical reason why the test should be different. I quite appreciate that it so happens that the majority in Scotland think (a) and the majority in England think (b), but it would be an illogical position to say: "In Scotland the test shall be (a) and in England the test shall be (b)". Surely that would be very regrettable, would it not?—(Dr. Shenkin.) It would obviously be preferable if the law and the test could be uniform.

9015. You see, it is not so much a question of historical background, as Lord Keith has pointed out, it is just a question of what is the best definition. I am not suggesting wholesale assimilation of the two laws, but that it would be a pity if the law of Scotland and the law of England on this point were different. Do you think it would be any use for the two Commissions to get together to try and agree on a definition, or do you think it would produce no results at all?—(Dr. Walk.) There is only one Council, actually, of the Association, and there are Divisions of the Association. The Scottish Division enjoys a degree of autonomy which the others do not enjoy, for obvious reasons, and therefore we have thought it quite proper that they should submit separate evidence. (Dr. Shenkin.) It is not perhaps surprising, Sir. The difficulties with regard to the interpretation of continuous

care and treatment have been responsible in part for the dissatisfaction with the English law. These difficulties have not arisen in the same way in Scotland, so it is not surprising that Scottish psychiatrists are not quite so dissatisfied. (Dr. Walk.) Perhaps the fact that the Scots law was passed a year later than the English one accounts for the fact that some of the anomalies have been removed in the Scottish one. There is one difference which made the Scottish members perhaps a little less dissatisfied, which was in regard to absence on trial from hospital. Under the Scottish Act it was made quite clear that absence on trial from hospital, so long as the order still existed, counted towards the period of care and treatment, whereas in English law nothing was said about that and the law was at first interpreted very strictly as meaning that the moment the patient left the hospital, even if he was on trial, his detention came to an end. That has since been modified, but it did remove at least one of the grounds for dissatisfaction in Scotland. But of course we in England have gone a good deal further than that in our new proposals, and we feel that there are a good many other grounds for saying that the existing Act is unsatisfactory, which in the opinion of the majority would apply equally well to Scotland.

9016. (Lord Keith.) Now, Dr. Shenkin, at the end of paragraph (4) of the Scottish memorandum you say:—

"Periods of leave, trial at home, or absences from hospital against medical advice should not be considered to invalidate the petition for divorce of a non-certified patient provided that no single period away from hospital exceeds twenty-eight days."

You are dealing here with a non-certified patient?—(Dr. Shenkin.) A voluntary patient.

9017. Is the idea to equate the position of a voluntary patient with a certified patient?—That is the idea.

9018. In other words, if a certified patient can manage to elude capture for twenty-eight days he is no longer treated as certifiably insane?—That was not quite the context in which we considered it. We were considering it in the context of continuity of treatment and continuity of illness; both a certified patient allowed home on trial for twenty-eight days, and a voluntary patient going out against medical advice for a similar period, might be considered to be continuously ill, although discharge with medical consent would constitute a break in the illness.

9019. I think I see the reason for it. We shall have to consider how the matter should be dealt with. May I turn now to divorce on the ground of cruelty? I do not think there is any difference here between your memorandum and the English memorandum, because I think you agree to accept the English definition?—That is the case.

9020. On divorce on the ground of desertion, I think that again your position is the same as the English one, is it not?—Exactly, yes.

9021. There is just one point that I would like to get cleared up. In paragraph (3), "Nullity on the grounds of undisclosed grave illness, mental or physical", you suggest that provided the grave illness was known to the affected party and not disclosed to his or her spouse at the time of the marriage it shall be a ground of nullity. What is at the bottom of this proposal is, as I understand it, the undesirability of a marriage being entered into when this grave disease exists, am I right? You are dealing with this, as I understand it, on medical grounds and not really from the point of view of the individual spouse? The whole outlook of your memorandum has got the medical point of view or the mental point of view, has it not?—(Dr. Hobson.) Yes.

9022. What is really the reason for this proviso which you introduce? Why is a marriage any better or worse if the grave disease was known or was not known either to the affected party at the time the marriage was entered into or to the other party?—I do not think that purely to satisfy medical grounds it would be necessary to retain this proviso. We feel that this proposed ground of nullity is desirable for two reasons: one, the medical one, based purely on the existence of the grave disease; secondly, not medical but so as to bring the law more in line with, say, the law of contract.

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9023. Now just pause for a moment there, let us take it bit by bit. Supposing the party affected did not know of the grave disease at the time the marriage was entered into; I suppose that is a medical possibility, is it?—It is.

9024. But it was discovered after the marriage?—I do not think we should be in favour, in those circumstances, of voiding the marriage.

9025. I just wondered, why? From the point of view of the other party and from the point of view of the medical desirability of not continuing the marriage?—These considerations are unaffected, but it might be presumed that if the marriage is voided there is some hardship on the party who is suffering from the grave disease.

9026. I quite see that.—And we feel it would not be justifiable to put this hardship upon him if he had not known of this disease, but we feel that it would be perfectly justifiable to do so if he had entered into the contract knowing this. (Chairman): Might I suggest another means? There might be a child on the way.

9027. (Lord Keith): There could be either way, even if the party knew of it.—(Dr. Walk): Although we are approaching this from the medical point of view, we are concerned with the patients as individuals, all the more so because we are psychiatrists, and we do want to minimise hardship. We do not want to set ourselves up as medical dictators, ruthlessly destroying marriages for the sake of some eugenic reason, and we feel it would be inequitable to go further than we have done. It would really mean that almost any person might be in a state of criminal insecurity, because at any moment some grave disease of this kind might be discovered in him or her, and he or she would then be in danger of his or her marriage being dissolved. We felt therefore that we should confine our proposal to those cases where it seems an equitable thing to do.

9028. What is at the back of my mind is that in the case of insanity supervening after the marriage, such considerations do not exist at all. It is the insanity which is the ground for divorce, there is no question of either party knowing anything about it or disclosing it?—No. I think I was asked that question last time, as to why insanity should be singled out from other diseases; it has to be singled out in the same way as it has to be singled out as a civil disability, and so forth, but even there the safeguards we have wished to maintain, such as the year's residence in hospital and the extreme unlikelihood of recovery, were all meant to safeguard the interests of the patients and protect them from undue harshness.

9029. (Mr. Beloe): In paragraph 19 of the English memorandum, you speak of "some grave disease or abnormality likely to be detrimental to the happiness of the marriage, or the health of the children". Suppose this abnormality were only detrimental to the happiness of one of the children, and there were two or three children?—(Dr. Hobson): You are thinking particularly of hereditary disease?

9030. Not necessarily. You said "abnormality". It might be an abnormality, might it not, which affected a father in relation to one of his children, and not all of them? He may have some sort of dislike for one child and not for the others?—I am sorry, I do not quite understand the point. I can give you an instance of this kind of thing: take haemophilia, for example, where the danger is entirely to the male children, because the disease does not exist in the females although the females transmit it. Although it would not be detrimental to the health of the females, it might be detrimental eventually to their happiness by reason of their themselves being in danger of producing an affected male child, but we will take it here, for the sake of argument, that haemophilia affects the boys but not the girls. Therefore, if there is one boy and one girl of a marriage that would be the kind of instance Mr. Beloe has in mind, where the danger was only to one of the children and not to the other.

9031. (Chairman): May I venture to point out that the words are "... likely to be detrimental to the happiness of the marriage, or the health of the children"? It is not limited to existing children, therefore I imagine that haemophilia under your proposal would be detrimental, because any after-born child might suffer from it. Would not that be the answer?—Yes.

9032. (Mr. Beloe): That helps me very much. Then, as I understand it, you propose that such conditions as psychopathy, alcoholism, drug addiction, and so on, would constitute "conduct, wilful or otherwise", as defined in paragraph 41 of your memorandum. Is that right?—(Dr. Walk): Our contention is rather that these conditions should only be regarded as grounds for divorce if they do in fact lead to conduct of that kind, but should not be so regarded if they are harmless; in other words, each case should be considered individually, as to whether it has in fact led to this kind of conduct or not.

9033. Did you not a short time ago say that you did not want to be unfair or unkind to a spouse? I imagine that alcoholism may be the fault of a person, but psychopathy and personality changes following a leucotomy are not the fault of a person, are they?—That is so.

9034. So that you would really classify these two conditions in somewhat the same category as insanity, would you not?—We would; as we have said elsewhere, in regard to such conditions we feel that both medical requirements and individual fairness suggest that the court should concern itself more with the relief of suffering where it exists, rather than with punishment of guilt, and that therefore these conditions should be ones for which divorce might be granted, if they led to cruel behaviour, although there is no guilt in the case.

9035. What worries me is the effect on the person who is subject to these conditions, if you allow his spouse to divorce him.—I think, from our psychiatric experience, we can say that there is more suffering likely to be caused by allowing the marriage to continue if in fact there has been conduct of this kind resulting from psychopathy, than hardship or suffering to the patient who is divorced.

9036. I do see that—drug addiction is certainly, I think, is it not?—No.

9037. Can a person not be registered?—No.

9038. What actually happens to these people, if they are divorced?—Nothing.

9039. They have not got anybody to live with and take care of them?—They have not got the support of their spouse, but presumably if their conduct has been of a kind which would be regarded by a court as equivalent to cruelty, it is very unlikely that they can receive or will ever receive the support of their spouse.

9040. You think that there is some other person or institution who can care for them?—Not necessarily, but it does seem to us that in a case which has gone to the point where a spouse asks for divorce on the grounds of cruelty, wilful or otherwise, it is very unlikely that that spouse could possibly be of any use to the sufferer.

9041. That is how you would justify it in respect of the person who is suffering?—That is how we find it, from our own experience. We are dealing with cases where the suffering is entirely on the other side, where the alcoholic or the drug addict has inflicted grievous suffering and is endangering the spouse's health; we want the spouse saved from the breakdown which may threaten her, and we think that in that case the medical and humane requirements are on that side.

9042. I think I see, but will you put me right about this: in the case of a patient who has a leucotomy, it is usually the spouse who decides, is it not, whether the leucotomy shall be carried out?—I would not put it quite like that. She would be entitled to refuse her consent, but surely it is the medical opinion which really decides? Nobody does a leucotomy merely because the wife asks for it.

9043. No, but on the other hand would the surgeon carry out a leucotomy against the wishes of the wife?—Not against the wishes of the relatives, no.

9044. You see what I am rather worried about, there is the sane spouse, who may agree to a leucotomy; a leucotomy may have the effect of making the insane spouse behave intolerably, and then the sane spouse can get a divorce because of that intolerable behaviour?—Yes.

9045. But you feel that on balance the divorce should be granted?—Yes, we do feel that. We of course have had the other point of view put to us, namely, whether alcoholism, psychopathy, drug addiction, and changes of that kind, should in themselves be grounds for divorce,

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[Continued]

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and it is because we think that that would be unfair to the sufferer from these conditions that we have come to the conclusion that they should constitute grounds for divorce only if they have led to this kind of intolerable behaviour. We feel that in that case there is not likely

to be any real hardship to the respondent, because if things have come to such a pitch he is not likely to benefit from an enforced continuation of the marriage.

(Chairman): Thank you for your memorandum, and for your assistance today.

(The witnesses withdrew.)

PAPER No. 118

MEMORANDUM SUBMITTED BY THE MARRIED WOMEN'S ASSOCIATION

1. The Married Women's Association for many years has concerned itself with the social, legal and economic aspects of the institution of marriage. It views with grave concern the increase in the number of broken marriages with the consequent disintegration of family life and the inevitable adverse repercussions on the life of the nation.

2. The physical health of the children, our future citizens, may in general be better cared for than ever before, but the increasingly serious problem of child delinquency does not indicate an equal care for their mental well-being. The Council of the British Medical Association in its evidence for the Ministry of Education Committee on Maladjusted Children states:—

"The groundwork of character formation takes place in the home and anything which interferes with the stability of the family will endanger this foundation. The attitude of the community towards religion, morality and parental and social responsibility is of basic importance in setting the standard of mental health in children."

There can be no doubt that the stability of married life and of the home is fundamental to the welfare not only of the individual, but also to the welfare of the country as a whole.

3. There are today many influences at work which are inimical to the stability of marriage and family life:—

Adverse physical conditions such as widespread lack of proper housing.

Economic necessity forcing the mothers of young children to work outside the home.

The psychological effects of continued world unrest.

The tendency of parents to transfer to the State the responsibility for the material welfare of their children, while failing to inculcate in them the spiritual and moral values which protect the individual and humanity.

4. The institution of marriage must be viewed against this changed and changing background. It is to survive, it must be strengthened and given a status of increased value to both husband and wife.

5. Among the large volume of evidence the Married Women's Association has acquired in the course of its work, there emerges the fact that the marriage law itself militates against this essential development. The law has failed to keep pace with the evolution of the emancipation and prestige which women have earned in their own right outside marriage, and continues to regard the married woman as a dependent of her husband with inferior legal and economic rights, thus disregarding the value of the wife's contribution in a partnership for life.

6. The Married Women's Association calls for a revision of the traditional and existing apprehension of women as wife and mother, and for effective recognition by legislation of the economic as well as the social value of her contribution to the resources of the family and of the country. The Association asserts the conviction that the only real foundation for stable and happy marriage is that of mutual trust and respect, with both partners equal in rights and responsibilities.

7. One of the basic and most insidious factors contributing to the stresses and strains of married life lies in the economic dependence of the wife on her husband. Thus, on the one hand, engendered in the wife a feeling of resentment and, on the other, gives to the husband the power of ultimate decision conferred by economic domination.

8. At one time marriage bestowed on a woman a higher status than she enjoyed as a spinster. Today, when the

vast majority of single women can and do earn their own living, the situation is reversed. Marriage for them women entails the sacrifice of their economic independence and, in many cases, a lowering of their standard of living.

9. Recent research into this problem reveals that many married women choose to work outside the home, not so much to raise the standard of living of the family as an integrated unit, but rather to retain or regain some degree of personal economic independence. Thus, far from consolidating the well-being of the family as a whole, there is engendered an element of conflict between the individual interests of husband and wife.

JOINT PARTNERSHIP

10. The Married Women's Association maintains the principle that marriage is a partnership and that the contributions of husband and wife, whether by earnings outside the home or services within it, are complementary and equally essential one to another and to the family.

11. The partners to a marriage have equal responsibility for maintaining the home, both in the material and moral sense, and for the upbringing of the children. To acquire a family should mean in law, as it already frequently does in practice, an obligation to joint consultation with the other adult concerned, about all that involves the welfare of the family. To this end, the two spouses should be recognised by law as joint owners of the matrimonial home and of the incomes of both.

ECONOMIC PRINCIPLES

12. The conduct of marriage in economic matters should accordingly be based on the following underlying principles, namely, that:—

(a) The incomes of both spouses be regarded as the income of the partnership and disposed of by mutual agreement within this principle.

(b) There be mutual decision by the spouses as to the standard of living to be adopted for the family and as to the periodic sum necessary for housekeeping and maintenance of the family to maintain this standard.

(c) Savings from, and surplus of income over, the sum so decided upon for housekeeping and maintenance of the family be joint property.

(d) There be mutual disclosure of all income and of financial liabilities and debts incurred by either party during marriage, or before marriage if outstanding at the date of the marriage.

(e) The matrimonial home be jointly owned. All other capital assets owned by the partners at the time of the marriage to remain their individual property.

(f) In the event of divorce or judicial separation the court have discretion to make such order as to the matrimonial home and other assets as it thinks fit having particular regard to the interests of any children of the marriage.

(g) These principles apply to all marriages unless the spouses prior to marriage enter into a special marriage contract by deed.

PROPOSALS FOR LEGISLATION

13. To implement and to give effect to the above principles legislation will be required to define the rights of the spouses *inter se* and the rights of third parties against the joint property. It will also be necessary to introduce appropriate remedies for failure to comply with the obligations to be imposed.

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14. It is realised that recourse to the courts by either spouse may seriously if not fatally impair the continuance of the partnership. Consequently, the remedies proposed below are intended to discourage reference to the courts until the partnership has either broken down or is about to break down.

15. The following is an outline of the proposed legislative enactments.

A. Rights *inter se*(1) *The matrimonial home*

(a) The occupational interests of the spouses in the matrimonial home shall by law be deemed to be joint.

(b) The contents of the matrimonial home shall be joint property. Either partner shall have the right to contract out in relation to particular items, provided that it is done at the time that the particular item is acquired by purchase or by gift or by inheritance, and is recorded in writing.

(2) *Disclosure of income*

This obligation shall be imposed on both spouses. Income tax returns shall be signed by both spouses and copies of assessments shall be available to each spouse.

(3) *Mutual decisions on amount required for maintenance of the family*

In the event of disagreement between the partners while living together as to the amount required for housekeeping and maintenance of the family or as to the disposal of savings and surplus on income, either party to have the right to refer the dispute to a reconciliation panel. In the event of the refusal of either party to abide by the recommendations of this panel, the aggrieved spouse to be entitled to refer the dispute to the court.

(4) *Divorce, judicial separation, desertion*

Existing legislation to be amended:—

(i) To give the courts power in their unfettered discretion to dispose of the matrimonial home and accumulated savings and/or surplus as defined above between the spouses in such manner as seems just, having regard to the paramount interests of any children of the marriage.

(ii) To empower the court in making an order for a spouse and/or children to leave the matrimonial home, to make it a condition that the other spouse shall provide alternative accommodation to the satisfaction of the court and to order a spouse to pay the rent and other outgoings in respect of a matrimonial home or other accommodation provided as an alternative.

(iii) To empower the court to enforce maintenance orders by requiring the employer of the spouse on whom the order has been made to deduct the whole or part of the sum ordered to be paid from the remuneration of such spouse, when there has been wilful failure to maintain.

(iv) In the event of divorce or judicial separation neither partner should have the right of maintenance or secured provision against the other unless:—

(a) he or she has the custody or care of dependent children, or

(b) in the opinion of the court the capacity or opportunity to earn of either partner to the marriage has been impaired by reason of the marriage, or by illness, or by infirmity.

B. Rights of third parties

Neither spouse shall alone be able to contract with regard to the joint property.

PROPOSALS FOR THE REMOVAL OF FURTHER LEGAL DISABILITIES AFFECTING SPOUSES

16.

A. Assessment of the wife's income for tax purposes as that of an individual and not as a dependent.

B. Neither spouse to be permitted to obtain a passport for nor to remove the children from the British Isles without the consent of the other spouse or, alternatively, without an order of the court.

C. The recommendations of the Committee on the Law of Intestate Succession be implemented without delay.

D. A wife be entitled to her retirement pension irrespective of the age of her husband.

E. A wife who has been divorced from her husband should not be penalised in respect of national insurance benefit merely by reason of the divorce.

F. Claims arising out of motor-car accidents (in respect of which persons not married to one another are covered by third party insurance) to be excluded from the legal rule that husbands and wives cannot sue each other in tort.

G. Damages in case of divorce should be awarded only in the interests of any dependent children of the marriage or in cases of exceptional hardship to the offended spouse (e.g., disabled persons) and should be enforceable against the co-respondent or the woman named.

BREACH OF PROMISE OF MARRIAGE

17. It is not considered that marriage contracted under threat of a breach of promise action is likely to prove stable or successful. It is therefore proposed that damages for breach of promise of marriage should be abolished except where special damage has been occasioned or where there is a child as the result of seduction under promise of marriage, in which latter case the damages should be settled on the child.

MATRIMONIAL COURTS

18. The Association regards the existing courts as frequently unsuitable for dealing with matrimonial matters and recommends the setting up of special matrimonial courts in which:—

(a) Procedure be simplified and expedited and the cost reduced.

(b) The children's interests be separately represented.

(c) Lay persons, including at least one woman, sit with the divorce judge or registrar or stipendiary magistrate as the case may be.

19. The Association advocates that the fullest use be made of existing and envisaged conciliation and advisory machinery before recourse be had to the courts.

20. With regard to financial disputes, the Association recommends the setting up, as bodies of first resort, of reconciliation panels to which the spouses may have easy access.

EDUCATION FOR MARRIAGE

21. The correspondence and cases which have come to the Married Women's Association show that many people enter into marriage with very inadequate knowledge of the law and with considerable confusion of mind as to the duties and responsibilities of the married state. This in itself often contributes to subsequent disillusionment and unhappiness and the Association therefore warmly supports those individuals and bodies seeking to extend education for marriage in all its aspects.

22. It is not only the dissemination of factual knowledge concerning the material, physical and psychological aspects of marriage which is needed, but equally vital is education in the perception of the spiritual and ethical values involved. The Association advocates:—

(a) That for children in schools the civics course should include instruction in the rights and duties of the individual towards the other members of the family group as well as to the community. The biology or physiology course should include sex education as a part of the regular curriculum. The practical home-making crafts should have a place in the general curriculum of all schools and should be available to all pupils, boys and girls, instead of only to those of the less academic type as is the tendency at present.

(b) That discussion groups in connection with youth clubs, churches, colleges, offices, workshops and the Services should be assisted with appropriate literature and especially qualified speakers.

(c) That adults on declaring at church or registry office their intention to marry, should be given a booklet, published by H.M. Stationery Office, setting out

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in simple language the duties and responsibilities of marriage and encouraging them to seek further information from their minister of religion, doctor or marriage guidance counsellor.

23. The Married Women's Association is more concerned with positive action designed to stabilise marriage and so reduce the incidence of divorce than with legislation for divorce law reform. Indeed the Association wishes to draw attention to the dangers inherent in extending facilities for easier divorce without, at the same time, introducing constructive measures that will effectively strengthen the prestige and status of marriage.

24. The Association advocates various changes in the law designed to raise the status of marriage, notably the establishment of the principle of joint partnership.

25. The Married Women's Association believes that the recognition of husband and wife as equal in status and responsibility would produce a powerful influence contributing to the permanence and stability of marriage. Against this healthy background of mutual respect and responsibility, the young people will grow up to enter into matrimony in their turn as sound individuals and responsible citizens.

(Dated May, 1952.)

EXAMINATION OF WITNESSES

(MRS. ELIZABETH POMEROY and MR. A. NABARRO, LL.B., representing the Married Women's Association; called and examined.)

9946. (Chairman): We have before us, as representing the Married Women's Association, Mrs. Elizabeth Pomeroy, who is the Chairman of the Association, and Mr. A. Nabarro, Bachelor of Laws—do you hold any office, Mr. Nabarro?—(Mr. Nabarro): I am a member of the Legal Committee, my Lord.

9947. Your first paragraph states:—

"The Married Women's Association for many years has concerned itself with the social, legal and economic aspects of the institution of marriage. It views with grave concern the increase in the number of broken marriages with the consequent disintegration of family life and the inevitable adverse repercussions on the life of the nation."

Will you tell me first of all, how long is it since the Married Women's Association was founded?—(Mrs. Pomeroy): About eight years, my Lord.

9948. What is its membership?—In round figures, about 1,600, including branches and group members.

9949. You have an annual subscription, I suppose?—That is right, my Lord.

9950. Before I ask you any questions, and I have very few because your memorandum is very clear, do you wish to add anything or to make any statement?—I should like to say that my colleague and I are very sensible of the fact that we are at the end of a long line of witnesses, who, if I may presume to say so, have been questioned and listened to with the utmost patience. We shall therefore have great care to spare you any tedious repetition. On the other hand, as we are coming after a number of witnesses, we have one or two comments which we should like to make briefly on views put forward by other associations and individuals.

9951. Certainly.—First of all, the evidence given by these other witnesses has confirmed our Association in the view that it is essential to raise the status of marriage, and that our proposal of joint partnership is a constructive one. We therefore feel that we in no way wish to retract from the views we have put forward. Certain witnesses, for instance, have suggested that it would be sufficient for the wife to receive an allowance from the husband—in general parlance this is called "pin-money". We cannot agree with this, for this reason: we feel that although it might offer a measure of relief in some homes, it would in fact perpetuate the inferior status of the wife, in that she would be regarded as a dependent and in some cases as an employee. It has been suggested by one witness that she should receive wages for her care of the home. This we cannot subscribe to. Further, we should like to suggest that in many cases it is not major financial discord which causes the trouble in marriage, but constant minor pinpricks. To quote an actual case: a man kept his wife, he gave her only the bare minimum necessary for family living; his fifteen-year-old daughter, as was quite natural at her age, was wishful to buy a small box of powder. She found, week after week, that her mother was unable to produce the 2s. 6d. necessary for this, but, on appealing to her father, on what was known as one of his good days, she was given 5s. 6d., as a grand gesture, which showed up in sharp contrast what appeared to be the mother's meanness.

Certain witnesses put forward the view that children are very unfortunately affected by unhappiness in the home, and that they themselves are daily prone to produce, when they grow up, the same unhappy pattern as their parents. It is not usual for them to revolt against it, it seems that when they marry they are very apt to produce the same unhappy conditions. That is one reason why we feel there is great necessity for a reform here.

We should like to stress the fact that our Association is representative of a cross-section of the population. Our members are drawn from all walks of life, from all income groups, from various political opinions and religious persuasions. Amongst our Vice-Presidents we have Mrs. Corbett Ashby, Lady Peckham-Lawrence and Dr. Edith Summerskill. We therefore feel that we do not represent any one particular income group, though in fact a large number of our members come from the lower income groups, and they in fact are the ones for whom we are particularly fighting. In the higher income groups it is customary today to make arrangements on marriage, but with the weekly wage earners, the wife is, we feel, in a position which requires assistance.

The presence here of my male colleague indicates that we welcome men members, which we have had from the beginning of the Association. As well as having extensive experience in matrimonial cases he is, like so many of our members, a happily married man. After all, equal partnership applies equally in favour of the husband as well as the wife, and under the proposals put forward in our evidence there are a number of disabilities, under which the husband suffers under the existing law, which would be removed. I think it would be meet for him to speak on that later on. The husband whose marriage is based on equal partnership gains a full partner to share his financial and other responsibilities.

I would end by saying that our members support us for various reasons. Some because their marriages have foundered and they would seek to spare this unhappiness to others. But there are the many who have found joint partnership to be a happy and successful model viewed, and therefore have a keen desire to see it a general practice.

9952. Thank you very much. May I say that the questions which I have to ask are rather directed to the practical aspect of the suggestions put forward, and possibly it would be better to address the questions to Mr. Nabarro? As you see, you are really asking us to suggest legislation, and of course, before suggesting legislation, we want to clear up as far as possible any difficulties there are. Therefore, I shall be putting certain difficulties, and seeing how you would deal with them. They are not put, I may say, with any lack of sympathy with the objects you have in mind. In paragraph 7 of your memorandum you state this note:—

"One of the basic and most insidious factors contributing to the stresses and strains of married life lies in the economic dependence of the wife on her husband. This, on the one hand, engenders in the wife a feeling of resentment; and, on the other, gives to the husband the power of ultimate decision conferred by economic domination."

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[Continued]

Now may I come to the concrete suggestions? First, you suggest joint partnership, and in paragraph 12 you say:—

"The conduct of marriage in economic matters should accordingly be based on the following underlying principles, namely, that:—

(a) The income of both spouses be regarded as the income of the partnership and disposed of by mutual agreement within this principle,

(b) There be mutual decision by the spouses as to the standard of living to be adopted for the family and as to the periodic sum necessary for housekeeping and maintenance of the family to maintain this standard."

That I link up with your comments in paragraph 15A (3), under the heading "Mutual decisions on amount required for maintenance of the family". To put it shortly: if the parties differ, either of them can refer the dispute to a reconciliation panel, and if the parties will not abide by the panel's recommendations, the aggrieved spouse can go to the court. Then, principle (c) is:—

"Savings from, and surplus of income over, the sum so decided upon for housekeeping and maintenance of the family be joint property."

I wanted to ask you this: is it your intention that that shall apply only to income resulting from the work of the spouses, respectively, or would you apply it also to investment income which either of them happens to possess? Would you say that that should be joint property also?—(Mr. Nabarro): Yes, my Lord. The Association feels that it should apply to all income wheresoever derived.

9053. Then the result would be that neither party would have an income which is his or hers absolutely to do with exactly as he or the wishes?—No, my Lord. It would be a matter for joint decision.

9054. I can quite see that, as regards management of the home, and so on, but would it not raise a great difficulty if the income of one or other of them was derived from a business? Let us take the case of a woman who has a dressmaking business or something of that kind. It would be rather embarrassing, would it not, if she has not complete power to decide what should be done with the profits, whether they should be ploughed back into the business or what should be done with them, and has to consult her husband in everything? The same of course would apply to a man who had a business. How would you deal with that?—This joint partnership, I know, is often looked upon as something rather revolutionary, but in fact it is what is practiced by most happily married middle-class couples, or middle income group couples, today. A husband will probably tell his wife that he has had a good year but has got to put the money back into the business, and the wife says no more about it. If the parties can agree that that sort of thing should be done, then under our proposals nobody is going to suggest that the court or some other person should come and interfere in that. But of course it is rather more important in the lower income groups, where they are less likely to have businesses of their own and may both be earning from employment outside the home.

9055. I can see that in many homes that is done at present, but you are contemplating giving a legal right. I will take, for example, the husband who has a business. The husband would have to consult his wife, who might know nothing whatever about business. If she said, "No, John, I do not think you should put it back into the business, you should give me my half", she would have a legal right to do that. That is what makes me wonder if it is not going too far to bring in legislation to do that. You see the possible difficulty?—I do. It is one to which we have given anxious consideration. It is not suggested that at any time during the marriage the husband and wife should go to the court or reconciliation panel and say, "Please divide up this joint property". The intention and hope is that it would be joint property in the true sense of the word, that is, property belonging to both and dealt with by the mutual decisions of both.

9056. I quite see that, but the difficulty arises when the mutual decision is not forthcoming?—I agree that if the mutual decision is not forthcoming, and the husband or wife says, "This money must remain in the business", and

the other says, "No, we must go on a cruise to the Mediterranean", then it would involve recourse to some panel. We do not want in the first place to send husbands and wives in that position to the court, but rather to a panel of honest people who would be able to help them in a practical way with their difficulties.

9057. It is sometimes said, you are probably familiar with it, that, in an ordinary business partnership, as long as the partners are friendly it works whether there is a partnership agreement or a legal arrangement or not, but where the partners are not friendly, no legal arrangement can put it right?—I can only add to that that there are partnerships where everything goes very well because there is a document hidden behind the scenes, the terms of which are known to both parties. Therefore they know, because it is recorded, what their rights and liabilities are. In the same way, I should have thought that a statute known to persons who get married would make them aware of the legal position and would tend to induce them to order their lives accordingly.

9058. That is a very fair point. I entirely appreciate it. Now will you turn to paragraph 12 (g):—

"These principles apply to all marriages unless the spouses prior to marriage enter into a special marriage contract by deed."

Would you allow people, if they thought fit, to say, "The statute—assuming there is one—shall not apply to this marriage"?—Yes, but only by deed, my Lord.

9059. It has to be recorded?—Not only recorded, but recorded in a solemn form so that it shall be brought home to both of them that they are departing from the normal principles which would otherwise apply to their married life.

9060. In paragraph 12 (f) you say:—

"In the event of divorce or judicial separation the court have discretion to make such order as to the matrimonial home and other assets as it thinks fit having particular regard to the interests of any children of the marriage."

But I understand, passing to paragraph 15 A (4) (i), that what you contemplate is the matrimonial home and accumulated savings and your surplus as defined above. I want to be sure of this, are you suggesting that it should apply to capital assets, investments belonging to the husband or wife which belonged to them before marriage, or not?—No, only accretions during marriage.

9061. I thought that was the intention and that really appears from paragraph 12 (c):—

"All other capital assets owned by the partners at the time of the marriage to remain their individual property."

Is that so?—Yes.

9062. And with these you did not intend the court to have any power to deal?—No, my Lord.

9063. In paragraph 15 A (4) (iv), you say:—

"In the event of divorce or judicial separation neither partner should have the right of maintenance or secured provision against the other unless:—

(a) he or she has the custody or care of dependent children, or

(b) in the opinion of the court the capacity or opportunity to earn of either partner to the marriage has been impaired by reason of the marriage, or by illness, or by infirmity."

Now I want you to take the case of an ordinary woman of sixty. She suffers from no particular physical disadvantages, but she is sixty, she has been married for quite a long time and has never learned any trade or business. By your provision, supposing she divorced her husband for cruelty or adultery, she would have no right to maintenance?—Yes, my Lord, she would. It would rather depend on the age at which she got married. If she was married at the age of thirty or thirty-five, presumably she would have had some trade or career, or then if she could take that up again, and she twenty-five intervening years of marriage had not in any way impaired her capacity to take it up or her earning capacity during that career, then she would have no right. But if the marriage had impaired her ability to take up her former occupation, or she had no former trade or occupation,

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[Continued]

That sort of article should clearly continue, and public opinion would wish it to continue, in the family in which it has been for so long. (Chairman): You are dealing here with exceptional cases, where some special article comes into the possession of one or other of the spouses.

9085. (Sir Frederick Burrows): The memorandum does not say that. It says:—

"Either partner shall have the right to contract out in relation to particular items, provided that it is done at the time that the particular item is acquired. . . ."

You do not mean exactly what you say?—We do mean what we say. We do not see how in law one can distinguish between an heirloom and some other article, but we feel it is reasonable to assume that except for special articles parties will not go to this trouble, therefore they will be joint property. If they do go to this trouble in respect of every-day articles, this provision would apply, but if the Commission can think of a better way of dealing with the point we have in mind we should be very happy indeed.

9086. (Chairman): It is a perfectly general provision, as Sir Frederick has said, but in practice it will probably only apply in very few cases, where the husband or wife either buys or acquires by inheritance a particular article and says, "Now I do not want that particular article to go into the common stock, let us record it in writing". That is all it is?—That is what we had in mind.

9087. (Sir Frederick Burrows): Thank you for your explanation. Then, in paragraph 18, under the heading, "Matrimonial courts", you say:—

"(a) Procedure be simplified and expedited and the cost reduced."

Will you please tell me how you envisage the procedure being simplified and expedited and the cost reduced?—I should say that the one concrete point we make in our memorandum is in regard to informal reconciliation panels. We feel that they could do a great deal to sort out marriage problems before they become serious. That would simplify procedure and reduce costs. Apart from that, there is the special matrimonial court which has recently been set up in London. That is the sort of thing we had in mind.

9088. Would that simplify and expedite procedure?—We feel so.

9089. Would it reduce costs?—We hope so.

9090. Then, in paragraph 18 (b), you say: "The children's interests be separately represented". Do you mean that there should be separate legal representation for the children?—(Mrs. Pomeroy): We do feel that at present too often the children become a sort of bargaining counter in these cases, and that this should not be so. If they were separately represented, this would go far to stop the very difficult and unfortunate situations that arise when one or other parent uses the child or children of the marriage to bargain with when it comes to a question of divorce or separation.

9091. Will you tell me who will instruct the solicitor to represent the children?—(Mr. Nabarro): It is not contemplated, I think, that they should be represented by a professional, legal person, but rather by an officer of the nature of a probation officer, who would be attached to the reconciliation panel, and whose duty it would be to make some enquiries concerning the effect of the matrimonial difficulties upon the children and to report to the panel or court concerned.

9092. Then, as to (c):—

"Lay persons, including at least one woman, sit with the divorce judge or registrar or stipendiary magistrate as the case may be."

How many lay persons have you in mind?—My colleague says a maximum of two.

9093. So that would mean a bench of three?—Yes, normally.

9094. (Mr. Flecker): In paragraph 19, you say:—

"The Association advocates that the fullest use be made of existing and envisaged conciliation and advisory machinery before recourse be had to the courts."

Is this to be compulsory? Are you going to say to people, "We will not try your case until you have been to a conciliation board"?—Yes, Sir.

9095. And, in paragraph 20, you say:—

"With regard to financial disputes, the Association recommends the setting up, at bodies of first resort, of reconciliation panels to which the spouses may have easy access."

That, too, is to be compulsory?—Yes.

9096. You know that the marriage guidance councils are doubtful about the wisdom of recourse to reconciliation machinery being made compulsory? They seem to think that might take a good deal of their usefulness from them.—(Mrs. Pomeroy): We have followed with interest that evidence. We appreciate the points put forward. On the other hand, we feel that by the time the partners get to a court there is so much bitterness that there is practically nothing that can be done. We may be optimistic, but we feel that at the intervening stage there is more chance of the partners coming together.

9097. If a party has recourse to a magistrates' court to obtain a separation order, is the magistrate or the clerk to say, "Have you been to a reconciliation panel?", and then, if the party says "No", will he then say, "I am afraid your case cannot come up until you have"? Is it your view that at that stage it cannot do any harm and in fact might do some good?—Yes, if the reconciliation panel existed. Might I say that we are not entirely happy about the name? I do not know that I could be persuaded to go before anything called a reconciliation panel. No doubt a more suitable name could be found. We feel that if such a panel existed people would be inclined to go to it of their own volition before going to court.

9098. (Mrs. Jones-Roberts): You did rule, my Lord, that items A to F in paragraph 16 are outside our terms of reference, but with your permission, I should like to put a question on item E. (Chairman): I would not like definitely to rule them out, but that is my present impression. (Mrs. Jones-Roberts): I should like to put a question on item E. The loss by a wife of her pension rights on divorce has been frequently put to us as an objection to a suggested additional ground of divorce, namely, divorce by either party after a number of years' separation. Will you tell us which of the national insurance benefits you have particularly in mind?—Under the existing Act, on divorce a woman loses her right to the pension to which she would have been entitled by virtue of her husband's contributions. This means that a woman may have been married for thirty years or more, during which time her husband has paid contributions which covered her as a married woman. When they are divorced those contributions can in no way help the wife. As a divorced woman, she loses all rights to that pension. If he marries again those thirty years of contributions go to the second wife. We feel that this is most inequitable.

9099. Really the answer is that the particular benefits that you have in mind are retirement pension and widow's pension?—That is right.

9100. Because the other benefits, sickness benefit, unemployment benefit, would be rather associated with the worker than with the wife herself. Let us deal with the retirement and widow's pensions. I want you to envisage a position where the man has married a second time. In such a case, you might have simultaneously two women drawing benefit under the same national insurance contribution. I would like your help as to how that particular difficulty could be got over, because, obviously, actually the scheme has been worked out very tightly and it might upset the balance of the scheme if there were a large number of such cases qualifying for benefits?—We feel that the basic fault here is that a married woman does not contribute in her own right. We see no reason why a married woman may not contribute in her own right even if not gainfully employed. In this event, it might be possible to reduce proportionately the husband's contribution, otherwise this would be a very heavy load on the family budget in the lower income groups. If the wife contributed in her own right, in the event of divorce she would be entitled to the benefits accruing from her contributions.

9101. Really you are in favour of a married woman being allowed to contribute in her own individual capacity?—That is right.

9102. Otherwise you might have to devise some scheme whereby if a man marries a second time and has a divorced wife living, he would have to make a special

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[Continued]

contribution, and even that might not pay the difference?—We would prefer to see the married woman contributing in her own right, irrespective of whether gainfully employed outside the home or non-gainfully in it.

9103. (Lord Keith): After divorce she would continue to make contributions herself?—That is right.

9104. (Mrs. Jones-Roberts): Another situation might arise. She might go out to work again, in which case her position would be very much simpler?—That is so, but if she went back to work after a long period of being in the home she would still lose all these previous years of benefit. The money to which you are entitled under the scheme depends on the number of your contributions. If she was regarded as having contributed for twenty years, her benefits would be that much larger than if she was regarded as having contributed for two years before marriage and ten years after divorce.

9105. So really your recommendation is that a married woman should be allowed to contribute as an individual?—Yes.

9106. Going back to paragraph 3, where you give as one of the reasons that make for the breakdown of family life, that of economic necessity forcing the mothers of young children to work outside the home, I wonder if your Association has any definite views on the question generally of married women going out to work during the marriage?—We have discussed this matter. We feel that it is very much for the individual to make the decision, but by and large, of course, it is not a good thing for the mother of very young children to go out to work. We feel that that is a hardship on the children, and that, good as day nurseries are, they are not ideal, and that it is preferable, where there are very young children, that the mothers should not go outside the home. But we would not interfere in any arbitrary fashion with the views of parents as to whether or not they go out to work. The point we make here is that too many women are forced to go out from economic necessity. In some cases it is because they are kept very short of money by their husbands and are quite unable to provide those little extras they would like to for their children.

9107. With your emphasis on the economic dependence of women in some cases during marriage, I would have expected you to favour the point of view that, where possible, you would like to see the women working. I like it that it is the presence of young children that makes you qualify that?—Not necessarily. We regard the work in the home as of great value. We do not think that work outside the home is necessarily the best contribution a wife can make to the home.

9108. I want to put another point of view to you. We have been told, in regard to juvenile delinquency, that there is the supposition that if the mother goes out to work the home is neglected. If a woman is competent and plans the work in the home, that does not necessarily follow, going out to work does not necessarily have a bad influence?—That is certainly true, but it depends to a great extent also on what arrangements she is able to make for the care of the children during her absence. And that comes back to the economics of the situation. If the wife earns sufficient to pay for the right kind of care for the children, or if she has a female relative who can stop

into the breach, the children do not necessarily suffer from the mother's absence. But it is in the lower income groups, where the mother earns very little outside the home, and the children are left entirely to school and the street, that we feel unhappy results often occur.

9109. (Mr. Mace): Mr. Nabarro, I do not understand why your proposal in paragraph 15 B is necessary under your scheme. At present the wife has the right to pledge her husband's credit?—(Mr. Nabarro): Yes.

9110. You propose to deprive her of that right?—Yes.

9111. And yet you do not propose to give both the partners the normal right of partners in an ordinary partnership to pledge the partnership's credit?—We felt that there would be great difficulty, certainly in the early years of a new scheme of this sort, if either party could contract with regard to the joint property. You might get husbands doing that, and though the wife would have a right of recourse to the courts in such a case, that might turn out to be valuable.

9112. Do you realise the difficulty which you are putting on general traders if they can only trade with a married person, either by having both parties present saying, "Yes, we want to buy it", or by having something in writing signed by both parties?—I see the difficulty. I do not think we visualise, for instance, any difficulty in the wife going to the local shops and buying the groceries or provisions, or the husband making ordinary every-day contracts. What we had more in mind was dealing with the matrimonial home and its contents, and capital investments, savings.

9113. You see my point? Personally I am in difficulties in seeing why you want to put that provision in at all.—Otherwise if either party can deal with the joint property, what is to prevent a husband, or a wife for that matter, who finds that the marriage is not going as well as he or she expects, from going off and selling some valuable item of furniture, even selling the house if the other spouse is away for a time?

9114. (Chairman): Might I suggest that the difficulty raised might be met by a rather more limited proposal, specifying what are the matters as to which they are not able to contract? As Mr. Mace says, as your proposal stands today, nobody could safely supply goods to either of them.—I think the point is absolutely sound. We did not fully see the effect of our proposal, and it would certainly have to be modified, to allow parties, without having to contract jointly, to deal with ordinary and limited matters, and perhaps also a little more.

9115. I will not pursue the practical difficulties that still remain.—I do see the difficulties and some modification is required. (Mrs. Pomeroy): In Norwegian law either party is able to buy things which are considered a daily household expense, but neither party could go off and buy an expensive carpet or a suite of furniture without consulting the other. Under Norwegian law that would not be considered a daily household expense. (Chairman): That is very interesting, we must study that. I can see that the provision might work, if it is limited to certain articles.

Thank you for your memorandum and for the help you have given us this afternoon.

(The witnesses withdrew.)

PAPER No. 119

MEMORANDUM SUBMITTED BY MRS. ROBERTA HOLT WILSON, J.P.

1. I wish to lay before you certain reasons why the grounds for divorce should not be extended to include compulsion against the will of one party where there has been separation for a certain period.

2. On the several occasions when I have been present at the open hearings of evidence submitted before you, it has appeared to me that the motives of the unwilling partner to divorce are always represented as being either vindictive, or a clinging to financial advantage.

3. My objection to divorce by compulsion is not aimed at supporting either of the above attitudes, but rather at the recognition that there are sometimes unexceptionably

good reasons for a refusal to divorce, unconnected with the above, and that, where these genuinely exist, it would result in a general lowering and impoverishment of the status of marriage if they were not upheld and respected.

4. I am not rigidly against the principle of relief by divorce under all circumstances, particularly in the case of younger people who have found some serious incompatibility, and who, having made a genuine effort to overcome it and failed, are both anxious to make a fresh start with a large part of their lives before them. But I think it should be borne in mind that even happy marriages are subject to periods of strain, and that any

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amendment of the law should scrupulously avoid all possibility of adding to those stresses and strains, even to the remotest degree.

5. In the effort to bring relief to those cases of hardship where undoubtedly a divorce should take place—and is being obstructed by a coaxed partner for unworthy motives, who no longer in fact feels the smallest attachment to the other spouse, and whose last wish would be a resumption of marital relations—it should be realised that there are other cases where the deserted spouse is actuated by quite other motives, and where a divorce by compulsion would be the cruelest injustice, resulting in a permanently broken home, and would reward with all the prizes the intervening party whose ruthless, callous and unscrupulous conduct caused the whole tragedy.

6. In these days of lowered sexual standards, when promiscuity is rife, even amongst women of an educated and respectable class, it should be realised that many marriages are open to the temptations and allurements of "other" men and women, particularly of young women, and that, by extending the grounds for divorce to include compulsion against an innocent, faithful and devoted partner, the difficulties of weathering the storms and stresses of marriage would be immeasurably weighted and increased.

7. The knowledge that successful intervention would be followed in due course by the certainty of divorce, and the opportunity of supplanting the former spouse in the full status and benefits of marriage, would be opening the door wider to this sort of marital wrecking, which now not infrequently takes place, and would surely increase the number of marriages broken up for this reason.

8. I do most earnestly request that nothing should be done which removes the last shred of security in the married state (except for some mental fault) of the woman who has reached middle age in devoted service to a happy home and family, and in self-effacing, loyal partnership with a loved husband, perhaps through a youth and early middle age of struggle to build up a comfortable financial position. There are many such, and they are not in the habit of being self-assertive about their rights and dues.

9. A factor in these cases which must not be overlooked is the fact that a number of men go through a period of great unhappiness at this age; others who have been steady while their earning capacity is moderate, lose

their heads when a degree of affluence is gained; others have become unstable after their war-time experiences and a period of separation from their homes and families; but whatever the predisposing cause, some women of fifty find that they do not receive the consideration which their part in their husband's success has earned, and instead of sharing in the small luxuries and ease which the family circumstances can now afford, find their loved husband lured from them by some loose young woman, with the possibility of being forced into divorcing him with a breaking heart, and having to face a lonely and imperious old age on the very meagre allowance which is then their portion.

10. I feel that, when a marriage has been in every sense a marriage—I can say no more—for twenty or more years, when a home has been shared which it was obvious to all was a happy one, when a family of children has been splendidly reared, and a good and prosperous life has been built up together in partnership—I feel that such a marriage should be accepted as irrevocable and immune from chance and change. Loose young women seeking excitement and a good time, should know that this wife's position is secure, and this home is not for breaking. And the husband, even if temporarily off his balance, should be made to realise that the law will not support him if he turns from his wife after a lifetime together, that he will not be able to drag her against her will through a divorce court, and then make her live on a pittance while he spends the money she helped him to earn on some woman young enough to be his daughter, for whom he has a middle-aged infatuation, which he can then cloak with a certain respectability.

11. It is a real and distressing fact that there are women who are quite unable to stop loving a man after a lifetime together, no matter how badly he has behaved, and that the bitterness and heart-break of a forced divorce would be as near unbearable as it is possible for anything to be, quite apart from other considerations.

12. I should immensely appreciate the opportunity of appearing before you, to answer questions, and to elaborate this memorandum. I would make it convenient to appear at any time or place that you may be pleased to appoint, and hope very much that, as possibly my memorandum strikes a somewhat unusual note, I may be permitted to do so.

(Received 6th November, 1952.)

EXAMINATION OF WITNESS

(MRS. ROBERTA HOLT WILSON, J.P.; called and examined.)

9116. (Chairman): Mrs. Wilson, you have made an offer to elaborate your memorandum and answer questions. We felt that we should like to hear any additions you might like to make to your memorandum and to put one or two questions to you, though I do not think they will take very long. Now do you wish to add anything before we ask our questions?—(Mrs. Holt Wilson): My Lord, I have several remarks I should like to make.

9117. I think the Commission would like to know whether what you are about to say is being said from your experience as a County Councillor and a Justice of the Peace and your general experience of life, or whether it is an elaboration of your own present position?—My Lord, I am speaking entirely generally, not as a County Councillor and a Justice of the Peace. I have no case-book, and the matrimonial court sits infrequently in the experience of a country magistrate, though the results of broken marriages are frequently before me, particularly as a member of the Children's Committee. But I am particularly interested in these social questions in both those capacities, and I also wish to speak as a member of my generation who is greatly struck by the number of long-standing marriages—which one has known as being happy for a great many years—while come to a break-up nowadays, and the large number of middle-aged and even elderly people involved in such cases among one's acquaintances. It would seem to me that in cases of people of that age, the predominant cause is that the man walks out, as they say, and I suggest that these cases today constitute almost a special problem. The reasons are not

far to seek. There is the sexual unrest induced in many men after their war-time experiences, the unbalance which is present sometimes at this age, and the present laxity of moral standards generally, because of which the difficulties of keeping the marriage together are greatly multiplied. I think the effects of marriage break-up at this middle age are worse on the wife, who necessarily has a great and long-standing attachment to the man and has put a great deal into the marriage for many years. She does not wish, even if she could, to marry again, therefore she has less resilience, and the effect of the break-up is very sad. All the witnesses before you have agreed that the worst effect is on the children, and in this type of case there are often children of school age or in their teens. On these the effect is devastating, not only because the concept which they get of marriage is lowered, but also because they lose respect for one parent, and that has a deplorable effect upon children. In no type of case would more unfavourable repercussions occur than if divorce by compulsion were allowed. I think you will agree that the consensus of opinion before you has been that the emphasis should be shifted on to reconciliation in the case of all marriages, but it would seem that specially in this type of case it should be so, where there is so much attachment, and I assume that the members of the Commission are aware that very definitely at present this is not the case. Not only is more spent on legal aid to facilitate divorce than on marriage guidance, but the whole emphasis is on divorce. I think all those who have been in any way connected with such cases would agree with this. Everything tends to push

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a marriage towards divorce; all advice from lawyers and relations and well-meaning friends tends in that direction, and the forgiving partner has to be very strong-minded to resist this general climate of opinion, which does not support them in their attitude, but supports the attitude of those who, to put it rather strongly, have not the guts to stick their marriage through any difficult period. It seems as if divorce-mindedness of this kind must be tackled by some positive action, and I suggest to you, with all respect, that one cannot both promote and strengthen the machinery for reconciliation and make divorce easier at the same time. It is bad psychology, one cannot have it both ways. The chief supporters of easier divorce, whose opinions I am opposing, advocate it on grounds of expediency. They fall into two categories, I think; those who regard their attitude as realistic, as making the best of a bad job, and the humanitarians who are sincere people seeing only one side of the question and not foreseeing the consequences of what they are advocating, especially those who wish for divorce by compulsion against the will of one partner. It seems as if the inevitable consequence would be, firstly, that adultery would be rewarded; secondly, that desertion would be encouraged; and thirdly, that intervention by a third party would be made worth while.

Easier divorce, I think it is hardly possible to deny, makes successful marriage more difficult. If divorce is difficult it tends to make couples try again. I was much struck by the case of a girl I knew recently who was going to be married to a Roman Catholic. Her parents in their early efforts to discourage the engagement put it to her that she must face the fact that, if things went wrong, and did not work as she hoped, she would not be able ever to get her freedom, and her reply was, "It will just have to be made to work". I do feel that positive action is necessary to reinforce success in marriage and not negative action to smooth the way to divorce. The humanitarians say, "Do not limit divorce at the expense of the happiness of people, husband and wife". But I suggest to you that we should not relax it at the expense of the happiness and stability of children, and is the long run therefore of the nation. They say that it is unjust to the lovers, the people who engage in romance at middle age, but it is unjust to faithful and loving wives and in natural justice these are worth most consideration. At least in the first case the damage is limited to the contracting parties. Other law-breakers pay for their misdemeanours, and marriage-breakers let loose disruptive influences with an enduring effect. I think, if it is possible, that it is most important to get the concept over to young people that marriage is a job, and a difficult one, but a very rewarding one, and also that marriages sustained in loyalty and faithfulness, even to an unworthy partner, are of more value than those whose reserves of character do not have to be drawn upon quite so much. I suggest, my Lord, that divorce by compulsion would be a death blow at the institution of marriage and make a right concept impossible, and would also make a perfect mockery of the marriage service. What we cry for—"let us never be confounded"—would indeed be the experience of many in that case. Instead of one alleged injustice we should create many, and would make home-working a profitable career. Briefly, I recommend that the length and standing of a marriage should be very definitely taken into consideration in granting facilities for divorce. It seems to me that it is quite ludicrous to attempt to claim incompatibility after ten or twenty harmonious years of marriage, or to say that one has discovered one has made a mistake. But these attempts at self-justification are frequently made. Other men I have known have been more honest and admit that now they are rich, they want someone smarter or they want a younger woman or they want their freedom. But I claim that a marriage is not dead if one spouse is forgiving. I consider that it would be highly immoral to refuse divorce if one refused at the same time to take the partner back. That would be most wrong and I would not support it at all. I suggest that the Commission should consider the statistics, which show definitely that there is an economic factor in this type of desertion by most of that age, in which frequently the wives have been through all the bad times and the mistresses come in only for the good times. The presumption inevitably is that they would soon fade away if the bad times returned. Those who are in favour of extension of divorce, I feel,

cannot answer the question satisfactorily—"Are there more happy marriages, homes and children now than when divorce was more difficult?" The inevitable deduction is "No". Extension of divorce facilities would relieve some hardships to create many others, and so far divorce certainly has not reduced married unhappiness.

9118. Thank you. As I understand it, your suggestion, as distinct from the reasons for it, lies in the first paragraph of your memorandum, where you say:—

"I wish to lay before you certain reasons why the grounds for divorce should not be extended to include compulsion against the will of one party where there has been separation for a certain period."

—Yes, that is the chief point I am proposing.

9119. I ask that, because in paragraph 4 you introduce various other matters of quite a different nature such as divorce for incompatibility. As I read your memorandum, what you want us to consider is the suggestion made in the first paragraph?—Yes, and also the suggestion that the age of a party is a very important factor in divorce.

9120. That is a complication which I am afraid I do not altogether understand. Are you suggesting that there should be different divorce laws according to the age of the parties or the length of time they have been married?—I am suggesting that in no circumstances at any age should divorce by compulsion be allowed.

9121. I appreciate that. I thought that was your only suggestion and that other observations were introductory to it, but if you have other suggestions then I have misunderstood you. Are you bringing forward for the consideration of the Commission a suggestion that the divorce law should be different for people of different ages or people who have been married for different lengths of time, or are you simply saying that in no circumstances should there be divorce by compulsion against the will of the parties?—I am saying that, but I am also putting forward for your consideration the problem which has arisen in the break-up of marriages of people of middle age and the particular hardship involved for the wives, and am putting forward for your consideration the fact that such marriages should not be allowed to break up if it is possible by any legislation to keep them together.

9122. I follow that, but I have not made myself quite clear. It is one thing to say, "What I want you to do is to say in no circumstances shall there be divorce by compulsion". That is perfectly clear, and whether it is right or wrong, we understand it. If you are saying, "It is worse in one case than another", we also understand that. Are you saying, "Never let there be divorce by compulsion; but it matters more if people have been married a long time"?—That is what I am saying.

9123. (Lord Keith): I thought that your special point was this, that where a marriage had lasted a long time, let us say twenty years, and the parties were well on in life, divorce was an unusually bad thing and there should be some restriction of divorce in such cases. Am I putting it correctly?—No, I think it is more that in such cases divorce by compulsion would be particularly cruel and unjustifiable.

9124. Then you are not against divorce on an existing ground where the marriage has lasted for some twenty years and the parties are well advanced in middle life?—If there is at present nothing to prevent such people getting a divorce on existing grounds.

9125. You are not making a special proposal where marriage has lasted for a very long time?—No. (Lord Keith): I am sorry, I misunderstood you. I thought you had some special point in regard to marriages that had lasted a long time.

9126. (Chairman): In other words, you are not suggesting any alteration in the divorce law? You have come here to advocate that a certain suggested change in the divorce law should not be made?—Yes.

9127. That being so, I think I have only one question to ask you. In paragraph 7 you say:—

"The knowledge that successful intervention would be followed in due course by the certainty of divorce, and the opportunity of supplanting the former spouse in the full status and benefits of marriage, would be opening the door wider to this sort of marital wrecking, which now not infrequently takes place, and would surely increase the number of marriages broken up for this reason."

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[Continued]

I want to ask you a question on these words—"which now not infrequently takes place". Is it the fact, according to your experience, whether officially or among your acquaintances, that today there are a large number of people, men and women, who are apt to take one spouse away from the other?—Yes, we all know many such cases and they occur with increasing frequency, I think.

9128. I was asked by one absent member of the Commission to put two questions to you. I will put them in her own words:—

"If the spouse goes off with a loose young woman for a year or two, or indeed for seven years, does Mrs. Wilson think that by making divorce impossible an erring husband will be likely to come back to his original spouse?"

In other words, is that one of your reasons, or is it not?—It is. I actually know of a case. Luckily this wife discovered before the man had actually deserted her that he was intending to do so. She was able to make it quite clear that, with a family of four children, she would in no circumstances consider divorce. She still loved him and would make home happy for him, and he abandoned the association. But I think a feature of this type of case is that very frequently the man gives no warning whatsoever, he is extremely deceitful up to the very last minute, and this situation is sprung on the wife, who has had no previous warning at all.

9129. Then the second question I was asked to put to you is this: "If the wife really loves the husband and wants him to be happy, why not release him?"—That is a point of view. I think that in certain cases, where the wife feels that the new association is one which she can respect, both in regard to the character of the intervening party and the way in which it was done, no matter how heartbroken she is, she might be capable of putting herself aside. But in a great number of cases that does not happen, the associations are not those which can be regarded with respect. The parties have behaved in such a fashion that they seem to be unworthy of consideration. Also, I think, in cases where there is a family the wife's feelings are frequently coloured by the fact that it would be far better, from the point of view of the children, if the husband did not take this step.

9130. May I put to you two concrete cases out of my own experience and ask in which case you think the woman was right? In each case there was a long married life, in each case there were children, some on the verge of being grown up; in each case the husband conceived a very strong attachment to a woman of whom the wife (perhaps not unreasonably) did not approve, and the wife thought the husband would not be happy with her. In each case the wife implored the husband not to take the step of breaking up the marriage, but in each case he said that he was so deeply in love that he must have her. In one case the wife said, "Whatever you do, I shall not divorce you. If you take that step, you take it with that knowledge". In the other case, the wife, being tender-hearted, said, "If that is really how you feel, I will not keep you". In each case the woman thoroughly disapproved of the woman with whom her husband had

fallen in love, not only from jealous reasons, but because she thought she was unsuitable in every way. Which was right?—As you have described those two cases, I think that the wife who gave way was in the right because the husband had talked it over with her beforehand, and presumably would not treat her with harshness and cruelty and turn her out of the house and leave her very much in want. But in a number of cases which have come to my knowledge, the open and honest course was not taken beforehand, and the behaviour of the husband was in every way extremely cruel and heartless. In that type of case, where the thing was a complete shock and the woman of no class and no character, having been known to be a thoroughly loose-living woman before, the fact that the husband says he is madly in love and must go, I do not feel should be paid great attention to. But in the second case you have mentioned, I think the wife was perfectly right.

9131. You might have given a different answer if the husband had gone off and she discovered that he was living with this woman, and he then said, "Please divorce me"?—Yes.

9132. (Lord Keith): Would you turn to the fourth paragraph of your memorandum? You say:—

"I am not rigidly against the principle of relief by divorce under all circumstances, particularly in the case of younger people who have found some serious incompatibility, and who, having made a genuine effort to overcome it and failed, are both anxious to make a fresh start with a large part of their lives before them."

What exactly had you in mind there?—I had in mind that I did not want to come before you as one of these people who are absolutely against divorce in all circumstances. I think there are cases where such incompatibility and unhappiness do arise and in that case they arise within the first few years.

9133. And you think that it might be better in those cases that the parties should be released and allowed to enter into fresh marriages if they so wish?—Yes.

9134. That is one of the things that made me think your special point here was that, in the case of marriages that had lasted a long time, perhaps some twenty years, somewhat different considerations might arise. But I now understand you are not making any such special point.—No. I think one can hardly do that, but the fact that the marriage has been of long standing should be borne in mind by the judge.

9135. (Mr. Frederick Barrow): Do I take it that you are also against divorce by consent?—I think I am hardly qualified to answer on that point. So many more learned witnesses have come before you and I am not particularly concerned with that legal point. I do not think I have any very clear-cut ideas.

9136. (Mr. Beloe): I gather that your position is that you are against an innocent partner being forced to have a divorce against his or her will?—Yes, I am strongly against that.

(Chairman): Thank you for your memorandum and for coming here to help us this afternoon.

(The witness withdrew.)

(The Commission adjourned.)

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